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# CONSTITUTIONAL LAW IN CONTEXT, 3rd Edition

Michael Kent Curtis, J. Wilson Parker,
Davison M. Douglas, Paul Finkelman, and William G. Ross

## 2016-2017 ANNUAL SUPPLEMENT

Carolina Academic Press

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**Volume I**

**Chapter 2. National Power.**

**Section II-G. The Commerce Clause and the Great Society.**

[*Insert in* Heart of Atlanta: Background *after the first full paragraph on page 171 (following the sentence* "The Act was strongly supported by President Lyndon Johnson").]

**The Civil Rights Act of 1964: Note**

One of its most important sections, Title II, prohibits discrimination based upon race, color, religion, and national origin in hotels, motels, restaurants, theaters, and all other public accommodations engaged in interstate commerce. Enacted at a time when many such businesses refused to serve African-Americans and other racial minorities or provided segregated facilities, the statute essentially revived the provisions of the Civil Rights Act of 1875, which the Supreme Court had invalidated in the *Civil Rights Cases* in 1883 (p. ?, *infra*). Since the Court in the *Civil Rights Cases* had held that Congress had no authority to prohibit racial discrimination pursuant to its remedial powers under Section 5 of the Fourteenth Amendment because private discrimination is not state action, Congress relied primarily upon the Commerce Clause in enacting the 1964 statute even though the Court in modern decisions such as *Shelley v. Kraemer* (1948) (p. ?, *infra*) and *Burton v. Wilmington Parking Authority* (1961) (p. ?, *infra*) had expanded the scope of what constituted state action. The Supreme Court sustained the constitutionality of Title II within months of its enactment in *Heart of Atlanta Motel v. United States* and *Katzenbach v. McClung* (pp.176-179), holding that an Atlanta motel and a Birmingham restaurant were engaged in interstate commerce.

Another major section, Title VII, prohibits a significant number of private employers from employment discrimination on the basis of race, color, religion, gender, or national origin. The statute applies to employers who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the present or preceding calendar year, and it provides certain exceptions for religious groups and nonprofit private membership organizations. Like Title II, this section was enacted under the authority of Congress's power to regulate interstate commerce. The statute created the Equal Employment Opportunity Commission for its enforcement.

The statute also struck against discrimination by state and local governments. Title III prohibits those governments from denying public access to public facilities on the basis of race, color, religion, or national origin, and Title VI prohibits governmental agencies that receive federal funds from discriminating on the basis of race, color, or national origin. Title VI permits federal agencies to refuse to grant or to terminate federal financial assistance to state and local governments that violate the statute. This section of the statute was particularly effective in discouraging racial segregation in public schools, which remained widespread in 1964, a decade

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after *Brown v. Board of Education* (p. ?, *infra*), because it was enacted at time when the federal government was significantly increasing its financial assistance to public education. Title IV of the statute authorizes the Attorney General of the United States to challenge racial segregation in public schools.

**Section II-H. Dual Federalism and the Commerce Power: The Rehnquist Revolution**
[*Replace* Morrison*, pages 181-196, with the following*.]

**United States v. Morrison**
529 U.S. 598 (2000)

[Majority: Rehnquist (C.J.), O'Connor, Scalia, Kennedy, Thomas. Concurring: Thomas. Dissenting: Souter, Breyer, Stevens, and Ginsburg.]

**Chief Justice Rehnquist delivered the opinion of the Court.**

In these cases we consider the constitutionality of 42 U.S.C. §13981, which provides a federal civil remedy for the victims of gender-motivated violence. The United States Court of Appeals for the Fourth Circuit, sitting en banc, struck down §13981 because it concluded that Congress lacked constitutional authority to enact the section's civil remedy. Believing that these cases are controlled by our decisions in *United States v. Lopez* (1995), *United States v. Harris* (1883), and the *Civil Rights Cases* (1883), we affirm.

I. Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September of that year, Brzonkala met respondents Antonio Morrison and James Crawford, who were both students at Virginia Tech and members of its varsity football team. Brzonkala alleges that, within 30 minutes of meeting Morrison and Crawford, they assaulted and repeatedly raped her. After the attack, Morrison allegedly told Brzonkala, “You better not have any … diseases.” In the months following the rape, Morrison also allegedly announced in the dormitory's dining room that he “like[d] to get girls drunk and….”

Brzonkala alleges that this attack caused her to become severely emotionally disturbed and depressed. She sought assistance from a university psychiatrist, who prescribed antidepressant medication. Shortly after the rape Brzonkala stopped attending classes and withdrew from the university.

In early 1995, Brzonkala filed a complaint against respondents under Virginia Tech's Sexual Assault Policy. During the school-conducted hearing on her complaint, Morrison admitted having sexual contact with her despite the fact that she had twice told him "no." After the hearing, Virginia Tech's Judicial Committee found insufficient evidence to punish Crawford, but found Morrison guilty of sexual assault and sentenced him to immediate suspension for two semesters.

Virginia Tech's dean of students upheld the judicial committee's sentence. However, in July 1995, Virginia Tech informed Brzonkala that Morrison intended to initiate a court challenge

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to his conviction under the Sexual Assault Policy. University officials told her that a second hearing would be necessary to remedy the school's error in prosecuting her complaint under that policy, which had not been widely circulated to students. The university therefore conducted a second hearing under its Abusive Conduct Policy, which was in force prior to the dissemination of the Sexual Assault Policy. Following this second hearing the Judicial Committee again found Morrison guilty and sentenced him to an identical 2-semester suspension. This time, however, the description of Morrison's offense was, without explanation, changed from "sexual assault" to "using abusive language."

Morrison appealed his second conviction through the university's administrative system. On August 21, 1995, Virginia Tech's senior vice president and provost set aside Morrison's punishment. She concluded that it was "excessive when compared with other cases where there has been a finding of violation of the Abusive Conduct Policy…." Virginia Tech did not inform Brzonkala of this decision. After learning from a newspaper that Morrison would be returning to Virginia Tech for the fall 1995 semester, she dropped out of the university.

In December 1995, Brzonkala sued Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia. Her complaint alleged that Morrison's and Crawford's attack violated §13981 and that Virginia Tech's handling of her complaint violated Title IX of the Education Amendments of 1972….

Section 13981 was part of the Violence Against Women Act of 1994. It states that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. §13981(b). To enforce that right, subsection (c) declares:

> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

Section 13981 defines a "crim[e] of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." §13981(d)(1). It also provides that the term "crime of violence" includes any

> (A) … act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

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> (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken. §13981(d)(2).

Further clarifying the broad scope of §13981's civil remedy, subsection (e)(2) states that "[n]othing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section." And subsection (e)(3) provides a §13981 litigant with a choice of forums: Federal and state courts "shall have concurrent jurisdiction" over complaints brought under the section.

Although the foregoing language of §13981 covers a wide swath of criminal conduct, Congress placed some limitations on the section's federal civil remedy. Subsection (e)(1) states that "[n]othing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender." Subsection (e)(4) further states that §13981 shall not be construed "to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."

Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *Marbury v. Madison* (1803) (Marshall, C.J.). Congress explicitly identified the sources of federal authority on which it relied in enacting §13981. It said that a "federal civil rights cause of action" is established "[p]ursuant to the affirmative power of Congress … under section 5 of the 14th Amendment to the Constitution, as well as under section 8 of Article I of the Constitution." 42 U.S.C. §13981(a). We address Congress' authority to enact this remedy under each of these constitutional provisions in turn.

II. Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States v. Lopez* (Kennedy, J., concurring); *United States v. Harris*. With this presumption of constitutionality in mind, we turn to the question whether §13981 falls within Congress' power under Article I, §8, of the Constitution. Brzonkala and the United States rely upon the third clause of the Article, which gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

As we discussed at length in *Lopez*, our interpretation of the Commerce Clause has changed as our Nation has developed. We need not repeat that detailed review of the Commerce Clause's history here; it suffices to say that, in the years since *NLRB v. Jones & Laughlin Steel Corp.* (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted.

*Lopez* emphasized, however, that even under our modern, expansive interpretation of the

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Commerce Clause, Congress' regulatory authority is not without effective bounds.

> [E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

As we observed in *Lopez*, modern Commerce Clause jurisprudence has "identified three broad categories of activity that Congress may regulate under its commerce power" (citing *Hodel v. Virginia Surface Mining & Reclamation Assn.*, Inc. (1981); *Perez v. United States* (1971)). "First, Congress may regulate the use of the channels of interstate commerce" (citing *Heart of Atlanta Motel, Inc. v. United States* (1964); *United States v. Darby* (1941)). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities" (citing *Shreveport Rate Cases* (1914); *Perez*). "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce … i.e., those activities that substantially affect interstate commerce" (citing *Jones & Laughlin Steel*).

Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain §13981 as a regulation of activity that substantially affects interstate commerce. Given §13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry.

Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of §13981. In *Lopez*, we held that the Gun-Free School Zones Act of 1990, which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress' authority under the Commerce Clause. Several significant considerations contributed to our decision.

First, we observed that §922(q) was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." Reviewing our case law, we noted that "we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." Although we cited only a few examples, including *Wickard v. Filburn* (1942); *Hodel*; *Perez*; *Katzenbach v. McClung* (1964); and *Heart of Atlanta Motel*, we stated that the pattern of analysis is clear. *Lopez*. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."

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*Id.*

Both petitioners and Justice Souter's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. ("The Act [does not] regulat[e] a commercial activity"), ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not"), ("Section 922(q) is not an essential part of a larger regulation of economic activity"), ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty'"), ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"); [In his concurring opinion Justice Kennedy also stated that] *Lopez* did not alter our "practical conception of commercial regulation" and that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur"), ("[U]nlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far"). *Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.

The second consideration that we found important in analyzing §922(q) was that the statute contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.

Third, we noted that neither §922(q) "'nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.'" While "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," the existence of such findings may "enable us to evaluate the legislative judgment that the activity in question substantially

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affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye."

Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated. The United States argued that the possession of guns may lead to violent crime, and that violent crime "can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe." The Government also argued that the presence of guns at schools poses a threat to the educational process, which in turn threatens to produce a less efficient and productive workforce, which will negatively affect national productivity and thus interstate commerce.

We rejected these "costs of crime" and "national productivity" arguments because they would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." We noted that, under this but-for reasoning:

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories … , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Like the Gun-Free School Zones Act at issue in *Lopez*, §13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that §13981 is sufficiently tied to interstate commerce, Congress elected to cast §13981's remedy over a wider, and more purely intrastate, body of violent crime.

In contrast with the lack of congressional findings that we faced in *Lopez*, §13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by

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itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, "'[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" Rather, "'[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'"

In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce

> by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; … by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part….

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce…. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.…

III. Because we conclude that the Commerce Clause does not provide Congress with authority to enact §13981, we address petitioners' alternative argument that the section's civil remedy should be upheld as an exercise of Congress' remedial power under §5 of the 14th Amendment. As noted above, Congress expressly invoked the 14th Amendment as a source of authority to enact §13981….

[W]e conclude that Congress' power under §5 does not extend to the enactment of §13981.

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IV. Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault…. [U]nder our federal system [her] remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is Affirmed.

**Justice Thomas, concurring.**

… I write separately only to express my view that the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.

**Justice Souter, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer join, dissenting.**

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, 42 U.S.C. §13981, exceeds Congress's power under that Clause. I find the claims irreconcilable and respectfully dissent.

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See *Wickard v. Filburn* (1942); *Hodel v. Virginia Surface Mining & Reclamation Assn.* (1981). The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead to only one conclusion.

One obvious difference from *United States v. Lopez* (1995), is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce. Passage of the Act in 1994 was preceded by four years of hearings, which included testimony from physicians and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement and private business. The record includes reports on gender bias from task forces in 21 States, and we have the benefit of specific factual findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment. Compare *Hodel* (noting "extended hearings," "vast amounts of

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testimony and documentary evidence," and "years of the most thorough legislative consideration").

With respect to domestic violence, Congress received evidence for the following findings:

> Three out of four American women will be victims of violent crimes sometime during their life. Violence is the leading cause of injuries to women ages 15 to 44…. [A]s many as 50 percent of homeless women and children are fleeing domestic violence. Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others. … [The incidence of] rape rose four times as fast as the total national crime rate over the past 10 years. According to one study, close to half a million girls now in high school will be raped before they graduate. [One hundred twenty-five thousand] college women can expect to be raped during this — or any — year. [T]hree-quarters of women never go to the movies alone after dark because of the fear of rape….

Based on the data thus partially summarized, Congress found that

> crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce … by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products….

Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned. …

Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges. In *Heart of Atlanta Motel, Inc. v. United States* (1964), and *Katzenbach v. McClung* (1964), the Court referred to evidence showing the consequences of racial discrimination by motels and restaurants on interstate commerce. Congress had relied on compelling anecdotal reports that individual instances of segregation cost thousands to millions of dollars. Congress also had evidence that the average black family spent substantially less than the average white family in the same income range on public accommodations, and that discrimination accounted for much of the difference….

While Congress did not, to my knowledge, calculate aggregate dollar values for the nationwide effects of racial discrimination in 1964, in 1994 it did rely on evidence of the harms

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caused by domestic violence and sexual assault, citing annual costs of $3 billion in 1990, and $5 to $10 billion in 1993. Equally important, though, gender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, "[g]ender-based violence bars its most likely targets — women—from full partic[ipation] in the national economy."

If the analogy to the Civil Rights Act of 1964 is not plain enough, one can always look back a bit further. In *Wickard*, we upheld the application of the Agricultural Adjustment Act to the planting and consumption of homegrown wheat. The effect on interstate commerce in that case followed from the possibility that wheat grown at home for personal consumption could either be drawn into the market by rising prices, or relieve its grower of any need to purchase wheat in the market. The Commerce Clause predicate was simply the effect of the production of wheat for home consumption on supply and demand in interstate commerce. Supply and demand for goods in interstate commerce will also be affected by the deaths of 2,000 to 4,000 women annually at the hands of domestic abusers, and by the reduction in the work force by the 100,000 or more rape victims who lose their jobs each year or are forced to quit. Violence against women may be found to affect interstate commerce and affect it substantially.

II. The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I. §8 cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. …

The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that *Lopez* was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.

Thus the elusive heart of the majority's analysis in these cases is its statement that Congress's findings of fact are "weakened" by the presence of a disfavored "method of reasoning." This seems to suggest that the "substantial effects" analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence.

This new characterization of substantial effects has no support in our cases (the self-fulfilling prophecies of *Lopez* aside), least of all those the majority cites. Perhaps this explains why the majority is not content to rest on its cited precedent but claims a textual justification for

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moving toward its new system of congressional deference subject to selective discounts. Thus it purports to rely on the sensible and traditional understanding that the listing in the Constitution of some powers implies the exclusion of others unmentioned. See *Gibbons v. Ogden* (1824); *The Federalist* No. 45. The majority stresses that Art. I, §8, enumerates the powers of Congress, including the commerce power, an enumeration implying the exclusion of powers not enumerated. It follows, for the majority, not only that there must be some limits to "commerce," but that some particular subjects arguably within the commerce power can be identified in advance as excluded, on the basis of characteristics other than their commercial effects. Such exclusions come into sight when the activity regulated is not itself commercial or when the States have traditionally addressed it in the exercise of the general police power, conferred under the state constitutions but never extended to Congress under the Constitution of the Nation.

The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur. From the fact that Art. I, §8, cl. 3 grants an authority limited to regulating commerce, it follows only that Congress may claim no authority under that section to address any subject that does not affect commerce. It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific character of the activity, or the authority of a State to regulate it along with Congress. My disagreement with the majority is not, however, confined to logic, for history has shown that categorical exclusions have proven as unworkable in practice as they are unsupportable in theory.

II-A. Obviously, it would not be inconsistent with the text of the Commerce Clause itself to declare "noncommercial" primary activity beyond or presumptively beyond the scope of the commerce power. That variant of categorical approach is not, however, the sole textually permissible way of defining the scope of the Commerce Clause, and any such neat limitation would at least be suspect in the light of the final sentence of Article I, §8, authorizing Congress to make "all Laws… necessary and proper" to give effect to its enumerated powers such as commerce. See *United States v. Darby* (1941) ("The power of Congress … extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce"). Accordingly, for significant periods of our history, the Court has defined the commerce power as plenary, unsusceptible to categorical exclusions, and this was the view expressed throughout the latter part of the 20th century in the substantial effects test. These two conceptions of the commerce power, plenary and categorically limited, are in fact old rivals, and today's revival of their competition summons up familiar history, a brief reprise of which may be helpful in posing what I take to be the key question going to the legitimacy of the majority's decision to breathe new life into the approach of categorical limitation.

Chief Justice Marshall's seminal opinion in *Gibbons v. Ogden*, construed the commerce

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power from the start with "a breadth never yet exceeded," *Wickard v. Filburn.* In particular, it is worth noting, the Court in *Wickard* did not regard its holding as exceeding the scope of Chief Justice Marshall's view of interstate commerce; *Wickard* applied an aggregate effects test to ostensibly domestic, noncommercial farming consistently with Chief Justice Marshall's indication that the commerce power may be understood by its exclusion of subjects, among others, "which do not affect other States," *Gibbons*…. And it was this understanding, free of categorical qualifications, that prevailed in the period after 1937 through *Lopez*, as summed up by Justice Harlan: "'Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators … have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.'" *Maryland v. Wirtz* (1968) (quoting *Katzenbach v. McClung* (1964))….

In the half century following the modern activation of the commerce power with passage of the Interstate Commerce Act in 1887, this Court from time to time created categorical enclaves beyond congressional reach by declaring such activities as "mining," "production," "manufacturing," and union membership to be outside the definition of "commerce" and by limiting application of the effects test to "direct" rather than "indirect" commercial consequences…. *See, e.g., United States v. E.C. Knight Co.* (1895) (narrowly construing the Sherman Antitrust Act in light of the distinction between "commerce" and "manufacture"); *The Employers' Liability Cases* (1908) (invalidating law governing tort liability for common carriers operating in interstate commerce because the effects on commerce were indirect); *Adair v. United States* (1908) (holding that labor union membership fell outside "commerce"); *Hammer v. Dagenhart* (1918) (invalidating law prohibiting interstate shipment of goods manufactured with child labor as a regulation of "manufacture"); *A.L.A. Schechter Poultry Corp. v. United States* (1935) (invalidating regulation of activities that only "indirectly" affected commerce); *Railroad Retirement Bd. v. Alton R. Co.* (1935) (invalidating pension law for railroad workers on the grounds that conditions of employment were only indirectly linked to commerce); *Carter v. Carter Coal Co.* (1936) (holding that regulation of unfair labor practices in mining regulated "production," not "commerce").

Since adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before *NLRB v. Jones & Laughlin Steel Corp.* (1937), which brought the earlier and nearly disastrous experiment to an end. And yet today's decision can only be seen as a step toward recapturing the prior mistakes. Its revival of a distinction between commercial and noncommercial conduct is at odds with *Wickard*, which repudiated that analysis, and the enquiry into commercial purpose, first intimated by the *Lopez* concurrence, (opinion of Kennedy, J.), is cousin to the intent-based analysis employed in *Hammer*, but rejected for Commerce Clause purposes in *Heart of Atlanta*, and *Darby.*

Why is the majority tempted to reject the lesson so painfully learned in 1937? An answer

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emerges from contrasting *Wickard* with one of the predecessor cases it superseded. It was obvious in *Wickard* that growing wheat for consumption right on the farm was not "commerce" in the common vocabulary, but that did not matter constitutionally so long as the aggregated activity of domestic wheat growing affected commerce substantially. Just a few years before *Wickard*, however, it had certainly been no less obvious that "mining" practices could substantially affect commerce, even though *Carter Coal* had held mining regulation beyond the national commerce power. When we try to fathom the difference between the two cases, it is clear that they did not go in different directions because the *Carter Coal* Court could not understand a causal connection that the *Wickard* Court could grasp; the difference, rather, turned on the fact that the Court in *Carter Coal* had a reason for trying to maintain its categorical, formalistic distinction, while that reason had been abandoned by the time *Wickard* was decided. The reason was laissez-faire economics, the point of which was to keep government interference to a minimum. The Court in *Carter Coal* was still trying to create a laissez-faire world out of the 20th-century economy, and formalistic commercial distinctions were thought to be useful instruments in achieving that object. The Court in *Wickard* knew it could not do any such thing and in the aftermath of the New Deal had long since stopped attempting the impossible. Without the animating economic theory, there was no point in contriving formalisms in a war with Chief Justice Marshall's conception of the commerce power.

If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. …

**Justice Breyer, with whom Justice Stevens joins, and with whom Justice Souter and Justice Ginsburg join as to Part I-A, dissenting.**

No one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty—both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home. The question is how the judiciary can best implement that original federalist understanding where the Commerce Clause is at issue….

I-A. Consider the problems. The "economic/noneconomic" distinction is not easy to apply. Does the local street corner mugger engage in "economic" activity or "noneconomic" activity when he mugs for money? See *Perez v. United States* (1971) (aggregating local "loan sharking" instances); *United States v. Lopez* (1995) (loan sharking is economic because it consists of "intrastate extortionate credit transactions"). Would evidence that desire for economic

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domination underlies many brutal crimes against women save the present statute? See United States General Accounting Office, Health, Education, and Human Services Division, *Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients* 7–8 (Nov.1998); *Brief for Equal Rights Advocates*, et al. as Amicus Curiae 10–12.

The line becomes yet harder to draw given the need for exceptions. The Court itself would permit Congress to aggregate, hence regulate, "noneconomic" activity taking place at economic establishments. See *Heart of Atlanta Motel, Inc. v. United States* (1964) (upholding civil rights laws forbidding discrimination at local motels); *Katzenbach v. McClung* (1964) (same for restaurants); *Lopez* (recognizing congressional power to aggregate, hence forbid, noneconomically motivated discrimination at public accommodations)….

More important, why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting cause? If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them? The Constitution itself refers only to Congress' power to "regulate Commerce … among the several States," and to make laws "necessary and proper" to implement that power. Art. I, §8, cls. 3, 18. The language says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause. …

### ***U.S. v. Morrison*: Questions**

1. Does *Morrison* depart from other pre-*Lopez* Commerce Clause cases? How? How much does it change the scope of federal power? How does it do so?

2. What are the three bases identified in *Lopez* and *Morrison* for congressional power over commerce? How does the Court in *Morrison* limit the commerce power — what tests does it suggest? How is rational basis analysis changed by *Morrison*? Is it completely eliminated or is its scope simply narrowed? If its scope is narrowed, how does the Court do so?

3. Review the abortion statute at the beginning of this chapter. Is the statute within the Commerce Clause power of Congress?

4. What do you think is the appropriate role of Congress in the regulation of commerce?

* * *

In *Morrison*, Justice Thomas referred to and reiterated his concurring opinion in *Lopez*, the gun-free school case. In his *Lopez* concurrence, which is posted on conlawincontext.com, Justice Thomas implicitly rejected most of the Court's commerce clause decisions rendered between 1937 and 2000.

[*Insert on page 218 after* Gonzales v. Oregon*: Note.*]

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**National Federation of Independent Business v. Sebelius**
567 U.S. ___ (2012)

[Majority: Roberts (C.J.), Ginsburg, Sotomayor, Breyer, Kagan. Concurring in part, concurring in judgment in part, and dissenting in part: Ginsburg, Sotomayor, Breyer, Kagan. Dissenting: Scalia, Kennedy, Alito, Thomas.]

**Chief Justice Roberts delivered the opinion of the Court with respect to Parts I, II, and III–C, an opinion with respect to Part IV, in which Justice Breyer and Justice Kagan join, and an opinion with respect to Parts III-A, III-B, and III-D.**

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that "the question respecting the extent of the powers actually granted" to the Federal Government "is perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch* v. *Maryland* (1819). In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing these boundaries.

The Federal Government "is acknowledged by all to be one of enumerated powers." *McCulloch.* That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. Congress may, for example, "coin Money," "establish Post Offices," and "raise and support Armies." Art. I, §8, cls. 5, 7, 12. The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." *Gibbons* v. *Ogden* (1824). The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it." *McCulloch.*…

If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution….

[T]he Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government…. And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: "The powers not delegated to the United States by the Constitution…are reserved to the States respectively, or to the people." The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions.

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The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power." *See, e.g., United States* v. *Morrison* (2000).

"State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York* v. *United States* (1992). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond* v. *United States* (2011).

This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. Our precedents read that to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *Morrison*. The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher shop. See *Wickard* v. *Filburn* (1942); *Perez* v. *United States* (1971).

Congress may also "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, §8, cl. 1. Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate….

The reach of the Federal Government's enumerated powers is broader still because the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art. I, §8, cl. 18. We have long read this provision to give Congress great latitude in exercising its powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*.

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. "Proper respect for a co-ordinate branch of

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the government" requires that we strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." *United States* v. *Harris* (1883). Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.

Our deference in matters of policy cannot, however, become abdication in matters of law. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury* v. *Madison* (1803)…. [T]here can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits. *Marbury v. Madison.*

The questions before us must be considered against the background of these basic principles.

I. In 2010, Congress enacted the Patient Protection and Affordable Care Act. The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care. The Act's 10 titles stretch over 900 pages and contain hundreds of provisions. This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate and the Medicaid expansion.

The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage. The mandate does not apply to some individuals, such as prisoners and undocumented aliens. Many individuals will receive the required coverage through their employer, or from a government program such as Medicaid or Medicare. But for individuals who are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company.

Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. That payment, which the Act describes as a "penalty," is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. In 2016, for example, the penalty will be 2.5 percent of an individual's household income, but no less than $695 and no more than the average yearly premium for insurance that covers 60 percent of the cost of 10 specified services (*e.g.*, prescription drugs and hospitalization). The Act provides that the penalty will be paid to the Internal Revenue Service with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties, such as the penalty for claiming too large an income tax refund. The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. And some individuals who are subject to the mandate are nonetheless exempt from the penalty—for example, those with income below a certain threshold and members of Indian tribes.

On the day the President signed the Act into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida. Those plaintiffs — who are both respondents and petitioners here, depending on the issue—were subsequently joined by 13 more States, several individuals, and the National Federation of Independent Business. The plaintiffs alleged, among other things, that the individual mandate provisions of the Act exceeded Congress's powers under Article I of the Constitution….

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The Court of Appeals for the Eleventh Circuit…affirmed the District Court's holding that the individual mandate exceeds Congress's power. The panel unanimously agreed that the individual mandate did not impose a tax, and thus could not be authorized by Congress's power to "lay and collect Taxes." A majority also held that the individual mandate was not supported by Congress's power to "regulate Commerce…among the several States"….

Having held the individual mandate to be unconstitutional, the majority examined whether that provision could be severed from the remainder of the Act. The majority determined that, contrary to the District Court's view, it could….

Other Courts of Appeals have also heard challenges to the individual mandate. The Sixth Circuit and the D. C. Circuit upheld the mandate as a valid exercise of Congress's commerce power….

The second provision of the Affordable Care Act directly challenged here is the Medicaid expansion….

III. The Government advances two theories for the proposition that Congress had constitutional authority to enact the individual mandate. First, the Government argues that Congress had the power to enact the mandate under the Commerce Clause. Under that theory, Congress may order individuals to buy health insurance because the failure to do so affects interstate commerce, and could undercut the Affordable Care Act's other reforms. Second, the Government argues that if the commerce power does not support the mandate, we should nonetheless uphold it as an exercise of Congress's power to tax….

III-A. The Government's first argument is that the individual mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over $1,000 per year.

In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues. It did so through the Act's "guaranteed-issue" and "community-rating" provisions. These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals.

The guaranteed-issue and community-rating reforms do not, however, address the issue of healthy individuals who choose not to purchase insurance to cover potential health care needs. In fact, the reforms sharply exacerbate that problem, by providing an incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage. The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them

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rates necessary to pay for their coverage. This will lead insurers to significantly increase premiums on everyone.

The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept….

III-A-1. The Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on interstate commerce" by creating the cost-shifting problem. The path of our Commerce Clause decisions has not always run smooth, see *United States* v. *Lopez* (1995), but it is now well established that Congress has broad authority under the Clause. We have recognized, for example, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," but extends to activities that "have a substantial effect on interstate commerce." *United States* v. *Darby* (1941). Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others. See *Wickard*.

Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.[1]

Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes "the most telling indication of [a] severe constitutional problem...is the lack of historical precedent" for Congress's action. *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.* (2010)….

The Constitution grants Congress the power to "*regulate* Commerce." Art. I, § 8, cl. 3 (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof"…. If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. See *Gibbons* ("[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said").

[1] The examples of other congressional mandates cited by Justice Ginsburg (opinion concurring in part, concurring in judgment in part, and dissenting in part), are not to the contrary. Each of those mandates — to report for jury duty, to register for the draft, to purchase firearms in anticipation of militia service, to exchange gold currency for paper currency, and to file a tax return — are based on constitutional provisions other than the Commerce Clause.

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Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity." It is nearly impossible to avoid the word when quoting them. *See, e.g., Lopez* ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained"); *Perez* ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class") (emphasis in original; internal quotation marks omitted); *Wickard* ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce")….

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things…. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him….

In *Wickard*, the Court famously upheld a federal penalty imposed on a farmer for growing wheat for consumption on his own farm…. The Court rejected the farmer's argument that growing wheat for home consumption was beyond the reach of the commerce power. It did so on the ground that the farmer's decision to grow wheat for his own use allowed him to avoid purchasing wheat in the market. That decision, when considered in the aggregate along with similar decisions of others, would have had a substantial effect on the interstate market for wheat.

*Wickard* has long been regarded as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, but the Government's theory in this case would go much further. Under *Wickard* it is within Congress's power to regulate the market for wheat by supporting its price. But price can be supported by increasing demand as well as by decreasing supply. The aggregated decisions of some consumers not to purchase wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of insurance….

Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem. To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance….

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

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That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was "an addition which few oppose and from which no apprehensions are entertained." The Federalist No. 45…. [O]ur cases have "always recognized that the power to regulate commerce, though broad indeed, has limits." *Maryland* v. *Wirtz* (1968). The Government's theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist No. 48 (J. Madison). Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.[2]

To an economist, perhaps, there is no difference between activity and inactivity; both have measureable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers….

The Government sees things differently. It argues that because sickness and injury are unpredictable but unavoidable, "the uninsured as a class are active in the market for health care, which they regularly seek and obtain." The individual mandate "merely regulates how individuals finance and pay for that active participation — requiring that they do so through insurance, rather than through attempted self-insurance with the back-stop of shifting costs to others."

The Government repeats the phrase "active in the market for health care" throughout its brief, but that concept has no constitutional significance…. The phrase "active in the market" cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care, and that fact is fatal to the Government's effort to "regulate the uninsured as a class." Our precedents recognize Congress's power to regulate "class[es] of *activities*," *Gonzales* v. *Raich* (2005), not classes of *individuals*, apart from any activity in which they are engaged….

The mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money…. If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature….

The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent…. Congress can anticipate the *effects* on commerce of an economic activity. *Heart of Atlanta Motel, Inc.* v. *United States* (1964) (prohibiting discrimination by hotel operators); *Katzenbach* v. *McClung* (1964) (prohibiting discrimination by restaurant owners). But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce. Each one of our cases, including those cited by Justice Ginsburg, involved preexisting economic activity.

[2] In an attempt to recast the individual mandate as a regulation of commercial activity, Justice Ginsburg suggests that "[a]n individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance." But "self-insurance" is, in this context, nothing more than a description of the failure to purchase insurance. Individuals are no more "activ[e] in the self-insurance market" when they fail to purchase insurance, than they are active in the "rest" market when doing nothing.

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Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions….

The Government says that health insurance and health care financing are "inherently integrated"…. No matter how "inherently integrated" health insurance and health care consumption may be, they are not the same thing…. The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception of the sort urged by the Government….

III-A-2. The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an "integral part of a comprehensive scheme of economic regulation"—the guaranteed-issue and community-rating insurance reforms. Under this argument … it is enough that Congress regulate commercial activity in a way that requires regulation of inactivity to be effective.

The power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers enumerated in the Constitution, Art. I, § 8 cl. 18, vests Congress with authority to enact provisions "incidental to the [enumerated] power, and conducive to its beneficial exercise," *McCulloch*…. [T]he Clause…does not license the exercise of any "great substantive and independent power[s]" beyond those specifically enumerated…. [T]he Clause is " 'merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.'" *Kinsella v. United States ex rel. Singleton* (1960).

As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress's determination that a regulation is "necessary." We have thus upheld laws that are " 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Comstock* (quoting *McCulloch*). But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not "consist[ent] with the letter and spirit of the constitution," *McCulloch*, are not "*proper* [means] for carrying into Execution" Congress's enumerated powers. Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'" *Printz v. Unites States* (1997); see also *New York*; *Comstock* (Kennedy, J., concurring in judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause....").

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power…. The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.

This is in no way an authority that is "narrow in scope," *Comstock* , or "incidental" to the exercise of the commerce power, *McCullough*. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting

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activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective.

The Government relies primarily on our decision in *Gonzales* v. *Raich*. In *Raich*, … [c]ertain individuals sought an exemption from that regulation on the ground that they engaged in only intrastate possession and consumption. We denied any exemption, on the ground that marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market. Congress's attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could not also regulate intrastate possession and consumption…. *Raich* … concerned only the constitutionality of "individual *applications* of a concededly valid statutory scheme."

Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a "necessary and proper" component of the insurance reforms. The commerce power thus does not authorize the mandate….

III-B. This is not the end of the matter. Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government's second argument that the mandate may be upheld as within Congress's enumerated power to "lay and collect Taxes"….

[Chief Justice Roberts, together with Justices Ginsburg, Sotomayor, Breyer, and Kagan, upheld the Individual Mandate under Congress's power to tax and spend.]

**Justice Ginsburg, with whom Justice Sotomayor joins, and with whom Justice Breyer and Justice Kagan join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part.**

I agree with the Chief Justice that the Anti-Injunction Act does not bar the Court's consideration of this case, and that the minimum coverage provision is a proper exercise of Congress' taxing power. I therefore join Parts I, II, and III-C of the Chief Justice's opinion. Unlike the Chief Justice, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision. I would also hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.

I. The provision of health care is today a concern of national dimension, just as the provision of old-age and survivors' benefits was in the 1930's. In the Social Security Act, Congress installed a federal system to provide monthly benefits to retired wage earners and, eventually, to their survivors. Beyond question, Congress could have adopted a similar scheme for health care. Congress chose, instead, to preserve a central role for private insurers and state governments. According to the Chief Justice, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive.

Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm. See *United States* v. *Darby* (1941) (overruling *Hammer* v. *Dagenhart* (1918), and recognizing that "regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause"); *NLRB* v. *Jones & Laughlin Steel Corp*. (1937) ("[The

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commerce] power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it"). The Chief Justice's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it. *See, e.g.*, *Railroad Retirement Bd.* v. *Alton R. Co.* (1935) (invalidating compulsory retirement and pension plan for employees of carriers subject to the Interstate Commerce Act; Court found law related essentially "to the social welfare of the worker, and therefore remote from any regulation of commerce as such"). It is a reading that should not have staying power.

I-A. In enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for health-care products and services. By any measure, that market is immense. Collectively, Americans spent $2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy.…

Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional…. (In 2009 alone, 64% of adults made two or more visits to a doctor's office.)

When individuals make those visits, they face another reality of the current market for medical care: its high cost. In 2010, on average, an individual in the United States incurred over $7,000 in health-care expenses…. When a person requires nonroutine care, the cost will generally exceed what he or she can afford to pay. A single hospital stay, for instance, typically costs upwards of $10,000…. [I]n 1998, the cost of treating a heart attack for the first 90 days exceeded $20,000, while the annual cost of treating certain cancers was more than $50,000….

[T]he time when care will be needed is often unpredictable…. Inescapably, we are all at peril of needing medical care without a moment's notice….

To manage the risks associated with medical care–its high cost, its unpredictability, and its inevitability–most people in the United States obtain health insurance. Many (approximately 170 million in 2009) are insured by private insurance companies. Others, including those over 65 and certain poor and disabled persons, rely on government-funded insurance programs, notably Medicare and Medicaid. Combined, private health insurers and State and Federal Governments finance almost 85% if the medical care administered to U.S. residents.

Not all U. S. residents, however, have health insurance. In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid. As a group, uninsured individuals annually consume more than $100 billion in healthcare services, nearly 5% of the Nation's total. Over 60% of those without insurance visit a doctor's office or emergency room in a given year.

I-B. The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market…. Unlike markets for most products, however, the inability to pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient's ability to pay.

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As a consequence, medical-care providers deliver significant amounts of care to the uninsured for which the providers receive no payment. In 2008, for example, hospitals, physicians, and other health-care professionals received no compensation for $43 billion worth of the $116 billion in care they administered to those without insurance.

Health-care providers do not absorb these bad debts. Instead, they raise their prices, passing along the cost of uncompensated care to those who do pay reliably: the government and private insurance companies. In response, private insurers increase their premiums, shifting the cost of the elevated bills from providers onto those who carry insurance. The net result: Those with health insurance subsidize the medical care of those without it….

The size of this subsidy is considerable. Congress found that the cost-shifting just described "increases family [insurance] premiums by on average over $1,000 a year….

Insurance companies and health-care providers know that some percentage of healthy, uninsured people will suffer sickness or injury each year and will receive medical care despite their inability to pay. In anticipation of this uncompensated care, health-care companies raise their prices, and insurers their premiums. In other words, because any uninsured person may need medical care at any moment and because health-care companies must account for that risk, every uninsured person impacts the market price of medical care and medical insurance.…

Because those without insurance generally lack access to preventative care, they do not receive treatment for conditions—like hypertension and diabetes—that can be successfully and affordably treated if diagnosed early on…. The extra time and resources providers spend serving the uninsured lessens the providers' ability to care for those who do have insurance.

I-C. States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be "bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose." *Helvering v. Davis* (1937). An influx of unhealthy individuals into a State with universal health care would result in increased spending on medical services. To cover the increased costs, a State would have to raise taxes, and private health-insurance companies would have to increase premiums. Higher taxes and increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the State.

States that undertake health-care reforms on their own thus risk "placing themselves in a position of economic disadvantage as compared with neighbors or competitors"….

I-D. Aware that a national solution was required, Congress could have taken over the health-insurance market by establishing a tax-and-spend federal program like Social Security. Such a program, commonly referred to as a single-payer system (where the sole payer is the Federal Government), would have left little, if any, room for private enterprise or the States. Instead of going this route, Congress enacted the ACA, a solution that retains a robust role for private insurers and state governments. To make its chosen approach work, however, Congress had to use some new tools, including a requirement that most individuals obtain private health insurance coverage. As explained below, by employing these tools, Congress was able to achieve a practical, altogether reasonable, solution.…

The minimum coverage provision advances this objective by giving potential recipients of health care a financial incentive to acquire insurance. Per the minimum coverage provision, an individual must either obtain insurance or pay a toll constructed as a tax penalty.…

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Of particular concern to Congress were people who, though desperately in need of insurance, often cannot acquire it: persons who suffer from preexisting medical conditions.

Before the ACA's enactment, private insurance companies took an applicant's medical history into account when setting insurance rates or deciding whether to insure an individual. Because individuals with preexisting medical conditions cost insurance companies significantly more than those without such conditions, insurers routinely refused to insure these individuals, charged them substantially higher premiums, or offered only limited coverage that did not include the preexisting illness.

To ensure that individuals with medical histories have access to affordable insurance, Congress devised a three-part solution. First, Congress imposed a "guaranteed issue" requirement, which bars insurers from denying coverage to any person on account of that person's medical condition or history. Second, Congress required insurers to use "community rating" to price their insurance policies. Community rating, in effect, bars insurance companies from charging higher premiums to those with preexisting conditions.

But these two provisions, Congress comprehended, could not work effectively unless individuals were given a powerful incentive to obtain insurance.

In the 1990's, several States—including New York, New Jersey, Washington, Kentucky, Maine, New Hampshire, and Vermont—enacted guaranteed-issue and community-rating laws without requiring universal acquisition of insurance coverage. The results were disastrous. "All seven states suffered from skyrocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers."

Congress comprehended that guaranteed-issue and community-rating laws alone will not work. When insurance companies are required to insure the sick at affordable prices, individuals can wait until they become ill to buy insurance. Pretty soon, those in need of immediate medical care—*i.e.*, those who cost insurers the most — become the insurance companies' main customers. This "adverse selection" problem leaves insurers with two choices: They can either raise premiums dramatically to cover their ever-increasing costs or they can exit the market. In the seven States that tried guaranteed-issue and community- rating requirements without a minimum coverage provision, that is precisely what insurance companies did.…

By requiring most residents to obtain insurance, the Commonwealth [of Massachusetts] ensured that insurers would not be left with only the sick as customers. As a result, federal lawmakers observed, Massachusetts succeeded where other States had failed…. [T]he Commonwealth's reforms reduced the number of uninsured residents to less than 2%, the lowest rate in the Nation, and cut the amount of uncompensated care by a third. In coupling the minimum coverage provision with guaranteed- issue and community-rating prescriptions, Congress followed Massachusetts' lead.…

Whatever one thinks of the policy decision Congress made, it was Congress' prerogative to make it. Reviewed with appropriate deference, the minimum coverage provision, allied to the guaranteed-issue and community-rating prescriptions, should survive measurement under the Commerce and Necessary and Proper Clauses.

II-A. The Commerce Clause, it is widely acknowledged, "was the Framers' response to the central problem that gave rise to the Constitution itself." *EEOC* v. *Wyoming* (1983) (Stevens, J., concurring). Under the Articles of Confederation, the Constitution's precursor, the

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regulation of commerce was left to the States. This scheme proved unworkable, because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole.

What was needed was a "national Government…armed with a positive & compleat authority in all cases where uniform measures are necessary." Papers of James Madison 368, 370; see also Letter from George Washington to James Madison (Nov. 30, 1785) ("We are either a United people or we are not. If the former, let us, in all matters of general concern act as a nation, which ha[s] national objects to promote, and a national character to support"). The Framers' solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation "in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent." 2 Records of the Federal Convention of 1787, pp. 131-132, ¶8 (M. Farrand rec. 1966). See also *North American Co. v. SEC* (1946) ("[The commerce power] is an affirmative power commensurate with the national needs").

The Framers understood that the "general Interests of the Union" would change over time, in ways they could not anticipate. Accordingly, they recognized that the Constitution was of necessity a "great outlin[e]," not a detailed blueprint, see *McCulloch* v. *Maryland* (1819), and that its provisions included broad concepts, to be "explained by the context or by the facts of the case." "Nothing…can be more fallacious," Alexander Hamilton emphasized, "than to infer the extent of any power, proper to be lodged in the national government, from…its immediate necessities. There ought to be a capacity to provide for future contingencies[,] as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity." The Federalist No. 34.

II-B. Consistent with the Framers' intent, we have repeatedly emphasized that Congress' authority under the Commerce Clause is dependent upon "practical" considerations, including "actual experience." *Jones & Laughlin Steel Corp.*; see *Wickard* v. *Filburn* (1942); *United States* v. *Lopez* (1995) (Kennedy, J., concurring) (emphasizing "the Court's definitive commitment to the practical conception of the commerce power"). See also *North American Co.* ("Commerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities"). We afford Congress the leeway "to undertake to solve national problems directly and realistically." *American Power & Light Co.* v. *SEC* (1946).

Until today, this Court's pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities "that substantially affect interstate commerce." *Gonzales* v. *Raich* (2005). This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. See also *Wickard* ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce"); *Jones & Laughlin Steel Corp.*

Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. See *Raich*. See also *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.* (1984) ("[S]trong deference [is] accorded legislation in the field of national economic policy."); *Hodel* v. *Indiana* (1981) ("This [C]ourt will certainly not substitute its

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judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."). When appraising such legislation, we ask only (1) whether Congress had a "rational basis" for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a "reasonable connection between the regulatory means selected and the asserted ends." *Hodel*. See also *Raich*; *Lopez*; *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, (1981); *Katzenbach* v. *McClung* (1964); *Heart of Atlanta Motel, Inc.* v. *United States* (1964); *United States* v. *Carolene Products Co.* (1938). In answering these questions, we presume the statute under review is constitutional and may strike it down only on a "plain showing" that Congress acted irrationally. *United States* v. *Morrison* (2000).

II-C. Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care….

Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to "doing nothing"; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause. See also *Wickard* ("It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and *practices affecting such prices*." (emphasis added)).

The minimum coverage provision, furthermore, bears a "reasonable connection" to Congress' goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum cover age provision gives individuals a strong incentive to insure. This incentive, Congress had good reason to believe, would reduce the number of uninsured and, correspondingly, mitigate the adverse impact the uninsured have on the national health-care market. …

"No insurance regime can survive if people can opt out when the risk insured against is only a risk, but opt in when the risk materializes."

"[W]here we find that the legislators…have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Katzenbach*….

II-D. Rather than evaluating the constitutionality of the minimum coverage provision in the manner established by our precedents, the chief justice relies on a newly minted constitutional doctrine. The commerce power does not, the Chief Justice announces, permit Congress to "compe[l] individuals to become active in commerce by purchasing a product."

II-D-1-a. The Chief Justice's novel constraint on Congress' commerce power gains no force from our precedent and for that reason alone warrants disapprobation. But even assuming, for

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the moment, that Congress lacks authority under the Commerce Clause to "compel individuals not engaged in commerce to purchase an unwanted product," such a limitation would be inapplicable here. Everyone will, at some point, consume health-care products and services. Thus, if the Chief Justice is correct that an insurance- purchase requirement can be applied only to those who "actively" consume health care, the minimum coverage provision fits the bill.…

[T]he Chief Justice insists [that] the uninsured cannot be considered active in the market for health care, because "[t]he proximity and degree of connection between the [uninsured today] and [their] subsequent commercial activity is too lacking."

This argument has multiple flaws. First, more than 60% of those without insurance visit a hospital or doctor's office each year. Nearly 90% will within five years. An uninsured's consumption of health care is thus quite proximate: It is virtually certain to occur in the next five years and more likely than not to occur this year.

Equally evident, Congress has no way of separating those uninsured individuals who will need emergency medical care today (surely their consumption of medical care is sufficiently imminent) from those who will not need medical services for years to come…. To capture individuals who unexpectedly will obtain medical care in the very near future, then, Congress needed to include individuals who will not go to a doctor anytime soon. Congress, our decisions instruct, has authority to cast its net that wide. See *Perez* v. *United States* (1971) ("[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so").[3]

Second, it is Congress' role, not the Court's, to delineate the boundaries of the market the Legislature seeks to regulate. The Chief Justice defines the health-care market as including only those transactions that will occur either in the next instant or within some (unspecified) proximity to the next instant. But Congress could reasonably have viewed the market from a long-term perspective, encompassing all transactions virtually certain to occur over the next decade, not just those occurring here and now.

Third, contrary to the Chief Justice's contention, our precedent does indeed support "[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity." In *Wickard*, the Court upheld a penalty the Federal Government imposed on a farmer who grew more wheat than he was permitted to grow under the Agricultural Adjustment Act of 1938 (AAA). He could not be penalized, the farmer argued, as he was growing the wheat for home consumption, not for sale on the open market….

Similar reasoning supported the Court's judgment in *Raich*, which upheld Congress' authority to regulate marijuana grown for personal use. Homegrown marijuana substantially affects the interstate market for marijuana, we observed, for "the high demand in the interstate market will [likely] draw such marijuana into that market."

Our decisions thus acknowledge Congress' authority, under the Commerce Clause, to direct the conduct of an individual today (the farmer in *Wickard*, stopped from growing excess

[3] Echoing the Chief Justice, the joint dissenters urge that the minimum coverage provision impermissibly regulates young people who "have no intention of purchasing [medical care]" and are too far "removed from the [health-care] market." This criticism ignores the reality that a healthy young person may be a day away from needing health care. A victim of an accident or unforeseen illness will consume extensive medical care immediately, though scarcely expecting to do so.

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wheat; the plaintiff in *Raich*, ordered to cease cultivating marijuana) because of a prophesied future transaction (the eventual sale of that wheat or marijuana in the interstate market). Congress' actions are even more rational in this case, where the future activity (the consumption of medical care) is certain to occur, the sole uncertainty being the time the activity will take place….

[T]he Chief Justice draws an analogy to the car market…. The inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided when required are conditions nonexistent in other markets….

Rather, Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket). Establishing payment terms for goods in or affecting interstate commerce is quintessential economic regulation well within Congress' domain.

The Chief Justice also calls the minimum coverage provision an illegitimate effort to make young, healthy individuals subsidize insurance premiums paid by the less hale and hardy. This complaint, too, is spurious. Under the current health-care system, healthy persons who lack insurance receive a benefit for which they do not pay: They are assured that, if they need it, emergency medical care will be available, although they cannot afford it. Those who have insurance bear the cost of this guarantee. By requiring the healthy uninsured to obtain insurance or pay a penalty structured as a tax, the minimum coverage provision ends the free ride these individuals currently enjoy.

In the fullness of time, moreover, today's young and healthy will become society's old and infirm. Viewed over a lifespan, the costs and benefits even out: The young who pay more than their fair share currently will pay less than their fair share when they become senior citizens. And even if, as undoubtedly will be the case, some individuals, over their lifespans, will pay more for health insurance than they receive in health services, they have little to complain about, for that is how insurance works. Every insured person receives protection against a catastrophic loss, even though only a subset of the covered class will ultimately need that protection.

II-D-1-b. In any event, the Chief Justice's limitation of the commerce power to the regulation of those actively engaged in commerce finds no home in the text of the Constitution or our decisions. Article I, §8, of the Constitution grants Congress the power "[t]o regulate Commerce…among the several States." Nothing in this language implies that Congress' commerce power is limited to regulating those actively engaged in commercial transactions. Indeed, as the D.C. Circuit observed, "[a]t the time the Constitution was [framed], to 'regulate' meant," among other things, "to require action." *Seven-Sky* v. *Holder* (D.C. Cir. 2011)….

[T]he Chief Justice asserts [that] "[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated."

This argument is difficult to fathom. Requiring individuals to obtain insurance unquestionably regulates the interstate health-insurance and health-care markets, both of them in existence well before the enactment of the ACA. See *Wickard* ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.").

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Thus, the "some thing to be regulated" was surely there when Congress created the minimum coverage provision.

Nor does our case law toe the activity versus inactivity line. In *Wickard*, for example, we upheld the penalty imposed on a farmer who grew too much wheat, even though the regulation had the effect of compelling farmers to purchase wheat in the open market. "[F]orcing some farmers into the market to buy what they could provide for themselves" was, the Court held, a valid means of regulating commerce….

In concluding that the Commerce Clause does not permit Congress to regulate commercial "inactivity," and therefore does not allow Congress to adopt the practical solution it devised for the health-care problem, the Chief Justice views the Clause as a "technical legal conception," precisely what our case law tells us not to do. *Wickard*. This Court's former endeavors to impose categorical limits on the commerce power have not fared well. In several pre-New Deal cases, the Court attempted to cabin Congress' Commerce Clause authority by distinguishing "commerce" from activity once conceived to be noncommercial, notably, "production," "mining," and "manufacturing." *See, e.g., United States* v. *E. C. Knight Co.* (1895); *Carter* v. *Carter Coal Co.* (1936)…. *See, e.g., A. L. A. Schechter Poultry Corp.* v. *United States* (1935) ("[T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one").

These line-drawing exercises were untenable, and the Court long ago abandoned them. "[Q]uestions of the power of Congress [under the Commerce Clause]," we held in *Wickard*, "are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." See also *Morrison* (Souter, J., dissenting) (recounting the Court's "nearly disastrous experiment" with formalistic limits on Congress' commerce power)….

As Judge Easterbrook noted, "it is possible to restate most actions as corresponding inactions with the same effect." An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance. The minimum coverage provision could therefore be described as regulating activists in the self-insurance market. *Wickard* is another example. Did the statute there at issue target activity (the growing of too much wheat) or inactivity (the farmer's failure to purchase wheat in the marketplace)? ...

At bottom, the Chief Justice's and the joint dissenters' "view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts that enter him or her into, or affect, the interstate market expresses a concern for individual liberty that [is] more redolent of Due Process Clause arguments." *Seven-Sky*. Plaintiffs have abandoned any argument pinned to substantive due process, however, and now concede that the provisions here at issue do not offend the Due Process Clause.

II-D-2. Underlying the Chief Justice's view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits. The joint dissenters express a similar apprehension….

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First, the Chief Justice could certainly uphold the individual mandate without giving Congress *carte blanche* to enact any and all purchase mandates. As several times noted, the unique attributes of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets.

Nor would the commerce power be unbridled, absent the Chief Justice's "activity" limitation. Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law. See *Lopez*. In *Lopez*, for example, the Court held that the Federal Government lacked power, under the Commerce Clause, to criminalize the possession of a gun in a local school zone. Possessing a gun near a school, the Court reasoned, "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"….

An individual's decision to self-insure, I have explained, is an economic act with the requisite connection to interstate commerce….

Consider the chain of inferences the Court would have to accept to conclude that a vegetable-purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans. The Court would have to believe that individuals forced to buy vegetables would then eat them (instead of throwing or giving them away), would prepare the vegetables in a healthy way (steamed or raw, not deep-fried), would cut back on unhealthy foods, and would not allow other factors (such as lack of exercise or little sleep) to trump the improved diet.[4] Such "pil[ing of] inference upon inference" is just what the Court refused to do in *Lopez* and *Morrison*.

Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause.

Supplementing these legal restraints is a formidable check on congressional power: the democratic process. See *Raich*; *Wickard* (repeating Chief Justice Marshall's "warning that effective restraints on [the commerce power's] exercise must proceed from political rather than judicial processes"…. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so. See Hall, Commerce Clause Challenges to Health Care Reform, 159 U. Pa. L. Rev. 1825, 1838 (2011)….

II-D-3. To bolster his argument that the minimum coverage provision is not valid Commerce Clause legislation, the Chief Justice emphasizes the provision's novelty. While an insurance-purchase mandate may be novel, the Chief Justice's argument certainly is not. "[I]n almost every instance of the exercise of the [commerce] power differences are asserted from previous exercises of it and made a ground of attack." *Hoke* v. *United States* (1913). For decades, the Court has declined to override legislation because of its novelty, and for good

[4] The failure to purchase vegetables in the Chief Justice's hypothetical, then, is *not* what leads to higher health-care costs for others; rather, it is the failure of individuals to maintain a healthy diet, and the resulting obesity, that creates the cost-shifting problem. Requiring individuals to purchase vegetables is thus several steps removed from solving the problem. The failure to obtain health insurance, by contrast, is the *immediate cause* of the cost-shifting Congress sought to address through the ACA. Requiring individuals to obtain insurance attacks the source of the problem directly, in a single step.

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reason. As our national economy grows and changes, we have recognized, Congress must adapt to the changing "economic and financial realities"….

III-A. … The Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its [commerce] powe[r] that are not within its authority to enact in isolation." *Raich* (Scalia, J., concurring in judgment). Hence, "[a] complex regulatory program…can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal." *Indiana*. "It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." See also *Raich* (A challenged statutory provision fits within Congress' commerce authority if it is an "essential par[t] of a larger regulation of economic activity," such that, in the absence of the provision, "the regulatory scheme could be undercut"); *Raich* (Scalia, J., concurring in judgment) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce….").

Recall that one of Congress' goals in enacting the Affordable Care Act was to eliminate the insurance industry's practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. The commerce power allows Congress to ban this practice, a point no one disputes.

Congress knew, however, that simply barring insurance companies from relying on an applicant's medical history would not work in practice. Without the individual man date, Congress learned, guaranteed-issue and community-rating requirements would trigger an adverse-selection death-spiral in the health-insurance market: Insurance premiums would skyrocket, the number of uninsured would increase, and insurance companies would exit the market. When complemented by an insurance mandate, on the other hand, guaranteed issue and community rating would work as intended, increasing access to insurance and reducing uncompensated care. The minimum coverage provision is thus an "essential par[t] of a larger regulation of economic activity"; without the provision, "the regulatory scheme [w]ould be undercut." *Raich*. Put differently, the minimum coverage provision, together with the guaranteed-issue and community-rating requirements, is "'reasonably adapted' to the attainment of a legitimate end under the commerce power": the elimination of pricing and sales practices that take an applicant's medical history into account. *Raich* (Scalia, J., concurring in judgment).

III-B. Asserting that the Necessary and Proper Clause does not authorize the minimum coverage provision, the Chief Justice focuses on the word "proper." A mandate to purchase health insurance is not "proper" legislation, the Chief Justice urges, because the command "undermine[s] the structure of government established by the Constitution"….

The Chief Justice cites only two cases in which this Court concluded that a federal statute impermissibly transgressed the Constitution's boundary between state and federal authority: *Printz* v. *United States* (1997), and *New York* v. *United States* (1992). The statutes at issue in both cases, however, compelled *state officials* to act on the Federal Government's behalf….

The minimum coverage provision, in contrast, acts "directly upon individuals, without employing the States as intermediaries." *New York*. The provision is thus entirely consistent with the Constitution's design. See *Printz* ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."

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Lacking case law support for his holding, the Chief Justice nevertheless declares the minimum coverage provision not "proper" because it is less "narrow in scope" than other laws this Court has upheld under the Necessary and Proper Clause. The Chief Justice's reliance on cases in which this Court has *affirmed* Congress' "broad authority to enact federal legislation" under the Necessary and Proper Clause is underwhelming.

Nor does the Chief Justice pause to explain *why* the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause. These powers include the power to enact criminal laws, the power to imprison, including civil imprisonment, and the power to create a national bank….

How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an "independent power," or merely a "derivative" one. Whether the power used is "substantive," or just "incidental"?....

It is more than exaggeration to suggest that the minimum coverage provision improperly intrudes on "essential attributes of state sovereignty." First, the Affordable Care Act does not operate "in [an] are[a] such as criminal law enforcement or education where States historically have been sovereign." As evidenced by Medicare, Medicaid, the Employee Retirement Income Security Act of 1974 (ERISA), and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Federal Government plays a lead role in the health-care sector, both as a direct payer and as a regulator.

Second, and perhaps most important, the minimum coverage provision, along with other provisions of the ACA, addresses the very sort of interstate problem that made the commerce power essential in our federal system. The crisis created by the large number of U. S. residents who lack health insurance is one of national dimension that States are "separately incompetent" to handle. Far from trampling on States' sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need….

IV. In the early 20th century, this Court regularly struck down economic regulation enacted by the peoples' representatives in both the States and the Federal Government. *See, e.g., Carter Coal Co.*; *Dagenhart*; *Lochner* v. *New York* (1905). The Chief Justice's Commerce Clause opinion, and even more so the joint dissenters' reasoning, bear a disquieting resemblance to those long-overruled decisions…

**Justice Scalia, with whom Justice Kennedy, Justice Thomas, and Justice Alito join, dissenting.**

… The case is easy and straightforward, however, in another respect. What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power — upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.

That clear principle carries the day here. The striking case of *Wickard v. Filburn* (1942), which held that the economic activity of growing wheat, even for one's own consumption,

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affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the failure to grow wheat (which is not an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity….

I. The Individual Mandate

Article I, §8, of the Constitution gives Congress the power to "regulate Commerce … among the several States." The Individual Mandate in the Act commands that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage." If this provision "regulates" anything, it is the failure to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure—that abstention from commerce—is not "Commerce." To be sure, purchasing insurance is "Commerce"; but one does not regulate commerce that does not exist by compelling its existence.

In *Gibbons v. Ogden* (1824), Chief Justice Marshall wrote that the power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed." That understanding is consistent with the original meaning of "regulate" at the time of the Constitution's ratification, when "to regulate" meant "[t]o adjust by rule, method or established mode"; "[t]o adjust by rule or method"; "[t]o adjust, to direct according to rule"; "to put in order, set to rights, govern or keep in order." It can mean to direct the manner of something but not to direct that something come into being. There is no instance in which this Court or Congress (or anyone else, to our knowledge) has used "regulate" in that peculiar fashion….

We do not doubt that the buying and selling of health insurance contracts is commerce generally subject to federal regulation. But when Congress provides that (nearly) all citizens must buy an insurance contract, it goes beyond "adjust[ing] by rule or method"….

I-A. … When Congress is regulating these industries directly, it enjoys the broad power to enact " 'all appropriate legislation' " to " 'protec[t]' " and " 'advanc[e]' " commerce, *NLRB v. Jones & Laughlin Steel Corp.* (1937). Thus, Congress might protect the imperiled industry by prohibiting low-cost competition, or by according it preferential tax treatment, or even by granting it a direct subsidy.

Here, however, Congress has impressed into service third parties, healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences of the regulation…. If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton's words, "the hideous monster whose devouring jaws…spare neither sex nor age, nor high nor low, nor sacred nor profane." The Federalist No. 33….

The case upon which the Government principally relies to sustain the Individual Mandate under the Necessary and Proper Clause is *Gonzales v. Raich* (2005). That case held that Congress could, in an effort to restrain the interstate market in marijuana, ban the local cultivation and possession of that drug. *Raich* is no precedent for what Congress has done here. That case's prohibition of growing (cf. Wickard) and of possession (cf. innumerable federal statutes) did not represent the expansion of the federal power to direct into a broad new field.

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The mandating of economic activity does, and since it is a field so limitless that it converts the Commerce Clause into a general authority to direct the economy, that mandating is not "consist[ent] with the letter and spirit of the constitution." *McCulloch v. Maryland* (1819).

Moreover, *Raich* is far different from the Individual Mandate in another respect. The Court's opinion in *Raich* pointed out that the growing and possession prohibitions were the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced….

With the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved. For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied a full income tax credit given to those who do purchase the insurance….

I-B. The Government's second theory in support of the Individual Mandate is that §5000A is valid because it is actually a "regulat[ion of] activities having a substantial relation to interstate commerce,…i.e.,…activities that substantially affect interstate commerce." This argument takes a few different forms, but the basic idea is that §5000A regulates "the way in which individuals finance their participation in the health-care market." That is, the provision directs the manner in which individuals purchase health care services and related goods (directing that they be purchased through insurance) and is therefore a straightforward exercise of the commerce power.

The primary problem with this argument is that §5000A does not apply only to persons who purchase all, or most, or even any, of the health care services or goods that the mandated insurance covers. Indeed, the main objection many have to the Mandate is that they have no intention of purchasing most or even any of such goods or services and thus no need to buy insurance for those purchases. The Government responds that the health-care market involves "essentially universal participation"…. But the health care "market" that is the object of the Individual Mandate not only includes but principally consists of goods and services that the young people primarily affected by the Mandate do not purchase. They are quite simply not participants in that market, and cannot be made so (and thereby subjected to regulation) by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance….

In a variation on this attempted exercise of federal power, the Government points out that Congress in this Act has purported to regulate "economic and financial decision[s] to forego [sic] health insurance coverage and [to] attempt to self-insure"…. But as the discussion above makes clear, the decision to forgo participation in an interstate market is not itself commercial activity (or indeed any activity at all) within Congress' power to regulate….

I-C. A few respectful responses to Justice Ginsburg's dissent on the issue of the Mandate are in order. That dissent duly recites the test of Commerce Clause power that our opinions have applied, but disregards the premise the test contains. It is true enough that Congress needs only a "'rational basis' for concluding that the regulated activity substantially affects interstate commerce." But it must be activity affecting commerce that is regulated, and not merely the failure to engage in commerce…. If all inactivity affecting commerce is commerce, commerce is everything…. To say, for example, that the inaction here consists of activity in "the self-insurance market," seems to us wordplay. By parity of reasoning the failure to buy a car can be called participation in the non-private-car-transportation market. Commerce becomes everything.

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The dissent claims that we "fai[l] to explain why the individual mandate threatens our constitutional order." But we have done so. It threatens that order because it gives such an expansive meaning to the Commerce Clause that all private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers. Thus the dissent, on the theories proposed for the validity of the Mandate, would alter the accepted constitutional relation between the individual and the National Government….

The dissent's exposition of the wonderful things the Federal Government has achieved through exercise of its assigned powers, such as "the provision of old-age and survivors' benefits" in the Social Security Act, is quite beside the point. The issue here is whether the federal government can impose the Individual Mandate through the Commerce Clause. And the relevant history is not that Congress has achieved wide and wonderful results through the proper exercise of its assigned powers in the past, but that it has never before used the Commerce Clause to compel entry into commerce…. Article I contains no whatever-it-takes-to-solve-a-national-problem power….

**Justice Thomas, dissenting.**

… The joint dissent and the Chief Justice correctly apply our precedents to conclude that the Individual Mandate is beyond the power granted to Congress under the Commerce Clause and the Necessary and Proper Clause…. I adhere to my view that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." *United States v. Morrison* (2000) (Thomas, J., concurring)…. [T]he Court's continued use of that test "has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits." *Morrison*.

## Section IV. Other Delegated Sources of National Power: The Power to Spend, the War Power, and the Treaty Power.

[*Replace IV-A: The Taxing and Spending Power, pages 225-232, with the following.]*

### *A. The Taxing and Spending Power*

Under the Articles of Confederation, the federal government had no power to tax individuals. Aware that the lack of taxing authority unduly limited the power of the federal government, the framers of the Constitution moved to provide Congress with the power to tax and spend. Article I, Section 8 provides that

> Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

One threshold question under Article I, Section 8 is whether Congress may tax and spend only for the purpose of carrying out one of the enumerated powers set forth in Article I, or whether Congress may also tax and spend for more general purposes, so long as those purposes

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can be considered for the "general Welfare of the United States." In *United States v. Butler* (1936), the Court embraced the latter, more expansive view of congressional taxing and spending power. In *Butler*, the Court considered the constitutionality of the Agricultural Adjustment Act of 1933, which, in part, offered subsidies to farmers to limit their crop production for the purpose of stabilizing farm prices. The Court in *Butler* declared the Agricultural Adjustment Act unconstitutional on grounds that it regulated "production" in violation of the 10th Amendment. This aspect of the *Butler* decision, as we have seen in our discussion above of the commerce power, has long been abandoned by the Court.

But the Court in *Butler* also considered the scope of the taxing and spending power and this aspect of the decision remains highly pertinent to considerations of the meaning of Article I, Section 8. The *Butler* Court observed that the debate over the scope of the taxing and spending power had its origins in a debate between James Madison and Alexander Hamilton. Madison took the view, in the Court's words, that the scope of the taxing and spending power was limited to "the other powers enumerated in [Article I]; that, as the United States is a government of limited and enumerated powers, the grant of the power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to Congress."

In contrast, Hamilton took the view that Congress could tax and spend for *any* purpose that Congress thought served "the general Welfare of the United States." As the *Butler* Court put it, Hamilton "maintained that the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States." The *Butler* Court embraced the Hamiltonian view, leaving Congress with a broad power to tax and spend for the "general welfare" so long as Congress violates no other constitutional provisions. A spending program, for example, that provided food only to Episcopalians might be for the "general Welfare of the United States," but would nevertheless violate the 1st Amendment.

After *Butler*, the New Deal Court upheld a number of federal taxing and spending programs. For example, in *Steward Machine Co. v. Davis* (1937), the Court upheld the federal unemployment compensation system as a legitimate exercise of the taxing and spending power. Similarly, in *Helvering v. Davis* (1937), the Court upheld the old age pension program of the Social Security Act.

Taxing and spending programs operate in a fundamentally different way than statutes passed pursuant to constitutional provisions that allow direct regulation of an area. For example, pursuant to the Commerce Clause, Congress can make it a crime to engage in certain commercial behavior (such as selling contaminated meat). The threat of criminal prosecution allows Congress to prevent certain behavior by imposing criminal penalties. Regulatory agencies are created and empowered to influence behavior directly. However, if Congress does not have direct regulatory power and wishes to achieve a certain goal, it can still work *indirectly*. Congress can either pay someone to do (or refrain from doing) an activity (tax and spend), or

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discourage the activity by making it more expensive (tax). If the latter, Congress must accept that the activity may in fact continue. The Supreme Court has made clear that the existence of inevitable indirect regulatory consequences to taxes does not invalidate their legitimacy as taxes. Congress has used this power widely to advance federal interests in areas that it cannot regulate directly by offering states funding (for "the general welfare") in the form of grants that are conditioned on following (otherwise unenforceable) federal guidelines. This strategy is known as "cooperative federalism."

However, Congress cannot just call something a tax to invoke the Taxing and Spending Clause. Any such act must have the characteristics of a tax. Following the Supreme Court's invalidation of a Commerce Clause-based regulatory ban on child labor in *Hammer v. Dagenhart* (1918), Congress passed the "Child Labor Tax Law of 1919, "imposing a "tax" on all goods made with child labor. *Bailey v. Drexel Furniture Company* (1922), struck down the statute. The Supreme Court held that it in fact was not a tax, but a regulatory penalty. The "tax" was exceedingly heavy, 10% of a violating company's net income. It had a scienter requirent (typical of criminal laws), applying only if the violator intended to employ children. And it was enforced in part by the Department of Labor, an agency that enforced regulatory, not tax, laws.

This fundamental distinction between regulatory power and taxing power lay at the heart of the dispute over the constitutionality of the individual mandate provision of the Affordable Care Act. As discussed above in connection with the Commerce Clause, a 5-4 majority in *NFIB v. Sebelius* (2012) held that being uninsured was not a commercial activity. Therefore, Congress could not, under its commerce power, impose a penalty as a means to motivate uninsured individuals to purchase medical insurance. The use of the word "mandate" suggests that the activity has been made "mandatory" by regulatory law.

However, that a majority of the Court refused to allow Congress to create a regulatory penalty pursuant to the Commerce Clause did not prove fatal to the mandate. A different five person majority ruled that the penalty could in fact be viewed as a tax, and thus was a constitutional exercise of the Taxing and Spending Clause. Just as Congress calling a regulatory penalty a "tax" was not conclusive in *Bailey*, calling a tax a "mandate" was not conclusive for the ACA. Chief Justice Roberts concluded that the mandate was a tax for the following reasons: unlike the Child Labor Tax, the amount of the tax was moderate, there was no scienter requirement, and the tax was collected by the IRS. Unlike the Child Labor Tax, which was set so high as to discourage the activity and not produce revenue for the government, the fine for not having health insurance was sufficiently low that people could reasonably choose to pay the fine rather than purchase insurance. The Congressional Budget Office had predicted that four million people a year would choose to pay the fine, clearly creating revenue for the government.

Having decided that the fine was in the nature of a tax, Chief Justice Roberts had no problem with applying a tax to "inactivity," recognizing that government has broad power to raise money and health insurance was certainly in the "general welfare."

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The joint dissent vehemently disagreed. The dissent argued that since Congress had repeatedly called the fine a mandate, it must be a regulatory mandate, not a tax. As a mandate, the dissenters said, it must fail given the majority's holding on the Commerce Clause. The dissent further argued that since it did not tax an activity, it was in the nature of a capitation (or head) tax, and the Court should have required full briefing before it held that the direct tax clause of Article I, section 9. clause 4 did not apply (requirement that "direct taxes be apportioned among the states according to their population).

The Court has given Congress considerable latitude to tax and spend for the "general welfare." The following excerpt from *Buckley v. Valeo* (1976) is representative of this deference. However, the Court's majority's renewed application of the dual sovereignty theory of state's rights has led the Court more closely to scrutinize spending programs that might be seen to coerce a state to accept federal funding. While the Court merely raised the possibility of invalidating a spending provision in *South Dakota v. Dole* (1987), the Court in fact found coercion and invalidated the Medicaid expansion provision of the Affordable Care Act in *NFIB v. Sebelius* (2012).

**Buckley v. Valeo**
424 U.S. 1 (1976)

[Per Curiam: Brennan, Stewart, Powell, Marshall, Blackmun, Stevens, White, Rehnquist, and Burger (C.J.). Dissenting (in part): Burger (C.J.), White, Marshall, Blackmun, and Rehnquist.]

[*Buckley* involved the constitutionality of a comprehensive campaign reform statute passed by Congress in the aftermath of the Watergate scandals. Most aspects of the case are discussed in the section on the 1st Amendment. Here we consider only the Court's discussion of public finance and the Spending Clause.]

III. PUBLIC FINANCING OF PRESIDENTIAL ELECTION CAMPAIGNS

III-A. Summary of Subtitle H

Section 9006 establishes a Presidential Election Campaign Fund (Fund), financed from general revenues in the aggregate amount designated by individual taxpayers, under §6096, who on their income tax returns may authorize payment to the Fund of one dollar of their tax liability in the case of an individual return or two dollars in the case of a joint return. The Fund consists of three separate accounts to finance (1) party nominating conventions, §9008(a), (2) general election campaigns, §9006(a), and (3) primary campaigns, §9037(a)….

For expenses in the general election campaign, §9004(a)(1) entitles each major-party candidate to $20,000,000. This amount is also adjusted for inflation. See §9004(a)(1). To be eligible for funds the candidate must pledge not to incur expenses in excess of the entitlement under §9004(a) (1) and not to accept private contributions except to the extent that the fund is insufficient to provide the full entitlement. §9003(b). Minor-party candidates are also entitled to

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funding, again based on the ratio of the vote received by the party's candidate in the preceding election to the average of the major-party candidates. §9004(a)(2)(A). Minor-party candidates must certify that they will not incur campaign expenses in excess of the major-party entitlement and that they will accept private contributions only to the extent needed to make up the difference between that amount and the public funding grant. §9003(c). New party candidates receive no money prior to the general election, but any candidate receiving 5% or more of the popular vote in the election is entitled to post-election payments according to the formula applicable to minor-party candidates. §9004(a)(3)….

III-B. Constitutionality of Subtitle H

Appellants argue that Subtitle H is invalid (1) as "contrary to the 'general welfare,'" Art. I, §8, (2) because any scheme of public financing of election campaigns is inconsistent with the 1st Amendment, and (3) because Subtitle H invidiously discriminates against certain interests in violation of the Due Process Clause of the 5th Amendment. We find no merit in these contentions.

Appellants' "general welfare" contention erroneously treats the General Welfare Clause as a limitation upon congressional power. It is rather a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause. *McCulloch v. Maryland* (1819). Congress has power to regulate Presidential elections and primaries, *United States v. Classic* (1941); and public financing of Presidential elections as a means to reform the electoral process was clearly a choice within the granted power. It is for Congress to decide which expenditures will promote the general welfare: "[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *United States v. Butler* (1936). Any limitations upon the exercise of that granted power must be found elsewhere in the Constitution. In this case, Congress was legislating for the "general welfare" to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising. Whether the chosen means appear "bad," "unwise," or "unworkable" to us is irrelevant; Congress has concluded that the means are "necessary and proper" to promote the general welfare, and we thus decline to find this legislation without the grant of power in Art. I, §8.

Appellants' challenge to the dollar check-off provision (§ 6096) fails for the same reason. They maintain that Congress is required to permit taxpayers to designate particular candidates or parties as recipients of their money. But the appropriation to the Fund in §9006 is like any other appropriation from the general revenue except that its amount is determined by reference to the aggregate of the one- and two-dollar authorization on taxpayers' income tax returns. This detail does not constitute the appropriation any less an appropriation by Congress. The fallacy of appellants' argument is therefore apparent; every appropriation made by Congress uses public money in a manner to which some taxpayers object. …

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**South Dakota v. Dole**
483 U.S. 203 (1987)

[Majority: Rehnquist (C.J.), White, Marshall, Blackmun, Powell, Stevens, Scalia. Dissenting: Brennan and O'Connor.]

**Chief Justice Rehnquist delivered the opinion of the Court.**

Petitioner South Dakota permits persons 19 years of age or older to purchase beer containing up to 3.2% alcohol. In 1984 Congress enacted 23 U.S.C. §158, which directs the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from States "in which the purchase or public possession…of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." The State sued in United States District Court seeking a declaratory judgment that §158 violates the constitutional limitations on congressional exercise of the spending power and violates the 21st Amendment to the United States Constitution. The District Court rejected the State's claims, and the Court of Appeals for the Eighth Circuit affirmed.

In this Court, the parties direct most of their efforts to defining the proper scope of the 21st Amendment…. Relying on our statement in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* (1980), that the "21st Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system," South Dakota asserts that the setting of minimum drinking ages is clearly within the "core powers" reserved to the States under §2 of the Amendment. Section 158, petitioner claims, usurps that core power. The Secretary in response asserts that the 21st Amendment is simply not implicated by §158; the plain language of §2 confirms the States' broad power to impose restrictions on the sale and distribution of alcoholic beverages but does not confer on them any power to permit sales that Congress seeks to prohibit. *Brief for Respondent* 25–26[1]….

Despite the extended treatment of the question by the parties, however, we need not decide in this case whether that Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age. Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly.

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, §8, cl. 1. Incident to this power, Congress may attach conditions on the

[1]. Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

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receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." … The breadth of this power was made clear in *United States v. Butler* (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's "enumerated legislative fields," may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare." See *Helvering v. Davis* (1937); *United States v. Butler*. In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. *Helvering v. Davis*.[2] Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously … enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State School & Hospital v. Halderman* (1981). Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *Massachusetts v. United States* (1978) (plurality opinion). See also *Ivanhoe Irrigation Dist. v. McCracken* (1958), ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof"). Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds….

South Dakota does not seriously claim that §158 is inconsistent with any of the first three restrictions mentioned above. We can readily conclude that the provision is designed to serve the general welfare, especially in light of the fact that “the concept of welfare or the opposite is shaped by Congress….” *Helvering v. Davis*. Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. And the State itself, rather than challenging the germaneness of the condition to federal purposes, admits that it “has never contended that the congressional action was…unrelated to a national concern in the absence of the 21st Amendment.” Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway

[2]. The level of deference to the congressional decision is such that the Court has more recently questioned whether "general welfare" is a judicially enforceable restriction at all. See *Buckley v. Valeo*, (per curiam).

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funds are expended — safe interstate travel. This goal of the interstate highway system had been frustrated by varying drinking ages among the States. A Presidential commission appointed to study alcohol-related accidents and fatalities on the Nation's highways concluded that the lack of uniformity in the States' drinking ages created "an incentive to drink and drive" because "young persons commut[e] to border States where the drinking age is lower." By enacting §158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.

The remaining question about the validity of §158 — and the basic point of disagreement between the parties — is whether the 21st Amendment constitutes an "independent constitutional bar" to the conditional grant of federal funds. *Lawrence County v. Lead-Deadwood School Dist*. (1985). Petitioner, relying on its view that the 21st Amendment prohibits direct regulation of drinking ages by Congress, asserts that "Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the 21st Amendment." But our cases show that this "independent constitutional bar" limitation on the spending power is not of the kind petitioner suggests. *United States v. Butler*, for example, established that the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.

We have also held that a perceived 10th Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants. In *Oklahoma v. Civil Service Comm'n* (1947), the Court considered the validity of the Hatch Act insofar as it was applied to political activities of state officials whose employment was financed in whole or in part with federal funds. The State contended that an order under this provision to withhold certain federal funds unless a state official was removed invaded its sovereignty in violation of the 10th Amendment. Though finding that "the United States is not concerned with, and has no power to regulate, local political activities as such of state officials," the Court nevertheless held that the Federal Government "does have power to fix the terms upon which its money allotments to states shall be disbursed." The Court found no violation of the State's sovereignty because the State could, and did, adopt "the 'simple expedient' of not yielding to what she urges is federal coercion. The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." See also *Steward Machine Co. v. Davis* (1937) ("There is only a condition which the state is free at pleasure to disregard or to fulfill").

These cases establish that the "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress'

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broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion." *Steward Machine Co. v. Davis*. Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. As we said a half century ago in *Steward Machine Co. v. Davis*: "[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems."

Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in §158 is a valid use of the spending power. Accordingly, the judgment of the Court of Appeals is

Affirmed.

[The dissents of Justices Brennan and O'Connor focused on their contention that the 21st Amendment reserved questions of alcohol policy exclusively to the states.]

**National Federation of Independent Business v. Sebelius**
567 U.S. ___ (2012)

[Plurality (on the Medicaid expansion and loss of all state Medicaid funds for refusal to join the expansion): Roberts (C.J.), Breyer, and Kagan. Scalia, Kennedy, Thomas, Alito reach a similar result on this issue but would have struck down the entire act.] Dissenting on this Medicaid expansion issue, Ginsburg, Sotomayor.

**Chief Justice Roberts announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, an opinion with respect to Part**

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**IV, in which Justice Breyer and Justice Kagan join, and an opinion with respect to Parts III–A, III–B, and III–D.**

… IV-A. The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States* (1992).

There is no doubt that the Act dramatically increases state obligations under Medicaid. The current Medicaid program requires States to cover only certain discrete categories of needy individuals — pregnant women, children, needy families, the blind, the elderly, and the disabled. There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage. The States also enjoy considerable flexibility with respect to the coverage levels for parents of needy families. On average States cover only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty line.

The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line. The Act also establishes a new "[e]ssential health benefits" package, which States must provide to all new Medicaid recipients — a level sufficient to satisfy a recipient's obligations under the individual mandate. The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering these newly eligible individuals through 2016. In the following years, the federal payment level gradually decreases, to a minimum of 90 percent. In light of the expansion in coverage mandated by the Act, the Federal Government estimates that its Medicaid spending will increase by approximately $100 billion per year, nearly 40 percent above current levels.

The Spending Clause grants Congress the power "to pay the Debts and provide for the…general Welfare of the United States." U. S. Const., Art. I, §8, cl. 1. We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' "taking certain actions that Congress could not require them to take." *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.* (1999). Such measures "encourage a State to regulate in a particular way, [and] influenc[e] a State's policy choices." *New York*. The conditions imposed by Congress ensure that the funds are used by the States to "provide for the…general Welfare" in the manner Congress intended.

At the same time, our cases have recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives. "We have repeatedly characterized…Spending Clause legislation as 'much in the nature of a contract.'" *Barnes v. Gorman* (2002) (quoting *Pennhurst State School & Hospital v. Halderman* (1981)). The legitimacy of Congress's exercise of the spending power "thus rests on whether the State

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voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*. Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system "rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond v. United States* (2012) (quoting *Alden v. Maine* (1999)). For this reason, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*. Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.

That insight has led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes. *See,* e.g., *Printz v. United States* (1997) (striking down federal legislation compelling state law enforcement officers to perform federally mandated background checks on handgun purchasers); *New York*, (invalidating provisions of an Act that would compel a State to either take title to nuclear waste or enact particular state waste regulations). It has also led us to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a "power akin to undue influence." *Steward Machine Co. v. Davis* (1937). Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when "pressure turns into compulsion," *ibid.*, the legislation runs contrary to our system of federalism. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." *New York*. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*. Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*. Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.

We addressed such concerns in *Steward Machine*. That case involved a federal tax on employers that was abated if the businesses paid into a state unemployment plan that met certain federally specified conditions. An employer sued, alleging that the tax was impermissibly "driv[ing] the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government." We acknowledged

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the danger that the Federal Government might employ its taxing power to exert a "power akin to undue influence" upon the States. *Steward Machine*. But we observed that Congress adopted the challenged tax and abatement program to channel money to the States that would otherwise have gone into the Federal Treasury for use in providing national unemployment services. Congress was willing to direct businesses to instead pay the money into state programs only on the condition that the money be used for the same purposes. Predicating tax abatement on a State's adoption of a particular type of unemployment legislation was therefore a means to "safeguard [the Federal Government's] own treasury." *Steward Machine.* We held that "[i]n such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power." *Ibid.*

In rejecting the argument that the federal law was a "weapon[] of coercion, destroying or impairing the autonomy of the states," the Court noted that there was no reason to suppose that the State in that case acted other than through "her unfettered will." *Steward Machine.* Indeed, the State itself did "not offer a suggestion that in passing the unemployment law she was affected by duress." *Ibid.* As our decision in *Steward Machine* confirms, Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting "the simple expedient of not yielding" to federal blandishments when they do not want to embrace the federal policies as their own. …

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has "crossed the line distinguishing encouragement from coercion," *New York*, in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the "general Welfare." Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.

In *South Dakota v. Dole* (1987), we considered a challenge to a federal law that threatened to withhold five percent of a State's federal highway funds if the State did not raise its drinking age to 21. The Court found that the condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel." At the same time, the condition was not a restriction on how the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used.

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We accordingly asked whether "the financial inducement offered by Congress" was "so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole* (quoting *Steward Machine*). By "financial inducement" the Court meant the threat of losing five percent of highway funds; no new money was offered to the States to raise their drinking ages. We found that the inducement was not impermissibly coercive, because Congress was offering only "relatively mild encouragement to the States." *Dole*. We observed that "all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5%" of her highway funds. *Ibid.* In fact, the federal funds at stake constituted less than half of one percent of South Dakota's budget at the time. … In consequence, "we conclude[d] that [the] encouragement to state action [was] a valid use of the spending power." *Dole*. Whether to accept the drinking age change "remain[ed] the prerogative of the States not merely in theory but in fact." *Ibid.*

In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head. … A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but all of it. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. … The Federal Government estimates that it will pay out approximately $3.3 trillion between 2010 and 2019 in order to cover the costs of pre-expansion Medicaid. In addition, the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid. It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a "prerogative" to reject Congress's desired policy, "not merely in theory but in fact." The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.

Justice Ginsburg claims that *Dole* is distinguishable because here "Congress has not threatened to withhold funds earmarked for any other program." But that begs the question: The States contend that the expansion is in reality a new program and that Congress is forcing them to accept it by threatening the funds for the existing Medicaid program. We cannot agree that existing Medicaid and the expansion dictated by the Affordable Care Act are all one program simply because "Congress styled" them as such. If the expansion is not properly viewed as a modification of the existing Medicaid program, Congress's decision to so title it is irrelevant.

Here, the Government claims that the Medicaid expansion is properly viewed merely as a modification of the existing program because the States agreed that Congress could change the terms of Medicaid when they signed on in the first place. The Government observes that the Social Security Act, which includes the original Medicaid provisions, contains a clause expressly reserving "[t]he right to alter, amend, or repeal any provision" of that statute. So it does. But "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*. A State confronted with statutory language reserving the right to

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"alter" or "amend" the pertinent provisions of the Social Security Act might reasonably assume that Congress was entitled to make adjustments to the Medicaid program as it developed. Congress has in fact done so, sometimes conditioning only the new funding, other times both old and new. …

The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage. …

As we have explained, "[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or 'retroactive' conditions." *Pennhurst*. A State could hardly anticipate that Congress's reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically.

Justice Ginsburg claims that in fact this expansion is no different from the previous changes to Medicaid, such that "a State would be hard put to complain that it lacked fair notice." But the prior change she discusses — presumably the most dramatic alteration she could find — does not come close to working the transformation the expansion accomplishes. She highlights an amendment requiring States to cover pregnant women and increasing the number of eligible children. But this modification can hardly be described as a major change in a program that — from its inception — provided health care for "families with dependent children." Previous Medicaid amendments simply do not fall into the same category as the one at stake here.

The Court in *Steward Machine* did not attempt to "fix the outermost line" where persuasion gives way to coercion. The Court found it "[e]nough for present purposes that wherever the line may be, this statute is within it." *Ibid.* We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply "conscript state [agencies] into the national bureaucratic army," *FERC v. Mississippi* (1982) (O'Connor, J., concurring in judgment in part and dissenting in part), and that is what it is attempting to do with the Medicaid expansion. …

**Justice Ginsburg, with whom Justice Sotomayor joins, dissenting in part.**

… V. Through Medicaid, Congress has offered the States an opportunity to furnish health care to the poor with the aid of federal financing. To receive federal Medicaid funds, States must provide health benefits to specified categories of needy persons, including pregnant women, children, parents, and adults with disabilities. Guaranteed eligibility varies by category: for some it is tied to the federal poverty level (incomes up to 100% or 133%); for others it depends on criteria such as eligibility for designated state or federal assistance programs. The ACA enlarges

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the population of needy people States must cover to include adults under age 65 with incomes up to 133% of the federal poverty level. The spending power conferred by the Constitution, the Court has never doubted, permits Congress to define the contours of programs financed with federal funds. And to expand coverage, Congress could have recalled the existing legislation, and replaced it with a new law making Medicaid as embracive of the poor as Congress chose.

The question posed by the 2010 Medicaid expansion, then, is essentially this: To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing law? The answer should be that Congress may expand by amendment the classes of needy persons entitled to Medicaid benefits. A ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism. To the contrary, such a requirement would rigidify Congress' efforts to empower States by partnering with them in the implementation of federal programs.

Medicaid is a prototypical example of federal-state cooperation in serving the Nation's general welfare. Rather than authorizing a federal agency to administer a uniform national health-care system for the poor, Congress offered States the opportunity to tailor Medicaid grants to their particular needs, so long as they remain within bounds set by federal law. In shaping Medicaid, Congress did not endeavor to fix permanently the terms participating states must meet; instead, Congress reserved the "right to alter, amend, or repeal" any provision of the Medicaid Act. States, for their part, agreed to amend their own Medicaid plans consistent with changes from time to time made in the federal law. And from 1965 to the present, States have regularly conformed to Congress' alterations of the Medicaid Act.

The Chief Justice acknowledges that Congress may "condition the receipt of [federal] funds on the States' complying with restrictions on the use of those funds," but nevertheless concludes that the 2010 expansion is unduly coercive. His conclusion rests on three premises, each of them essential to his theory. First, the Medicaid expansion is, in the Chief Justice's view, a new grant program, not an addition to the Medicaid program existing before the ACA's enactment. Congress, the Chief Justice maintains, has threatened States with the loss of funds from an old program in an effort to get them to adopt a new one. Second, the expansion was unforeseeable by the States when they first signed on to Medicaid. Third, the threatened loss of funding is so large that the States have no real choice but to participate in the Medicaid expansion. The Chief Justice therefore — for the first time ever — finds an exercise of Congress' spending power unconstitutionally coercive.

Medicaid, as amended by the ACA, however, is not two spending programs; it is a single program with a constant aim — to enable poor persons to receive basic health care when they need it. Given past expansions, plus express statutory warning that Congress may change the requirements participating States must meet, there can be no tenable claim that the ACA fails for lack of notice. Moreover, States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress' terms. Future Congresses are not bound by

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their predecessors' dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as the Chief Justice charges, threatening States with the loss of "existing" funds from one spending program in order to induce them to opt into another program. Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation. …

V-A. Expansion has been characteristic of the Medicaid program. Akin to the ACA in 2010, the Medicaid Act as passed in 1965 augmented existing federal grant programs jointly administered with the States. States were not required to participate in Medicaid. But if they did, the Federal Government paid at least half the costs. To qualify for these grants, States had to offer a minimum level of health coverage to beneficiaries of four federally funded, state-administered welfare programs: Aid to Families with Dependent Children; Old Age Assistance; Aid to the Blind; and Aid to the Permanently and Totally Disabled. At their option, States could enroll additional "medically needy" individuals; these costs, too, were partially borne by the Federal Government at the same, at least 50%, rate.

Since 1965, Congress has amended the Medicaid program on more than 50 occasions, sometimes quite sizably. Most relevant here, between 1988 and 1990, Congress required participating States to include among their beneficiaries pregnant women with family incomes up to 133% of the federal poverty level, children up to age 6 at the same income levels, and children ages 6 to 18 with family incomes up to 100% of the poverty level. These amendments added millions to the Medicaid-eligible population. … Enlargement of the population and services covered by Medicaid, in short, has been the trend.

Compared to past alterations, the ACA is notable for the extent to which the Federal Government will pick up the tab. Medicaid's 2010 expansion is financed largely by federal outlays. In 2014, federal funds will cover 100% of the costs for newly eligible beneficiaries; that rate will gradually decrease before settling at 90% in 2020. …

Nor will the expansion exorbitantly increase state Medicaid spending. The Congressional Budget Office (CBO) projects that States will spend 0.8% more than they would have, absent the ACA. … Whatever the increase in state obligations after the ACA, it will pale in comparison to the increase in federal funding.

Finally, any fair appraisal of Medicaid would require acknowledgment of the considerable autonomy States enjoy under the Act. … The ACA does not jettison this approach. States, as first-line administrators, will continue to guide the distribution of substantial resources among their needy populations.

The alternative to conditional federal spending, it bears emphasis, is not state autonomy but state marginalization. In 1965, Congress elected to nationalize health coverage for seniors through Medicare. It could similarly have established Medicaid as an exclusively federal program. Instead, Congress gave the States the opportunity to partner in the program's administration and development. Absent from the nationalized model, of course, is the state-level

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policy discretion and experimentation that is Medicaid's hallmark; undoubtedly the interests of federalism are better served when States retain a meaningful role in the implementation of a program of such importance. …

V-B. The Spending Clause authorizes Congress "to pay the Debts and provide for the…general Welfare of the United States." Art. I, §8, cl. 1. To ensure that federal funds granted to the States are spent "to 'provide for the…general Welfare' in the manner Congress intended," Congress must of course have authority to impose limitations on the States' use of the federal dollars. This Court, time and again, has respected Congress' prescription of spending conditions, and has required States to abide by them. In particular, we have recognized Congress' prerogative to condition a State's receipt of Medicaid funding on compliance with the terms Congress set for participation in the program. *See, e.g., Harris v. McRae* (1980) ("[O]nce a State elects to participate [in Medicaid], it must comply with the requirements of [the Medicaid Act]").

Congress' authority to condition the use of federal funds is not confined to spending programs as first launched. The legislature may, and often does, amend the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds. …

Yes, there are federalism-based limits on the use of Congress' conditional spending power. In the leading decision in this area, *South Dakota v. Dole* (1987), the Court identified four criteria. The conditions placed on federal grants to States must (a) promote the "general welfare," (b) "unambiguously" inform States what is demanded of them, (c) be germane "to the federal interest in particular national projects or programs," and (d) not "induce the States to engage in activities that would themselves be unconstitutional."

The Court in *Dole* mentioned, but did not adopt, a further limitation, one hypothetically raised a half-century earlier: In "some circumstances," Congress might be prohibited from offering a "financial inducement…so coercive as to pass the point at which 'pressure turns into compulsion.'" (quoting *Steward Machine Co. v. Davis* (1937)). Prior to today's decision, however, the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.

Dole involved the National Minimum Drinking Age Act, 23 U.S.C. §158, enacted in 1984. That Act directed the Secretary of Transportation to withhold 5% of the federal highway funds otherwise payable to a State if the State permitted purchase of alcoholic beverages by persons less than 21 years old. Drinking age was not within the authority of Congress to regulate, South Dakota argued, because the 21st Amendment gave the States exclusive power to control the manufacture, transportation, and consumption of alcoholic beverages. The small percentage of highway-construction funds South Dakota stood to lose by adhering to 19 as the age of eligibility to purchase 3.2% beer, however, was not enough to qualify as coercion, the Court concluded.

This case does not present the concerns that led the Court in Dole even to consider the prospect of coercion. In *Dole*, the condition—set 21 as the minimum drinking age—did not tell

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the States how to use funds Congress provided for highway construction. Further, in view of the 21st Amendment, it was an open question whether Congress could directly impose a national minimum drinking age.

The ACA, in contrast, relates solely to the federally funded Medicaid program; if States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the ACA use Medicaid funding to induce States to take action Congress itself could not undertake. The Federal Government undoubtedly could operate its own health-care program for poor persons, just as it operates Medicare for seniors' health care.

That is what makes this such a simple case, and the Court's decision so unsettling. Congress, aiming to assist the needy, has appropriated federal money to subsidize state health-insurance programs that meet federal standards. The principal standard the ACA sets is that the state program cover adults earning no more than 133% of the federal poverty line. Enforcing that prescription ensures that federal funds will be spent on health care for the poor in furtherance of Congress' present perception of the general welfare.

V-C. The Chief Justice asserts that the Medicaid expansion creates a "new health care program." Moreover, States could "hardly anticipate" that Congress would "transform [the program] so dramatically." Therefore, the Chief Justice maintains, Congress' threat to withhold "old" Medicaid funds based on a State's refusal to participate in the "new" program is a "threa[t] to terminate [an]other…independent gran[t]." And because the threat to withhold a large amount of funds from one program "leaves the States with no real option but to acquiesce [in a newly created program]," The Chief Justice concludes, the Medicaid expansion is unconstitutionally coercive.

V-C-1. The starting premise on which The Chief Justice's coercion analysis rests is that the ACA did not really "extend" Medicaid; instead, Congress created an entirely new program to co-exist with the old. The Chief Justice calls the ACA new, but in truth, it simply reaches more of America's poor than Congress originally covered. Medicaid was created to enable States to provide medical assistance to "needy persons." … By bringing health care within the reach of a larger population of Americans unable to afford it, the Medicaid expansion is an extension of that basic aim.

The Medicaid Act contains hundreds of provisions governing operation of the program…. The Medicaid expansion leaves unchanged the vast majority of these provisions; it adds beneficiaries to the existing program and specifies the rate at which States will be reimbursed for services provided to the added beneficiaries. … The ACA does not describe operational aspects of the program for these newly eligible persons; for that information, one must read the existing Medicaid Act….

Congress styled and clearly viewed the Medicaid expansion as an amendment to the Medicaid Act, not as a "new" health-care program. To the four categories of beneficiaries for whom coverage became mandatory in 1965, and the three mandatory classes added in the late

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1980's, the ACA adds an eighth: individuals under 65 with incomes not exceeding 133% of the federal poverty level. The expansion is effectuated by §2001 of the ACA, aptly titled: "Medicaid Coverage for the Lowest Income Populations." 124 Stat. 271. That section amends Title 42, Chapter 7, Subchapter XIX: Grants to States for Medical Assistance Programs. Commonly known as the Medicaid Act, Subchapter XIX filled some 278 pages in 2006. Section 2001 of the ACA would add approximately three pages.

Congress has broad authority to construct or adjust spending programs to meet its contemporary understanding of "the general Welfare." *Helvering v. Davis* (1937). Courts owe a large measure of respect to Congress' characterization of the grant programs it establishes. See *Steward Machine*. Even if courts were inclined to second-guess Congress' conception of the character of its legislation, how would reviewing judges divine whether an Act of Congress, purporting to amend a law, is in reality not an amendment, but a new creation? At what point does an extension become so large that it transforms" the basic law?

Endeavoring to show that Congress created a new program, the Chief Justice cites three aspects of the expansion. First, he asserts that, in covering those earning no more than 133% of the federal poverty line, the Medicaid expansion, unlike pre-ACA Medicaid, does not "care for the neediest among us." What makes that so? Single adults earning no more than $14,856 per year—133% of the current federal poverty level—surely rank among the Nation's poor.

Second, according to The Chief Justice, "Congress mandated that newly eligible persons receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package." That less comprehensive benefit package, however, is not an innovation introduced by the ACA; since 2006, States have been free to use it for many of their Medicaid beneficiaries. The level of benefits offered therefore does not set apart post-ACA Medicaid recipients from all those entitled to benefits pre-ACA.

Third, The Chief Justice correctly notes that the reimbursement rate for participating States is different regarding individuals who became Medicaid-eligible through the ACA. But the rate differs only in its generosity to participating States. Under pre-ACA Medicaid, the Federal Government pays up to 83% of the costs of coverage for current enrollees; under the ACA, the federal contribution starts at 100% and will eventually settle at 90%. Even if one agreed that a change of as little as 7 percentage points carries constitutional significance, is it not passing strange to suggest that the purported incursion on state sovereignty might have been averted, or at least mitigated, had Congress offered States less money to carry out the same obligations?

Consider also that Congress could have repealed Medicaid. … Thereafter, Congress could have enacted Medicaid II, a new program combining the pre-2010 coverage with the expanded coverage required by the ACA. By what right does a court stop Congress from building up without first tearing down?

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V-C-2. The Chief Justice finds the Medicaid expansion vulnerable because it took participating States by surprise. "A State could hardly anticipate that Congres[s]" would endeavor to "transform [the Medicaid program] so dramatically," he states. For the notion that States must be able to foresee, when they sign up, alterations Congress might make later on, the Chief Justice cites only one case: *Pennhurst State School & Hospital v. Halderman* (1981).

In *Pennhurst*, residents of a state-run, federally funded institution for the mentally disabled complained of abusive treatment and inhumane conditions in alleged violation of the Developmentally Disabled Assistance and Bill of Rights Act. We held that the State was not answerable in damages for violating conditions it did not "voluntarily and knowingly accep[t]." Inspecting the statutory language and legislative history, we found that the Act did not "unambiguously" impose the requirement on which the plaintiffs relied: that they receive appropriate treatment in the least restrictive environment. Satisfied that Congress had not clearly conditioned the States' receipt of federal funds on the States' provision of such treatment, we declined to read such a requirement into the Act. Congress' spending power, we concluded, "does not include surprising participating States with post-acceptance or 'retroactive' conditions."

*Pennhurst* thus instructs that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." That requirement is met in this case. Section 2001 does not take effect until 2014. The ACA makes perfectly clear what will be required of States that accept Medicaid funding after that date: They must extend eligibility to adults with incomes no more than 133% of the federal poverty line.

The Chief Justice appears to find in *Pennhurst* a requirement that, when spending legislation is first passed, or when States first enlist in the federal program, Congress must provide clear notice of conditions it might later impose. If I understand his point correctly, it was incumbent on Congress, in 1965, to warn the States clearly of the size and shape potential changes to Medicaid might take. And absent such notice, sizable changes could not be made mandatory. Our decisions do not support such a requirement.

In *Bennett v. New Jersey* (1985), the Secretary of Education sought to recoup Title I funds based on the State's noncompliance, from 1970 to 1972, with a 1978 amendment to Title I. Relying on *Pennhurst*, we rejected the Secretary's attempt to recover funds based on the States' alleged violation of a rule that did not exist when the State accepted and spent the funds. …

When amendment of an existing grant program has no such retroactive effect, however, we have upheld Congress' instruction. In *Bennett v. Kentucky Dept. of Ed.* (1985), the Secretary sued to recapture Title I funds based on the Commonwealth's 1974 violation of a spending condition Congress added to Title I in 1970. Rejecting Kentucky's argument pinned to *Pennhurst*, we held that the Commonwealth suffered no surprise after accepting the federal funds. Kentucky was therefore obliged to return the money. The conditions imposed were to be assessed as of 1974, in light of "the legal requirements in place when the grants were made," when Title I was originally enacted.

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As these decisions show, *Pennhurst's* rule demands that conditions on federal funds be unambiguously clear at the time a State receives and uses the money — not at the time, perhaps years earlier, when Congress passed the law establishing the program. …

In any event, from the start, the Medicaid Act put States on notice that the program could be changed: "The right to alter, amend, or repeal any provision of [Medicaid]," the statute has read since 1965, "is hereby reserved to the Congress." 42 U.S.C. §1304. The "effect of these few simple words" has long been settled. See *Sinking Fund Cases* (1879). By reserving the right to "alter, amend, [or] repeal" a spending program, Congress "has given special notice of its intention to retain … full and complete power to make such alterations and amendments…as come within the just scope of legislative power." *Ibid.*

Our decision in *Bowen v. Public Agencies Opposed to Social Security Entrapment* (1986), is guiding here. As enacted in 1935, the Social Security Act did not cover state employees. In response to pressure from States that wanted coverage for their employees, Congress, in 1950, amended the Act to allow States to opt into the program. The statutory provision giving States this option expressly permitted them to withdraw from the program.

Beginning in the late 1970's, States increasingly exercised the option to withdraw. Concerned that withdrawals were threatening the integrity of Social Security, Congress repealed the termination provision. Congress thereby changed Social Security from a program voluntary for the States to one from which they could not escape. California objected, arguing that the change impermissibly deprived it of a right to withdraw from Social Security. *Bowen*. We unanimously rejected California's argument. By including in the Act "a clause expressly reserving to it '[t]he right to alter, amend, or repeal any provision' of the Act," we held, Congress put States on notice that the Act "created no contractual rights." *Bowen.* The States therefore had no law-based ground on which to complain about the amendment, despite the significant character of the change.

The Chief Justice nevertheless would rewrite 42 U.S.C. §1304 to countenance only the "right to alter somewhat," or "amend, but not too much." Congress, however, did not so qualify §1304. Indeed, Congress retained discretion to "repeal" Medicaid, wiping it out entirely. Cf. *Delta Air Lines, Inc. v. August* (1981) (Rehnquist, J., dissenting) (invoking "the common-sense maxim that the greater includes the lesser"). As *Bowen* indicates, no State could reasonably have read §1304 as reserving to Congress authority to make adjustments only if modestly sized.

In fact, no State proceeded on that understanding. In compliance with Medicaid regulations, each State expressly undertook to abide by future Medicaid changes. Whenever a State notifies the Federal Government of a change in its own Medicaid program, the State certifies both that it knows the federally set terms of participation may change, and that it will abide by those changes as a condition of continued participation. …

The Chief Justice insists that the most recent expansion, in contrast to its predecessors, "accomplishes a shift in kind, not merely degree." But why was Medicaid altered only in degree,

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not in kind, when Congress required States to cover millions of children and pregnant women? Congress did not "merely alte[r] and expan[d] the boundaries of" the Aid to Families with Dependent Children program. … Rather, Congress required participating States to provide coverage tied to the federal poverty level (as it later did in the ACA), rather than to the AFDC program. … In short, given §1304, this Court's construction of §1304's language in Bowen, and the enlargement of Medicaid in the years since 1965, a State would be hard put to complain that it lacked fair notice when, in 2010, Congress altered Medicaid to embrace a larger portion of the Nation's poor.

V-C-3. The Chief Justice ultimately asks whether "the financial inducement offered by Congress … pass[ed] the point at which pressure turns into compulsion." The financial inducement Congress employed here, he concludes, crosses that threshold: The threatened withholding of "existing Medicaid funds" is "a gun to the head" that forces States to acquiesce.

The Chief Justice sees no need to "fix the outermost line," *Steward Machine*, "where persuasion gives way to coercion." Neither do the joint dissenters. Notably, the decision on which they rely, *Steward Machine*, found the statute at issue inside the line, "wherever the line may be."

When future Spending Clause challenges arrive, as they likely will in the wake of today's decision, how will litigants and judges assess whether "a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds"? Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State's budget at stake? And which State's — or States' — budget is determinative: the lead plaintiff, all challenging States (26 in this case, many with quite different fiscal situations), or some national median? Does it matter that Florida, unlike most States, imposes no state income tax, and therefore might be able to replace foregone federal funds with new state revenue? Or that the coercion state officials in fact fear is punishment at the ballot box for turning down a politically popular federal grant?

The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation. See *Baker v. Carr* (1962). Even commentators sympathetic to robust enforcement of Dole's limitations have concluded that conceptions of "impermissible coercion" premised on States' perceived inability to decline federal funds "are just too amorphous to be judicially administrable." Baker & Berman, Getting off the Dole, 78 Ind. L. J. 459, 521, 522, n. 307 (2003) (citing, *e.g.*, Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989)).

At bottom, my colleagues' position is that the States' reliance on federal funds limits Congress' authority to alter its spending programs. This gets things backwards: Congress, not the States, is tasked with spending federal money in service of the general welfare. And each successive Congress is empowered to appropriate funds as it sees fit. When the 110th Congress reached a conclusion about Medicaid funds that differed from its predecessors' view, it abridged no State's right to "existing," or "pre-existing," funds. … For, in fact, there are no such funds. There is only money States anticipate receiving from future Congresses.

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V-D. Congress has delegated to the Secretary of Health and Human Services the authority to withhold, in whole or in part, federal Medicaid funds from States that fail to comply with the Medicaid Act as originally composed and as subsequently amended. The Chief Justice, however, holds that the Constitution precludes the Secretary from withholding "existing" Medicaid funds based on States' refusal to comply with the expanded Medicaid program. For the foregoing reasons, I disagree that any such withholding would violate the Spending Clause. …

**Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito, dissenting.**

… IV-C. This practice of attaching conditions to federal funds greatly increases federal power. "[O]bjectives not thought to be within Article I's enumerated legislative fields, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *South Dakota v. Dole* (1987); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.* (1999) (by attaching conditions to federal funds, Congress may induce the States to "tak[e] certain actions that Congress could not require them to take").

This formidable power, if not checked in any way, would present a grave threat to the system of federalism created by our Constitution. If Congress' "Spending Clause power to pursue objectives outside of Article I's enumerated legislative fields," *Davis v. Monroe County Bd. of Ed.* (1999) (Kennedy, J., dissenting), is "limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed,'" (O'Connor, J., dissenting) (quoting *United States v. Butler* (1936)). "[T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis* (Kennedy, J., dissenting).

Recognizing this potential for abuse, our cases have long held that the power to attach conditions to grants to the States has limits. *See, e.g., Dole* (spending power is "subject to several general restrictions articulated in our cases"). For one thing, any such conditions must be unambiguous so that a State at least knows what it is getting into. *Pennhurst State School & Hospital v. Halderman* (1981). Conditions must also be related "to the federal interest in particular national projects or programs," *Massachusetts v. United States* (1978), and the conditional grant of federal funds may not "induce the States to engage in activities that would themselves be unconstitutional," *Dole*. Finally, while Congress may seek to induce States to accept conditional grants, Congress may not cross the "point at which pressure turns into compulsion, and ceases to be inducement." *Steward Machine Co. v. Davis* (1937).

When federal legislation gives the States a real choice whether to accept or decline a federal aid package, the federal-state relationship is in the nature of a contractual relationship. And just as a contract is voidable if coerced, "[t]he legitimacy of Congress' power to legislate under the spending power…rests on whether the State voluntarily and knowingly accepts the

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terms of the 'contract.'" *Pennhurst*. If a federal spending program coerces participation the States have not "exercise[d] their choice" — let alone made an "informed choice."

Coercing States to accept conditions risks the destruction of the "unique role of the States in our system." *Davis* (Kennedy, J., dissenting). "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States* (1992). Congress may not "simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*. Congress effectively engages in this impermissible compulsion when state participation in a federal spending program is coerced, so that the States' choice whether to enact or administer a federal regulatory program is rendered illusory. …

IV-D-2. The Federal Government's argument in this case at best pays lip service to the anti-coercion principle. The Federal Government suggests that it is sufficient if States are "free, as a matter of law, to turn down" federal funds. According to the Federal Government, neither the amount of the offered federal funds nor the amount of the federal taxes extracted from the taxpayers of a State to pay for the program in question is relevant in determining whether there is impermissible coercion.

This argument ignores reality. When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative. Even if a State believes that the federal program is ineffective and inefficient, withdrawal would likely force the State to impose a huge tax increase on its residents, and this new state tax would come on top of the federal taxes already paid by residents to support subsidies to participating States.[5]

Acceptance of the Federal Government's interpretation of the anti-coercion rule would permit Congress to dictate policy in areas traditionally governed primarily at the state or local level. Suppose, for example, that Congress enacted legislation offering each State a grant equal to the State's entire annual expenditures for primary and secondary education. Suppose also that this funding came with conditions governing such things as school curriculum, the hiring and tenure of teachers, the drawing of school districts, the length and hours of the school day, the school calendar, a dress code for students, and rules for student discipline. As a matter of law, a State could turn down that offer, but if it did so, its residents would not only be required to pay the federal taxes needed to support this expensive new program, but they would also be forced to pay an equivalent amount in state taxes. And if the State gave in to the federal law, the State and its subdivisions would surrender their traditional authority in the field of education. Asked at oral

[5] Justice Ginsburg argues that "[a] State … has no claim on the money its residents pay in federal taxes." This is true as a formal matter. "When the United States Government taxes United States citizens, it taxes them 'in their individual capacities' as 'the people of America' — not as residents of a particular State." (Quoting *U. S. Term Limits, Inc. v. Thornton* (1995) (Kennedy, J., concurring)). But unless Justice Ginsburg thinks that there is no limit to the amount of money that can be squeezed out of taxpayers, heavy federal taxation diminishes the practical ability of States to collect their own taxes.

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argument [by Justice Alito] whether such a law would be allowed under the spending power, the Solicitor General responded that it would. …

IV-E. Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear. In this case, however, there can be no doubt. In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the anti-coercion rule does not apply in this case, then there is no such rule. …

### *The Spending Power: Questions*

1. How does the Court treat the General Welfare Clause in *Buckley v. Valeo* and *South Dakota v. Dole*? What, if any, constitutional limits exist on the power to spend for the general welfare?

2. Does the power to spend for the general welfare in effect expand the delegated powers of Congress? Why or why not?

3. How closely will the Court scrutinize whether the expenditure is for the general welfare? What sort of scrutiny does it seem to use?

4. Recall Justice Marshall's statement in *Gibbons v. Ogden* (1824):

> [T]he power over commerce…is vested in Congress as absolutely as it would be in a single government…. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are…the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

5. *NFIB v. Sebelius* marks the first time the Supreme Court has invalidated a congressional exercise of the Taxing and Spending Clause as "coercive." What is the source of the "coercion" principle? What are the parameters of this test? Is it a standard lower courts will be able to consistently apply? Why did the Court not follow Justice Marshall's admonition in *Gibbons*?

### *King v. Burwell* (2015): Note

In 2015, the Supreme Court considered and rejected another challenge to the Patient Protection and Affordable Care Act in *King v. Burwell,* a case that hinged on the statutory interpretation of the Act's tax credit provision.

The Act was unquestionably an attempt by Congress to expand individual health care coverage throughout the nation, creating three major reforms in an effort to achieve this goal. First, the Act created "guaranteed issue" and "community rating" requirements, which required insurers to offer health insurance to individuals regardless of the state of their current health and also barred them from basing the cost of health insurance on an individual's ill health. Similar

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reform measures were enacted by some states in the 1990's with calamitous results because these prohibitions encouraged "adverse selection"—individuals waited to purchase health insurance until they became ill, knowing that they could not be denied coverage or charged a higher premium. This, in turn, created what the Court referred to as a "death spiral": premiums continued to rise, more people waited to buy insurance until they were sick, and insurers began leaving the market.

The second major reform implemented by the Act addressed the problem of adverse selection by creating a "coverage requirement," whereby all individuals must obtain health insurance or pay a penalty to the IRS. The coverage requirement exempted certain individuals for whom the cost of insurance would be more than eight percent of their income. By requiring healthy individuals to purchase health insurance, this broadened the risk pool and lowered insurance premiums. To facilitate the sale of insurance plans, the Act required "an Exchange" to be set up in every state where people can shop for insurance. 42 U.S.C. § 18031(b)(1). The Act gave incentives to the States to create their own exchanges, but also created a fallback provision where the Secretary of Health and Human Services "shall…establish and operate such Exchange within the State" should a State elect not to do so. 42 U.S.C. § 18041(c)(1). At the time of this litigation, thirty-four states had federally created exchanges.

Finally, the act created tax credits to make the cost of health insurance more affordable for individuals within certain income ranges. The Act allows a tax credit for any "applicable taxpayer" under 26 U.S.C. § 36B(a). However, Section 36B(b)(2)(a) dictates that the amount of credit allowable will partly depend on whether the individual enrolled through "an Exchange *established by the State* under section 1311 [42 U.S.C. § 18031]." (Emphasis added). The IRS also created a rule to address the tax credits that made the credits available for individuals regardless of whether they enrolled in a state or federal exchange.

Four individuals in Virginia challenged the IRS rule, arguing that because Virginia did not create an exchange they were not eligible for a tax credit through the exchange created by the federal government. Without the credit, the cost of coverage would be greater than eight percent of their income, thus exempting them from the Act's coverage requirement. The District Court dismissed the case finding that the Act was not ambiguous and the tax credits are available to taxpayers who enrolled through a federal exchange. The Fourth Circuit Court of Appeals affirmed the decision, but found that the Act's language was indeed ambiguous and deferred to the IRS Rule that applied tax credits to both state and federal exchanges.

The Supreme Court, in a 6-3 decision with Chief Justice Roberts writing for the majority, also interpreted the tax credit language as ambiguous, but engaged in its own statutory interpretation instead of deferring to the IRS rule. The Chief Justice argued that this case presented "a question of deep 'economic and political significance,'" and that it was unlikely Congress would have deferred to the IRS to interpret an issue that "involve[ed] billions of dollars in spending each year and affect[ed] the price of health insurance for millions of people."

The majority opinion considered the text, the statutory scheme, and the intent of Congress to find that the Act's tax credits are available to individuals through any exchange, state or federal. Chief Justice Roberts argued that the Act is the result of "inartful drafting…that does not reflect the type of care and deliberation that one might expect of such significant

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legislation." Accordingly, the Court "'must do [its] best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" The Chief Justice argued that, "State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens; the other type of Exchange would not."

The Court further argued that to accept the challengers' argument that tax credits were not meant to apply to individuals who enrolled through a federal exchange "would destabilize the…insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid." Chief Justice Roberts argued that because "Congress made the guaranteed issue and community rating requirements applicable in every State" and "those requirements only work when combined with the coverage requirement and the tax credits[,]…it stands to reason that Congress meant for those provisions to apply in every State as well."

The Chief Justice also considered the structure of the disputed section itself, providing that, "tax credits 'shall be allowed' for any 'applicable taxpayer.'" 36B(a). The Act defines "applicable taxpayer" to include anyone whose income is within a certain range of the poverty level. The Court argued that "[t]ogether these two provisions appear to make anyone in the specified income range eligible to receive a tax credit." Although the challengers argued that this is just an "empty promise" to those in states with a federal exchange, the Court disagreed. It argued "that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions,'" and the challengers' reading of the law would mean "Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code." The Court concluded by noting that "while the meaning [of the provision] may seem plain 'when viewed in isolation,' such a reading turns out to be 'untenable in light of [the statute] as a whole.'"

Justice Scalia, joined by Justices Thomas and Alito, authored a dissenting opinion that acerbically criticized the majority's interpretation of what was, in the dissent's view, a plain and unambiguous statutory provision that only provided tax credits to persons enrolled through state created exchanges. He contended that "[w]ords no longer have meaning if an Exchange that is *not* established by a State is 'established by the State.'" In Scalia's view, the majority acted only to save the Affordable Care Act because of its view that it was good policy, and in so doing ignored long-established principles of statutory construction and proper judicial function. In his view, Congress intended for the Act to offer tax credits only to individuals in those states that established an exchange and was perfectly capable of writing the law differently if it had intended to do so. Justice Scalia would rely on the plain meaning of "an Exchange established by the State" to gut the Affordable Care Act in 34 states, and suggested that the Act should now be called "SCOTUScare," because he considered the majority opinion to be stepping far outside of the bounds of the judiciary's role to save the Act from its own poor drafting.

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## Chapter 3. Limits on Federal Power: The Federal Structure, the 10th Amendment, and State Sovereign Immunity

### Section II. National Power and State Power: State Sovereign Immunity

[*Insert on page 304 after Note 7.*]

#### *Virginia Office for Protection and Advocacy v. Stewart* (2011): Note

8. The Supreme Court considered the scope of *Ex parte Young* (1908) in *Virginia Office for Protection and Advocacy v. Stewart* (2011). Virginia accepted federal funds to improve services for individuals with developmental disabilities. As a condition to that funding, Virginia had to establish a protection and advocacy (P&A) system. Instead of a private non-profit entity, Virginia appointed a state agency as the P&A system, the Virginia Office for Protection and Advocacy (VOPA). When VOPA investigated the deaths of two mental hospital patients, state officials in charge of the hospital refused to produce any records. VOPA then brought suit against the officials demanding declaratory and injunctive relief. State officials moved to dismiss the suit because of the sovereign immunity principles in the Eleventh Amendment.

   In a 6-2 decision (Justice Kagan recused herself from the case) written by Justice Scalia and joined by Justices Kennedy, Thomas, Ginsburg, Breyer, and Sotomayor, the Supreme Court held that "*Ex parte Young* (1908) allows a federal court to hear a lawsuit for prospective relief against state officials brought by another agency of the same state." The majority reasoned that "there is no warrant in our cases for making the validity of an *Ex parte Young* action turn on the identity of the plaintiff." Whether a private actor or state agency sued the state, it suffered a similar indignity. Furthermore, the entire situation "is a consequence of Virginia's own decision to establish a public, rather than a private P&A system." Thus, the Court ruled that

   > In *Verizon Md. Inc. v. Public Serv. Comm'n of Md.* (2002), we held that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.' " ... VOPA's suit satisfies that straightforward inquiry. It alleges that respondents' refusal to produce the requested medical records violates federal law; and it seeks an injunction requiring the production of the records, which would prospectively abate the alleged violation.

   Although there was a lack of historical precedent for a state agency to sue state officials, the Court concluded that "the Eleventh Amendment presents no obstacle to VOPA's ability to invoke federal jurisdiction on the same terms as any other litigant."

   Justices Kennedy and Thomas concurred, emphasizing that VOPA's interest in the records outweighs the state's interest in dignity and respect.

   Justices Roberts (C.J.) and Alito dissented, finding the majority opinion to be "a substantial and novel expansion of what we have also called 'a narrow exception' to a State's sovereign immunity…." They reason that the state suffers compounded indignity because "[w]hatever the decision in the litigation, one thing is clear: The Commonwealth will win. And the Commonwealth will lose."

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### *Sassamon v. Texas* (2011): Note

9. In a second sovereign immunity case decided during the 2011 term, *Sassamon v. Texas* (2011), the issue was "whether the States, by accepting federal funds, consent to waive their sovereign immunity to suits for money damages under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)." RLUIPA provided that " '[n]o government shall impose a substantial burden on the religious exercise' of an institutionalized person" unless it was the least restrictive means of furthering a compelling governmental interest. The statute also provided an express cause of action stating "[a] person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."

   Harvey Sossamon, an inmate in a Texas correctional institution, was prevented from attending religious services while on cell restriction and was barred from using the prison chapel for religious worship. He claimed these policies violated RLUIPA and he sought injunctive and monetary relief from the state.

   A state may choose to waive its sovereign immunity. However, "[a] State's consent to suit must be 'unequivocally expressed' in the text of the relevant statute." In a 6-2 decision (Justice Kagan recused herself from the case) written by Justice Thomas, and joined by Justices Roberts (C.J.), Scalia, Kennedy, Ginsburg, and Alito, the Court held that RLUIPA's "appropriate relief" language was not an unequivocal expression of a state waiving its sovereign immunity. Instead, the terms "appropriate relief" were "open-ended and ambiguous about what types of relief it includes" and were "inherently context-dependent." Thus, the Court concluded that "appropriate relief" did not encompass suits involving monetary relief against a state under the RLUIPA. Justice Thomas wrote

   > the phrase "appropriate relief" in RLUIPA is not so free from ambiguity that we may conclude that the States, by receiving federal funds, have unequivocally expressed intent to waive their sovereign immunity to suits for damages. Strictly construing that phrase in favor of the sovereign—as we must, see *Lane v. Pena* (1996)—we conclude that it does not include suits for damages against a State.

   Additionally, the Court ruled against the contention that Spending Clause legislation operated as a contract for which damages are always available. The Court reasoned that

   > Sossamon's implied-contract-remedies proposal cannot be squared with our longstanding rule that a waiver of sovereign immunity must be expressly and unequivocally stated in the text of the relevant statute. It would be bizarre to create an "unequivocal statement" rule and then find that every Spending Clause enactment, no matter what its text, satisfies the rule because it includes unexpressed, implied remedies against the States.

   Justices Sotomayor and Breyer dissented. They recognized that a state may waive its sovereign immunity by "unequivocally consent[ing] to suit in federal court." Here, the dissent suggested that

   > [t]here is…no dispute that RLUIPA clearly conditions a State's receipt of federal funding on its consent to suit for violations of the statute's substantive provisions.

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> The statute states that "program[s] or activit[ies] that receiv[e] Federal financial assistance" may not impose a "substantial burden on the religious exercise of a person residing in or confined to an institution." When such a burden has been imposed, the victim "may assert a violation of [RLUIPA] as a claim…in a judicial proceeding and obtain appropriate relief against a government," which the statute defines, as relevant, as "a State, county, municipality, or other governmental entity created under the authority of a State." Accordingly, it is evident that Texas had notice that, in accepting federal funds, it waived its sovereign immunity to suit by institutionalized persons upon whom it has imposed an unlawful substantial burden.
>
> Furthermore, "[u]nder general remedies principles, the usual remedy for a violation of a legal right is damages. Consistent with these principles our precedents make clear that the phrase 'appropriate relief' includes monetary relief." Thus, the dissent found that by accepting the federal funds, the state waived its sovereign immunity to RLUIPA suits seeking monetary relief.
>
> The dissent feared that the majority's reading "severely undermines Congress' unmistakably stated intent in passing the statute: to afford 'broad protection of religious exercise, to the maximum extent permitted by the terms of [the statute] and the Constitution.' " In the future, "Congress must…itemize in the statutory text every type of relief meant to be available against sovereign defendants."

[*Insert on page 307 after "III. The Rehnquist Court"*.]

**Section IV. A Unifying Theme? Dual Sovereignty.**

In *NFIB v. Sebelius* (2012), the Court continued to resurrect dual sovereignty as an independent limit on federal power, giving more life to a theory that had its heyday in the *Lochner* era. Where it is successfully invoked, this view means that the federal government may not regulate certain areas of state affairs, even in the course of exercising a recognized or delegated federal power. The contrasting view is that where it has been given enumerated powers, the federal government may exercise those powers in a plenary fashion.

Dual sovereignty provided the theoretical basis for the cases such as *Hammer v. Dagenhart* (1918) and *Carter v. Carter Coal* Co. (1936), which invalidated much federal economic legislation prior to the "New Deal Court." The other ground used at the time to strike down social and economic legislation was the *Lochner* era doctrine of liberty of contract.

Advocates of dual sovereignty circumvent the "truism" understanding of the text of the 10th Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." By the truism view, the powers that *are delegated* are *not reserved*.) To support less textually-explicit state's rights, dual sovereignty advocates emphasize the historical role of the states during the founding period, and they invoke a structural argument. By this argument, the various references to the existence of the states in the Constitution implicitly stand for dual sovereignty. In essence,

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this view suggests that the 10th Amendment should be interpreted as reminder that "Congress shall make no law abridging the sovereignty of the states."

After reaching its height during the period running from the end of the 19th century through 1937, the theory of dual sovereignty had largely disappeared from 1937 to 1992. Cases such as *United States v. Darby* (1941) stated that the 10th Amendment was simply a "truism."

But in *Printz v. United States* (1997), Justice Scalia reflected on the revival of dual sovereignty. He stated:

> It is incontestable that the Constitution established a system of "dual sovereignty." … Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," *The Federalist* No. 39, at 245 (J. Madison).

He later noted the source of this "inviolable sovereignty":

> [The argument against dual sovereignty] falsely presumes that the Tenth Amendment is the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions, and not only those, like the Tenth Amendment, that speak to the point explicitly. It is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications.

Determining the scope of this less textually-explicit *implied* "inviolable sovereignty" has been a controversial judicial undertaking.

The rebirth of dual sovereignty was seen most dramatically in *National League of Cities v. Usery* (1976). In that case, what would otherwise have been a clear and admitted exercise of the Commerce Clause (minimum wage for workers) was nonetheless invalidated, 5-4, for intruding upon state sovereignty. Justice Rehnquist attempted to articulate a legal standard that lower courts could apply in determining when to judicially invalidate an otherwise appropriate exercise of a federal power. This test was subsequently summarized by Justice Blackmun, in *Garcia v. SAMTA* (1985); Justice Blackmun had provided the decisive fifth vote in *Usery*:

> The prerequisites for governmental immunity under *National League of Cities* were summarized by this Court in *Hodel* [*v. Virginia Surface Mining & Recl. Assn.* (1981)]. Under that summary, four conditions must be satisfied before a state activity may be deemed immune from a particular federal regulation under the Commerce Clause. First, it is said that the federal statute at issue must regulate "the 'States as States.'" Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.'" Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the relation of

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> state and federal interests must not be such that "the nature of the federal interest … justifies state submission."

In *Garcia*, Justice Blackmun then proceeded to overrule *Usery*, repudiating his vote and adopting the position of the *Usery* dissenters:

> We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." …
>
> We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty. …
>
> State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power. …
>
> The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation. …

Justice Rehnquist was curt in his *Garcia* dissent:

> I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.

Justice (later Chief Justice) Rehnquist proved prophetic. While *Garcia* had seemingly rejected the theory of judicially-enforced dual sovereignty, the Court's membership changed in the 1980's and proponents of dual sovereignty once again found a sympathetic reception. In *New York v. United States* (1992), the Court again invalidated an exercise of the Commerce Clause power. The Court held that the federal government was attempting to coerce the New York legislature into adopting a federal regulatory scheme by forcing the state to take title to radioactive waste if the legislature did not enact laws consistent with federal guidelines for the disposal of nuclear waste. Next, in *Printz v. United States* (1997), the Court invalidated a requirement that local officials conduct background checks on gun purchasers (though only during an interim period before a federal registry was established). This statute, which had been based on the Commerce Clause, was struck down as an attempt to coerce a state to enforce a federal regulatory scheme. *Printz* expanded the rule of *New York* to include members of a state's executive branch as well as the legislature.

In 1999, the Court rejected the congressional power to give state employees, who were entitled to minimum wage and maximum hours protection under the amended Fair Labor Standards Act (FLSA) and *Garcia*, a damage action to enforce their rights. (Employees of private companies already had an individual damage action for violations of the FLSA.) The Court, in *Alden v. Maine* (1999), found the individual cause of action for state employees was

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not "proper." While not challenging that the commerce power allowed such regulation for employees of private companies or that the United States could sue in its own name to enforce the FLSA (itself also valid under the Commerce Clause), the Court held that state sovereignty prevented Congress from choosing a damage action for state employees as a "necessary and proper" means of advancing the valid FLSA interest.

In *NFIB v. Sebelius*, the Court rejected, on the basis of dual sovereignty, two separate claims of federal power under the Affordable Care Act (ACA): 1) the imposition of an "Individual Mandate" to purchase health insurance (as an exercise of the Commerce Clause or as an exercise of the commerce power plus the Necessary and Proper Clause); and 2) the imposed loss of *all* Medicaid funds for failure to expand the coverage of Medicaid as called for in the ACA (as an exercise of the Taxing and Spending Clause). (The Court upheld the Individual Mandate as an appropriate exercise of the Taxing and Spending Clause, but rejected the Medicaid penalty.)

Since five members of the Court concluded that the failure to purchase health insurance—"inaction"—could not be commerce, the Commerce Clause basis of the Individual Mandate (standing alone) fell. Congress had regulated of the issuance of health insurance policies by the industry to require community rating and guaranteed issuance. (All Justices agreed that sale of such policies *is* "commerce among the states" and was therefore subject to federal regulation). However, when considering whether or not it was "necessary and proper" to require an individual mandate to make the requirements of community rating and guaranteed issuance practical, the theory of dual sovereignty proved determinative for five justices. While the mandate was "necessary" to make the Affordable Care Act viable, five Justices held that such a requirement was not "proper" because it would "undermine the structure of government established by the Constitution," (Roberts, C.J.) or because it "violates the sovereignty of the states" (joint dissent). *Printz* and *New York* had insisted that the Constitution was designed to regulate individuals, not states, and so struck down laws commandeering states to perform federally desired functions. Unlike *New York* (federal coercion of the State legislature), and *Printz* (federal commandeering of state employees), the mandate in *Sebelius* involved federal coercion of *individuals*. But the Court now interpreted *New York* and *Prince* as standing for the larger principle of dual sovereignty or state sovereignty.

The attempted ACA Medicaid expansion also fell under a dual sovereignty ax. Medicaid revenues come from taxes, and Medicaid is a spending program within Congress's power to tax and spend to promote the general welfare, but seven Justices invalidated the expansion nonetheless. Those Justices found that the threatened loss of all Medicaid funds was impermissibly coercive because states were not given a "real" choice as to whether or not to participate in the new, expanded program. The Taxing and Spending power issue was not whether a state has been *directly* coerced (like by the use of the Commerce Clause in *New York* and *Printz*), but whether or not it had been indirectly coerced by the threat of losing pre-existing federal funding for state Medicaid programs.

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Unlike Justice Rehnquist, who attempted to articulate a standard to evaluate claims of state sovereignty in *Usery*, the prevailing Justices in *Sebelius* did not offer a standard to determine either the meaning of "proper" or to evaluate a permissible (as opposed to impermissible) level of coercion in a spending program. In her dissent, Justice Ginsburg noted that while Justices Scalia and Thomas had been harsh critics of the allegedly unbounded nature of personal liberty under the (substantive) Due Process Clause, neither appeared to be troubled by judicially invalidating otherwise permissible federal legislation under a seemingly indeterminate notion of state sovereignty.

It will be interesting to see how the current "dual sovereignty" or "state sovereignty" majority of the Court will attempt to articulate a principled standard in future cases — one that can provide guidance to the lower courts. Federal (and state) courts are certain to see a rise in "state sovereignty" challenges to federal legislation.

In discussing a test for obscenity, beyond reference to "hard core pornography," Justice Potter Stewart once famously said:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of obscenity]; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that.

*Jacobellis v. Ohio* (1964) (Stewart, J., concurring) (emphasis added). The Court eventually reached consensus on a test for obscenity in *Miller v. California* (1973).

In determining the long-term legitimacy of *Sebelius*, one might consider the discussion of stare decisis in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). In the course of rejecting calls to overrule *Roe v. Wade* (1973), the Court noted:

> [I]t is common wisdom that the rule of stare decisis is not an "inexorable command," and certainly it is not such in every constitutional case.… Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability….

Is the dual sovereignty rule of *Sebelius* merely "State Sovereignty. I know it when I see it"? Will the Court subsequently be able to articulate a clear standard, or will the dual sovereignty holding of *Sebelius* lead to a series of basically ad hoc decisions? Will it eventually go the way of the dual sovereignty holdings of *Hammer*, *Carter Coal*, *United States v. Butler*, and *Usery*? Or will the 1937-1992 cases be the ones that end up in the dustbin of history? Or, perhaps, most likely, will two lines of authority survive, making it difficult to determine on which side of the line new cases lie?

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## Chapter 4. Powers and Limits of the Federal Courts.

### Section III-B. Political and Similar Questions.

[*Insert after* United States v. Stanley*, page 386.*]

#### After *United States v. Stanley* (1987): Note

*United States v. Stanley* barred Master Sergeant Stanley from seeking relief in a civil action against government officials. However, Representative Harry Johnston, a Democrat from Florida, continued to champion Stanley's cause in the legislature. In 1989, Rep. Johnston introduced a bill in Congress "for the relief of James B. Stanley." The bill directed the Secretary of the Treasury to compensate Stanley for the injuries he sustained as a result of the surreptitious LSD testing.

After unsuccessful attempts to pass Stanley's bill in 1989 and 1991, Johnston reintroduced the bill for a third and final time in 1993. Johnston's bill passed both the House and Senate and was signed into law by President Bill Clinton on October 25, 1994. As enacted, the law provided a maximum payment of $450,577 to Stanley "in full satisfaction of all claims [he] he may have against the United States" arising from "the administration to him, without his knowledge, of [LSD] by United States Army personnel." In 1996, an arbitration panel awarded Stanley the full authorized amount. "Ex-Sergeant Compensated for LSD Experiments," *Baltimore Sun*, March 7, 1996. Speaking to reporters at his Florida home, Stanley said of the award: "I'd love to have an apology, but I don't believe I'll get it.… They can do anything unless someone stops them. We didn't stop them. We just caught them." "U.S. Must Pay Man Tested with LSD," *Sun-Sentinel*, March 5, 1996.

### Section III-C-1. Citizen and Taxpayer Standing: The Personal Injury Requirement

[*Insert on page 398 before the last paragraph beginning* "In Hein." *Replace* Hein.]

#### *Arizona Christian School Tuition Organization v. Winn*: Background

In *Hein v. Freedom from Religion Foundation, Inc.* (2007), the Court denied taxpayer standing to make an Establishment Clause challenge to the operation of President Bush's White House Office of Faith-Based and Community Initiatives and the Executive Department Centers for Faith-Based and Community Initiatives. President Bush's initiatives were created to "ensure that 'private and charitable community groups, including religious ones…have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes.' "

A plurality opinion by Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, distinguished the program from the one upheld in *Bowen v. Kendrick* (1988) and continued the Court's approach of limiting *Flast v. Cohen* (1968) to its facts. The Court ruled that the *Flast* exception to taxpayer standing did not apply. It reasoned,

> [t]he link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here…. That is because the expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress

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> provided general appropriations to the Executive Branch to fund its day-to-day activities. These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain. Those expenditures resulted from executive discretion, not congressional act.

Furthermore, the Court feared that "[b]ecause almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action…to Establishment Clause challenge by any taxpayer in federal court."

Justice Scalia, joined by Justice Thomas, concurred and also denied standing to the taxpayers. However, Scalia criticized the plurality's attempt to distinguish *Hein* from *Flast*. Instead, he contended *Flast* should be directly overruled.

Justice Souter, joined by Justices Breyer, Ginsburg, and Stevens, dissented and would have found the taxpayers to have standing to make this First Amendment challenge. The dissent stated that "the controlling opinion closes the door on these taxpayers because the Executive Branch, and not the Legislative Branch, caused their injury. I see no basis for this distinction in either logic or precedent." They reasoned

> We held in *Flast*, and repeated just last Term, that the "'injury' alleged in Establishment Clause challenges to federal spending" is "the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion." *DaimlerChrysler Corp. v. Cuno* (2006). As the Court said in *Flast*, the importance of that type of injury has deep historical roots going back to the ideal of religious liberty in James Madison's *Memorial and Remonstrance Against Religious Assessments*, that the government in a free society may not "force a citizen to contribute three pence only of his property for the support of any one establishment" of religion. *Writings of James Madison* (G. Hunt ed. 1901). Madison thus translated into practical terms the right of conscience described when he wrote that "[t]he Religion...of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." *Id.*... ("Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion"); N. Feldman, *Divided By God: America's Church-State Problem—And What We Should Do About It* (2005) ("The advocates of a constitutional ban on establishment were concerned about paying taxes to support religious purposes that their consciences told them not to support").

The Court continued its restriction of the *Flast* exception in *Arizona Christian School Tuition Organization v. Winn* (2011). At issue was an Arizona statute that gave tax credits for contributions to school tuition organizations (STOs). These STOs then provided scholarships for students attending private schools, including religious private schools. In a 5-4 decision written by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, the Court denied standing to the Arizona taxpayers making an Establishment Clause challenge to

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this tax law in federal court. The majority reasoned that the tax credit was not a governmental expenditure; therefore, the taxpayers did not have standing under *Flast*. Justices Scalia and Thomas concurred, stressing that *Flast* should be overruled as irreconcilable with Article III. Justice Kagan, along with Justices Ginsburg, Breyer, and Sotomayor dissented, finding no reason for a distinction between a tax credit and a governmental appropriation. They found no precedent for such a division which will allow the government to turn any government appropriation into a tax credit that is not subject to taxpayer Establishment Clause challenges.

**Arizona Christian School Tuition Organization v. Winn**

563 U. S. ___ (2011)

[Majority: Kennedy, Roberts (C.J.), Scalia, Thomas, and Alito. Concurrence: Scalia and Thomas. Dissent: Kagan, Ginsburg, Breyer, and Sotomayor.]

**Justice Kennedy delivered the opinion of the Court.**

Arizona provides tax credits for contributions to school tuition organizations, or STOs. STOs use these contributions to provide scholarships to students attending private schools, many of which are religious. Respondents are a group of Arizona taxpayers who challenge the STO tax credit as a violation of Establishment Clause principles under the First and Fourteenth Amendments. [R]espondents sought intervention from the Federal Judiciary.

To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution.…

[R]espondents contend that they have standing to challenge Arizona's STO tax credit for one and only one reason: because they are Arizona taxpayers. But the mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court. To overcome that rule, respondents must rely on an exception created in *Flast* v. *Cohen* (1968). For the reasons discussed below, respondents cannot take advantage of *Flast*'s narrow exception to the general rule against taxpayer standing. As a consequence, respondents lacked standing to commence this action, and their suit must be dismissed for want of jurisdiction.

I. Respondents challenged §43–1089, a provision of the Arizona Tax Code. See 1997 Ariz. Sess. Laws §43–1087…. Section 43–1089 allows Arizona taxpayers to obtain dollar-for-dollar tax credits of up to $500 per person and $1,000 per married couple for contributions to STOs. §43–1089(A).…

The Arizona taxpayers who brought the suit claimed that §43–1089 violates the Establishment Clause of the First Amendment, as incorporated against the States by the Fourteenth Amendment. Respondents alleged that §43–1089 allows STOs "to use State income-tax revenues to pay tuition for students at religious schools," some of which "discriminate on the basis of religion in selecting students…."

[The Court of Appeals] held that respondents had standing under *Flast* v. *Cohen* (1968). Reaching the merits, the Court of Appeals ruled that respondents had stated a claim that §43–1089 violated the Establishment Clause of the First Amendment.… This Court granted certiorari.

II. The concept and operation of the separation of powers in our National Government have their principal foundation in the first three Articles of the Constitution. Under Article III, the Federal Judiciary is vested with the "Power" to resolve not questions and issues but "Cases" or "Controversies…." By rules consistent with the longstanding practices of Anglo-American

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courts a plaintiff who seeks to invoke the federal judicial power must assert more than just the "generalized interest of all citizens in constitutional governance." *Schlesinger* v. *Reservists Comm. to Stop the War* (1974).

III-A. Respondents suggest that their status as Arizona taxpayers provides them with standing to challenge the STO tax credit. Absent special circumstances, however, standing cannot be based on a plaintiff's mere status as a taxpayer…. This precept has been referred to as the rule against taxpayer standing….

[R]ecent decisions have explained that claims of taxpayer standing rest on unjustifiable economic and political speculation. When a government expends resources or declines to impose a tax, its budget does not necessarily suffer….

By helping students obtain scholarships to private schools, both religious and secular, the STO program might relieve the burden placed on Arizona's public schools. The result could be an immediate and permanent cost savings for the State.… [T]he STO tax credit may not cause the State to incur any financial loss.

Even assuming the STO tax credit has an adverse effect on Arizona's annual budget, problems would remain. To conclude there is a particular injury in fact would require speculation that Arizona lawmakers react to revenue shortfalls by increasing respondents' tax liability. *DaimlerChrysler v. Cuno* (2006)….

Each of the inferential steps to show causation and redressability depends on premises as to which there remains considerable doubt….

III-B. The primary contention of respondents, of course, is that, despite the general rule that taxpayers lack standing to object to expenditures alleged to be unconstitutional, their suit falls within the exception established by *Flast* v. *Cohen*….

At issue in *Flast* was the standing of federal taxpayers to object, on First Amendment grounds, to a congressional statute that allowed expenditures of federal funds from the General Treasury to support, among other programs, "instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools." *Flast*. *Flast* held that taxpayers have standing when two conditions are met.

The first condition is that there must be a "logical link" between the plaintiff's taxpayer status "and the type of legislative enactment attacked." *Id.*…

The second condition for standing under *Flast* is that there must be "a nexus" between the plaintiff's taxpayer status and "the precise nature of the constitutional infringement alleged." *Id.*…

After stating the two conditions for taxpayer standing, *Flast* considered them together, explaining that individuals suffer a particular injury for standing purposes when, in violation of the Establishment Clause and by means of "the taxing and spending power," their property is transferred through the Government's Treasury to a sectarian entity. As *Flast* put it: "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Flast* thus "understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff."

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*Daimler-Chrysler* (quoting *Flast*). "Such an injury," *Flast* continued, is unlike "generalized grievances about the conduct of government" and so is "appropriate for judicial redress."

*Flast* found support for its finding of personal injury in "the history of the Establishment Clause," particularly James Madison's Memorial and Remonstrance Against Religious Assessments. *DaimlerChrysler*. In 1785, the General Assembly of the Commonwealth of Virginia considered a "tax levy to support teachers of the Christian religion." *Flast*. Under the proposed assessment bill, taxpayers would direct their payments to Christian societies of their choosing. If a taxpayer made no such choice, the General Assembly was to divert his funds to "seminaries of learning," at least some of which "undoubtedly would have been religious in character." *Rosenberger* v. *Rector and Visitors of Univ. of Va*. (1995) (Souter, J., dissenting). [C]ritics took the position that the proposed bill threatened compulsory religious contributions.

In the Memorial and Remonstrance, Madison objected to the proposed assessment on the ground that it would coerce a form of religious devotion in violation of conscience. In Madison's view, government should not " 'force a citizen to contribute three pence only of his property for the support of any one establishment.' " *Flast, supra* (quoting *Writings of James Madison* (1901)…. *Flast* was thus informed by "the specific evils" identified in the public arguments of "those who drafted the Establishment Clause and fought for its adoption." ...

Respondents contend that these principles demonstrate their standing to challenge the STO tax credit. In their view the tax credit is, for *Flast* purposes, best understood as a governmental expenditure. That is incorrect.

It is easy to see that tax credits and governmental expenditures can have similar economic consequences, at least for beneficiaries whose tax liability is sufficiently large to take full advantage of the credit. Yet tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are "extracted and spent" knows that he has in some small measure been made to contribute to an establishment in violation of conscience. *Flast.* In that instance the taxpayer's direct and particular connection with the establishment does not depend on economic speculation or political conjecture. The connection would exist even if the conscientious dissenter's tax liability were unaffected or reduced. See *DaimlerChrysler*.

When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.

The distinction between governmental expenditures and tax credits refutes respondents' assertion of standing. When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers. Arizona's §43–1089 does not "extrac[t] and spen[d]" a conscientious dissenter's funds in service of an establishment, *Flast*, or " 'force a citizen to contribute three pence only of his property' " to a sectarian organization (quoting *Writings of James Madison*). On the contrary, respondents and other Arizona taxpayers remain free to pay their own tax bills, without contributing to an STO. Respondents are likewise able to contribute to an STO of their choice, either religious or secular. And respondents also have the option of contributing to other charitable organizations, in which case respondents may become eligible for a tax deduction or a different tax credit. *See, e.g.*, Ariz. Rev. Stat. Ann. §43–1088 (2010).

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The STO tax credit is not tantamount to a religious tax or to a tithe and does not visit the injury identified in *Flast*. It follows that respondents have neither alleged an injury for standing purposes under general rules nor met the *Flast* exception. Finding standing under these circumstances would be more than the extension of *Flast* "to the limits of its logic." *Hein* (plurality opinion). It would be a departure from *Flast*'s stated rationale.

Furthermore, respondents cannot satisfy the requirements of causation and redressability. When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is, for purposes of *Flast*, traceable to the government's expenditures. And an injunction against those expenditures would address the objections of conscience raised by taxpayer-plaintiffs. See *DaimlerChrysler*. Here, by contrast, contributions result from the decisions of private taxpayers regarding their own funds. Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention.

Objecting taxpayers know that their fellow citizens, not the State, decide to contribute and in fact make the contribution. These considerations prevent any injury the objectors may suffer from being fairly traceable to the government. And while an injunction against application of the tax credit most likely would reduce contributions to STOs, that remedy would not affect noncontributing taxpayers or their tax payments. As a result, any injury suffered by respondents would not be remedied by an injunction limiting the tax credit's operation.

Resisting this conclusion, respondents suggest that Arizonans who benefit from §43–1089 tax credits in effect are paying their state income tax to STOs. In respondents' view, tax credits give rise to standing even if tax deductions do not, since only the former yield a dollar-for-dollar reduction in final tax liability. But what matters under *Flast* is whether sectarian STOs receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience.

In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so. Making the Article III standing inquiry all the more necessary are the significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress' power to change.

The present suit serves as an illustration of these principles. The fact that respondents are state taxpayers does not give them standing to challenge the subsidies that §43–1089 allegedly provides to religious STOs. To alter the rules of standing or weaken their requisite elements would be inconsistent with the case-or-controversy limitation on federal jurisdiction imposed by Article III.

The judgment of the Court of Appeals is reversed. So it is ordered.

**Justice Scalia, with whom Justice Thomas joins, concurring.**

Today's majority and dissent struggle with whether respondents' challenge to the Arizona tuition tax credit falls within [*Flast's*] narrow exception. Under a principled reading of Article III, their struggles are unnecessary. *Flast* is an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power that our opinions have

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established. I would repudiate that misguided decision and enforce the Constitution. See *Hein* v. *Freedom From Religion Foundation, Inc.* (2007) (Scalia, J., concurring in judgment).

I nevertheless join the Court's opinion because it finds respondents lack standing by applying *Flast* rather than distinguishing it away on unprincipled grounds. Cf. *Hein* (2007).

**Justice Kagan, with whom Justice Ginsburg, Justice Breyer, and Justice Sotomayor join, dissenting.**

For almost half a century, litigants like the Plaintiffs have obtained judicial review of claims that the government has used its taxing and spending power in violation of the Establishment Clause. [T]his Court and others have exercised jurisdiction to decide taxpayer-initiated challenges not materially different from this one.…

Today, the Court breaks from this precedent by refusing to hear taxpayers' claims that the government has unconstitutionally subsidized religion through its tax system. These litigants lack standing, the majority holds, because the funding of religion they challenge comes from a tax credit, rather than an appropriation….

This novel distinction in standing law between appropriations and tax expenditures has as little basis in principle as it has in our precedent. Cash grants and targeted tax breaks are means of accomplishing the same government objective—to provide financial support to select individuals or organizations. Taxpayers who oppose state aid of religion have equal reason to protest whether that aid flows from the one form of subsidy or the other. Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy….

I. The Plaintiffs have standing if their suit meets *Flast*'s requirements—and it does so under any fair reading of that decision.

Taxpayers have standing, *Flast* held, when they allege that a statute enacted pursuant to the legislature's taxing and spending power violates the Establishment Clause. In this situation, the Court explained, a plaintiff can establish a two-part nexus "between the [taxpayer] status asserted and the claim sought to be adjudicated." Because of these connections, *Flast* held, taxpayers alleging that the government is using tax proceeds to aid religion have "the necessary stake…in the outcome of the litigation to satisfy Article III." They are "proper and appropriate part[ies]"—indeed, often the only possible parties—to seek judicial enforcement of the Constitution's guarantee of religious neutrality.

That simple restatement of the *Flast* standard should be enough to establish that the Plaintiffs have standing. They attack a provision of the Arizona tax code that the legislature enacted pursuant to the State Constitution's taxing and spending clause…. And they allege that this provision violates the Establishment Clause….

II. The majority reaches a contrary decision by distinguishing between two methods of financing religion: A taxpayer has standing to challenge state subsidies to religion, the Court announces, when the mechanism used is an appropriation, but not when the mechanism is a targeted tax break, otherwise called a "tax expenditure."[1] In the former case, but not in the latter, the Court declares, the taxpayer suffers cognizable injury. *Ante*….

[1] "Tax expenditures" are monetary subsidies the government bestows on particular individuals or organizations

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II-A. Until today, this Court has never so much as hinted that litigants in the same shoes as the Plaintiffs lack standing under *Flast*. To the contrary: We have faced the identical situation five times—including in a prior incarnation of this very case!—and we have five times resolved the suit without questioning the plaintiffs' standing. Lower federal courts have followed our example and handled the matter in the same way…. I have not found any instance of a court dismissing such a claim for lack of standing.…

II-B. And what ordinary people would appreciate, this Court's case law also recognizes—that targeted tax breaks are often "economically and functionally indistinguishable from a direct monetary subsidy." *Rosenberger* v. *Rector and Visitors of Univ. of Va.* (1995) (Thomas, J., concurring)…. "Our opinions," therefore, "have long recognized…the reality that [tax expenditures] are a form of subsidy that is administered through the tax system." *Arkansas Writers' Project, Inc.* v. *Ragland* (1987) (Scalia, J., dissenting).

And because these financing mechanisms result in the same bottom line, taxpayers challenging them can allege the same harm. Our prior cases have often recognized the cost that targeted tax breaks impose on taxpayers generally…. Indeed, we have specifically compared the harm arising from a tax subsidy with that arising from a cash grant, and declared those injuries equivalent because both kinds of support deplete the public fisc. "In either case," we stated, "the alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes." *DaimlerChrysler Corp.* v. *Cuno* (2006).…

Here, the mechanism Arizona has selected is a dollar-for-dollar tax credit to aid school tuition organizations. Each year come April 15, the State tells Arizonans: Either pay the full amount of your tax liability to the State, or subtract up to $500 from your tax bill by contributing that sum to an STO. See *Winn I*…. [T]he STO payment is therefore "costless" to the individual*;* it comes out of what she otherwise would be legally obligated to pay the State—hence, out of public resources. And STOs capitalize on this aspect of the tax credit for all it is worth—which is quite a lot. To drum up support, STOs highlight that "donations" are made not with an individual's own, but with other people's—*i.e.*, taxpayers'—money. One STO advertises that "[w]ith Arizona's scholarship tax credit, you can send children to our community's [religious] day schools and it won't cost you a dime!" Brief for Respondents 13 (internal quotation marks and emphasis omitted)….

The Plaintiffs contend that this expenditure violates the Establishment Clause. If the legislature had appropriated these monies for STOs, the Plaintiffs would have standing, beyond any dispute, to argue the merits of their claim in federal court. But the Plaintiffs have no such recourse, the Court today holds, because Arizona funds STOs through a tax credit

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by granting them preferential tax treatment. The co-chairmen of the National Commission on Fiscal Responsibility and Reform recently referred to these tax breaks as "the various deductions, credits and loopholes that are just spending by another name." Washington Post, Feb. 20, 2011, p. A19, col. 3; see also 2 U. S. C. §622(3) (defining "tax expenditures," for purposes of the Federal Government's budgetary process, as "those revenue losses attributable to provisions of the…tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability")….

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rather than a cash grant…. [T]he casualty is a historic and vital method of enforcing the Constitution's guarantee of religious neutrality.

II-C. The majority offers just one reason to distinguish appropriations and tax expenditures: A taxpayer experiences injury, the Court asserts, only when the government "extracts and spends" her very own tax dollars to aid religion. In other words, a taxpayer suffers legally cognizable harm if but only if her particular tax dollars wind up in a religious organization's coffers…. And no taxpayer can make this showing, the Court concludes, if the government subsidizes religion through tax credits, deductions, or exemptions (rather than through appropriations).[2]

The majority purports to rely on *Flast* to support this new "extraction" requirement. It plucks the three words "extrac[t] and spen[d]" from the midst of the *Flast* opinion, and suggests that they severely constrict the decision's scope. And it notes that *Flast* partly relied on James Madison's famed argument in the Memorial and Remonstrance Against Religious Assessments.... And that is all the majority can come up with.

But as indicated earlier, everything of import in *Flast* cuts against the majority's position. Here is how *Flast* stated its holding: "[W]e hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of" the Establishment Clause. *Flast*. Nothing in that straightforward sentence supports the idea that a taxpayer can challenge only legislative action that disburses his particular contribution to the state treasury.

And here is how *Flast* primarily justified its holding: "[O]ne of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." That evil arises even if the specific dollars that the government uses do not come from citizens who object to the preference.

Likewise, the two-part nexus test, which is the heart of *Flast*'s doctrinal analysis, contains no hint of an extraction requirement. And finally, James Madison provides no comfort to today's majority. He referred to "three pence" exactly because it was, even in 1785, a meaningless sum of money; then, as today, the core injury of a religious establishment had

[2] Even taken on its own terms, the majority's reasoning does not justify the conclusion that the Plaintiffs lack standing. Arizona's tuition tax-credit program in fact necessitates the direct expenditure of funds from the state treasury. After all, the statute establishing the initiative requires the Arizona Department of Revenue to certify STOs, maintain an STO registry, make the registry available to the public on request and post it on a website, collect annual reports filed by STOs, and send written notice to STOs that have failed to comply with statutory requirements. Ariz. Rev. Stat. Ann. §§43-1502(A)-(C), 43-1506 (2010). Presumably all these activities cost money, which comes from the state treasury. Thus, on the majority's own theory, the government has "extract[ed] and spen[t]" the Plaintiffs' (along with other taxpayers') dollars to implement the challenged program, and the Plaintiffs should have standing. (The majority, after all, makes clear that nothing in its analysis hinges on the size or proportion of the Plaintiffs' contribution.) But applying the majority's theory in this way reveals the hollowness at its core. Can anyone believe that the Plaintiffs have suffered injury through the costs involved in administering the program, but not through the far greater costs of granting the tax expenditure in the first place?

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naught to do with any given individual's out-of-pocket loss. See *infra* (further discussing Madison's views). So the majority is left with nothing, save for three words *Flast* used to describe the particular facts in that case: In not a single non-trivial respect could the *Flast* Court recognize its handiwork in the majority's depiction.

III. Today's decision devastates taxpayer standing in Establishment Clause cases.… Appropriations and tax subsidies are readily interchangeable; what is a cash grant today can be a tax break tomorrow. The Court's opinion thus offers a roadmap—more truly, just a one-step instruction—to any government that wishes to insulate its financing of religious activity from legal challenge. Structure the funding as a tax expenditure, and *Flast* will not stand in the way. No taxpayer will have standing to object. However blatantly the government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts….

### ***Winn:*** **Notes**

1. Is the "mere" denial of constitutional right sufficient to provide standing? If not what else is needed? Compare *Richardson*, *Schlesinger*, *Flast*, *Valley Forge*, *DaimlerChrysler*, *Hein*, and *Winn*.

2. Assume that after a massive victory in the Presidential and Congressional elections, the victorious political party wishes to bestow Earldoms, an honorary title of nobility, on its largest contributors. Congress subsequently passes legislation authorizing the President to bestow the title upon those he deems fit. Corporations have volunteered to pay for the plaques and robes conferred on the earls, so no expense to the taxpayers is involved. Is the act of Congress constitutional? May a taxpayer challenge it? May a citizen? Should a constitutional challenge be entertained by the Court?

3. Assume Congress passes the following Balanced Budget Amendment and it is ratified by the necessary number of states:

> "SECTION 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a roll call vote.
>
> "SECTION 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a roll call vote.
>
> "SECTION 3. Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year in which total outlays do not exceed total receipts.
>
> "SECTION 4. No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a roll call vote.

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> "SECTION 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law.
>
> "SECTION 6. The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts.
>
> "SECTION 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.
>
> "SECTION 8. This article shall take effect beginning with fiscal year 2006 or with the second fiscal year beginning after its ratification, whichever is later."

The President subsequently submits an unbalanced budget and the Congress passes an unbalanced budget by a simple majority in both houses. A citizen sues. What result? A taxpayer sues. What result?

**Section III-C-2. What Constitutes a Cognizable Injury?**

[*Insert as note 5 on page 414 of text, following note 4 of Chapter 4, section III-C-2,* City of Los Angeles v. Lyons.]

***United States v. Windsor* (2013) and *Hollingsworth v. Perry* (2013)*:* Note**

5. In *United States v. Windsor* (2013) (the merits of which are discussed in the chapter on Substantive Due Process), the Court held that it had jurisdiction to consider the merits of a challenge to the Defense of Marriage Act (DOMA), even though the Justice Department had not appealed a district court's ruling that the statute was unconstitutional and that the federal government was required to permit the surviving spouse of a same-sex marriage to receive a federal estate tax exemption for surviving spouses. The Court first explained that the taxpayer had standing to challenge the constitutionality of the statute in district court because her payment of $363,053 in estate tax caused "a real and immediate economic injury," quoting *Hein v. Freedom From Religion Foundation* (2007). The court then concluded that it had jurisdiction within Article III's "case or controversy" requirement to adjudicate an appeal brought by an intervenor, the Bipartisan Legal Advisory Group of the U.S. House of Representatives, because the United States also was facing a "real and immediate economic injury." The Court found that the injury was not eliminated merely because "the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants" since "the judgment orders the United States to pay money that it would not disburse but for the court's

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order." Emphasizing the distinction between the jurisdictional requirements of Article III and prudential limitations on the Court's exercise of those powers, the Court concluded that the adjudication of the case was prudent because the Bipartisan Legal Advisory Group had convinced the Court that its dismissal of the case would generate "extensive litigation." The Court explained that the nation's ninety-four federal district courts "would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA's sweep involving over [sic] 1,000 federal statutes and a myriad of federal regulations."

Four dissenters, in three separate dissents, contended that the Court lacked standing because the federal government agreed with the plaintiff that DOMA was constitutional. Decrying the Court's willingness to hear the appeal as "jaw dropping," Justice Scalia stated that never before had the Court "suggested that we have the power to decide a question when every party agrees with both its nominal opponent *and the court below* on that question's answer." (emphasis in original). Declaring that "the Court is eager – *hungry* – to tell everyone its view of the legal question at the heart of this case," Scalia alleged that proceedings after the plaintiff won her case in the district court were "a contrivance" that had no object except to give the district court's decision "precedential effect throughout the United States." (emphasis in original).

In another decision involving gay rights, *Hollingsworth v. Perry* (2013), the Court held that proponents of a California constitutional provision limiting marriage to opposite-sex couples lacked standing to appeal an order of a federal district court ruling that the law was unconstitutional. The persons who sought to appeal the order were the official proponents of Proposition 8, the ballot initiative by which California voters had added the marriage provision to the state constitution. The district court had permitted them to intervene in defense of the law after California officials had refused to defend it. After California officials likewise refused to appeal the district court's decision, the Ninth Circuit permitted the proponents to appeal that decision, which the Ninth Circuit affirmed.

The Court explained that "for there to be a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have 'standing,' which requires, among other things, that it have suffered a concrete and particularized injury." The Court found that the proponents of the initiative lacked a "direct stake" in the outcome of their appeal. Their only interest in reversing the district court's order, the Court explained, "was to vindicate the constitutional validity of a generally applicable California law." The Court reiterated that a litigant does not have standing if he or she seeks "relief that no more directly and tangibly benefits him than it does the public at large," quoting *Lujan v. Defenders of Wildlife* (1992). Rejecting the argument that the proponents had standing because they had served as the official advocates of the initiative, for which they had collected signatures for ballot access and

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helped compose the ballot language, the Court explained that their interest in the measure became no different than that of other California citizens once the voters approved Proposition 8. The Court concluded that "we have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here."

Four dissenting justices complained that "the Court's reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials – the same officials who would not defend the initiative, an injury the Court now leaves unremedied." The dissenters contended that it was ironic that "a prime purpose of justiciability is to ensure vigorous advocacy, yet the Court insists upon litigation by state officials whose preference is to lose the case. The doctrine is meant to ensure that courts are responsible and constrained in their power, but the Court's opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed."

[*Insert as note 6 on page 414 of text, following note 4 (and note 5 above) of Chapter 4, section III-C-2,* City of Los Angeles v. Lyons.]

### ***Susan B. Anthony List v. Driehaus* (2014): Note**

6. In *Susan B. Anthony List v. Driehaus* (2014)**,** the Court unanimously concluded that the Susan B. Anthony List has standing to bring an anticipatory facial challenge to an Ohio law making it a crime to disseminate a knowingly or recklessly false statement concerning an electoral candidate.

   Driehaus, a former Congressman, filed a complaint with the Ohio Elections Commission alleging that Susan B. Anthony List violated an Ohio law that criminalizes certain false statements made during the course of a political campaign. After Driehaus' lost his election bid and his complaint was dismissed, the Susan B. Anthony List, joined by the Coalition Opposed to Additional Spending and Taxes (COAST), pursued a separate suit challenging the Ohio statute on 1st Amendment grounds. The District Court consolidated the two cases and dismissed them as nonjusticiable concluding that neither suit presented a sufficiently concrete injury to support standing or ripeness. The 6th Circuit affirmed on ripeness grounds.

   Justice Thomas wrote the opinion for the Court. The Court found the ripeness requirements were easily satisfied. The case presents a purely legal issue not clarified by further factual development. Denying prompt judicial review would impose a substantial hardship on Susan B. Anthony List because it would force to choose between refraining from core political speech or risking criminal prosecution.

   The Court found a sufficiently imminent injury to satisfy Article III requirements—an actual injury in fact which is concrete and particularized and actual or imminent and not

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> conjectural or hypothetical. Here the Susan B. Anthony List met the test because they had alleged an intention to engage in conduct that was arguably proscribed by the statute and there was a credible threat of prosecution. The Susan B. Anthony List pled specific statements that they intended to make in future election cycles. The Ohio Elections Commission had found probable cause to believe that the SBA List violated the law when it made statements similar to those it planned to make in the future. Past enforcement against the same conduct is evidence that the threat of enforcement is sufficiently substantial for ripeness and standing. *See, Steffel v. Thompson* (1974). The Court decided that the combination of burdensome Commission proceedings with the additional threat of criminal prosecution was sufficient to create an Article III injury.

[*Insert as note 7 on page 414 of text, following note 4 (and notes 5 and 6 above) of Chapter 4, section III-C-2,* City of Los Angeles v. Lyons.]

### ***Bond v. United States* (2011): Note**

7. In *Bond v. United States* (2011), the Supreme Court considered whether Carol Anne Bond had standing to challenge her conviction under 18 U.S.C. §229. Bond had harassed another woman by placing caustic substances on objects the woman was likely to, and did touch. She was then charged with violating §229, a statute enacted as part of the Chemical Weapons Convention Implementation Act of 1998. Bond claimed that the statute was invalid because of the Tenth Amendment.

The Court of Appeals ruled that Bond did not have standing to challenge §229 because "a State was not a party to the federal criminal proceeding." The Supreme Court reversed in a unanimous decision. It held that "a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States."

In a unanimous opinion written by Justice Kennedy, the Court rejected the Court of Appeals' analysis because it relied on a single sentence from *Tennessee Elec. Power Co. v. TVA* (1939). That sentence said "the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment." After reviewing the *Tennessee* opinion in whole, the Court found that this sentence was just a restatement of a previous argument in the decision. Thus, that sentence was limited to the context of business competition and did not control *Bond*.

Furthermore, granting Bond standing in this case was consistent with principles of federalism and the Tenth Amendment. Kennedy wrote,

> Federalism…protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power….
>
> The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of

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> federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

Therefore, the Court ruled Bond should be granted standing because "Bond seeks to vindicate her own constitutional interests. The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State." However, on remand the lower courts will decide the issue of whether §229 actually violates the Tenth Amendment.

Justices Ginsburg and Breyer concurred with the majority only to emphasize that "a law 'beyond the power of Congress,' for any reason, is 'no law at all.' The validity of Bond's conviction depends upon whether the Constitution permits Congress to enact §229. Her claim that it does not must be considered and decided on the merits."

Section III-C-3. Cause-In-Fact and Redressability [*Insert on page 424 after Note 4.*]

***Clapper v. Amnesty International USA* (2013): Note**

5.In *Clapper v. Amnesty International USA* (2013), the Court held that various human rights and media organizations lacked standing to challenge statute permitting the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by authorizing surveillance of various persons located outside the United States. The organizations contended that they had standing because their work required them to communicate with likely targets of the surveillance and that there was a reasonable likelihood that the government would obtain such communications pursuant to the statute. They also contended that they suffered present injury because the prospect of such interception already had "forced them to take costly and burdensome measures to protect the confidentiality of their international communications."

In denying standing, the Court concluded that the organizations' "speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending or is fairly traceable" to the statute. The Court explained that the plaintiffs could only speculate about whether the government would target their communications; whether the government would seek to conduct any such surveillance pursuant to the statute; whether the Foreign Intelligence Surveillance Court would authorize such surveillance; and whether any authorized surveillance would acquire the communications of the organizations or their foreign contacts. The Court likewise held that the organizations "cannot manufacture standing by incurring costs in anticipation of non-imminent harm."

The four dissenters contended that the apprehensions of at least some of the organizations were not unduly speculative. For example, the dissent noted that lawyers who represent suspected terrorists detained at Guantanamo Bay would naturally expect to discuss

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international terrorism with their clients – and these are exactly the type of communications that the government has a strong motive to intercept. Relying on such "commonsense inferences," as well as a detailed study of prior standing cases, the dissent concluded that the Court had permitted standing in cases in which the threat of harm was far less.

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**Chapter 5. The Role of the President**
[*Insert on page 454 after Youngstown Sheeting Tube v. Sawyer and before the* ***]

**Section I. The Scope of Power**

***Zivotofsky v. Kerry* (2015): Note**

In this separation of powers decision, the Court ruled in favor of the President in his dispute with Congress over the manner in which passports record places of birth when such notations involve issues about diplomatic recognition of the sovereignty of foreign countries. The Court invalidated a federal statute that required the Secretary of State to record on passports, birth registrations, and certificates of nationality that Israel was the birthplace of persons born in Jerusalem, upon the request of such person or her guardian. The statute conflicted with the Executive Branch's longstanding refusal to recognize any nation's sovereignty over Jerusalem.

Even though the Court agreed with the Secretary of State's admission that the President's power was at its "lowest ebb" within the meaning of Justice Jackson's concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635-78 (1952) because the Executive Branch's action contravened a federal statute, the Court concluded that the statute violated the authority of the President to grant diplomatic recognition to foreign countries. The Court found this authority in Article II, section 3, which directs that the President "shall receive Ambassadors and other public Ministers." The Court also found the power in the structure and history of the Constitution. The Court explained that the President always has been accorded the sole power to grant diplomatic recognition to foreign countries, a subject upon which the nation needs to speak with one voice. Although the Court recognized that Congress has substantial power to regulate passports, it concluded that the statute went beyond regulation to intrude upon the President's power to determine the diplomatic status of foreign nations.

In a concurring opinion, Justice Thomas concluded that the statute was constitutional with regard to the reporting of births but unconstitutional as applied to passports.

Justice Breyer concurred in the Court's opinion even though he explained that he continued to believe that the case presented a political question, a position that the Court had rejected in *Zivotofsky v. Clinton*, 566 U.S. ___ (2012).

Chief Justice Roberts and Justices Alito and Scalia in two dissenting opinions contended that the statute did not implicate diplomatic recognition. Scalia declared that the statute had "nothing to do with recognition" and that "making a notation in a passport or birth report does not encumber the Republic with any international obligations." Roberts and Alito wrote that the Court's decision was unprecedented because the Court never before had "accepted a President's direct defiance of an Act of Congress in the field of foreign affairs."

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## Section III. Appointments and the Separation of Powers

[*Insert on page 1497, Chapter V, Section III. Appointments and the Separation of Powers: addition to end of section.*]

### *NLRB v. Noel Canning* (2014): Note

Article II, § 2, cl. 3 further provides that "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." During much of the nineteenth and early twentieth centuries, when both houses of Congress were in recess for long periods, this provision enabled the President to appoint temporary federal judges and executive officials to conduct business that otherwise might have been neglected during the recess. During the past century, when Congress usually has been in session throughout most of each year, Presidents increasingly have used the clause to evade the Senate confirmation process, particularly when their nominations would have encountered opposition. Since recess appointees may serve until the end of the session, some persons have served as judges or executive officials for nearly two years without receiving the approval of the Senate. The Supreme Court for the first time addressed the scope of the recess appointments clause in *NLRB v. Noel Canning* (2014), in which the Court unanimously held that President Obama had unconstitutionally used this procedure to appoint three members to the National Labor Relations Board during a time when the Senate was meeting in brief pro forma sessions every three business days.

In interpreting the meaning of the ambiguous word "Recess," the Court ruled that the President may make recess appointments during both inter-session recesses and intra-session recesses. The Court found that its application of the clause to both kinds of recesses was consistent with the meaning of the word "Recess" and was required by the clause's purpose of helping the President to "ensure the continued functioning of the Federal Government when the Senate is away." The Court explained that the "Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure." The Court also found that history and practice supported this interpretation because "the President has consistently and frequently" made intra-session appointments and the Senate has "done nothing to deny the validity of this practice for at least three-quarters of a century." The Court explained that "we must hesitate to upset the compromises and working arrangements that the elected branches of the Government themselves have reached."

In assessing the length of time needed to qualify as a "Recess," the Court concluded that a recess does not trigger the clause if it is so short that it does not require the consent of the House of Representatives and if it lasts less than ten days, unless "some very unusual circumstance – a national catastrophe, for instance…renders the Senate unavailable but calls for an urgent response."

The Court also held that the recess appointments clause applies to both vacancies that arise during a recess and to those that initially occur before a recess and continue to exist during

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the recess. The Court concluded that this interpretation was consistent with the words "Vacancies that may happen during the recess of the Senate," with historical practice, and with the purpose of the clause.

The *Noel Canning* decision confirmed the President's broad power to make recess appointments even though it curtailed the more extreme exercises of that power. The Court determined that its "broader reading better serves the Clause's structural function." Observing that "[m]ost appointments are not controversial and do not produce friction between the branches," the Court explained that "[w]here political controversy is serious, the Senate unquestionably has other methods of preventing recess appointments," including more frequent sessions. Although the Court acknowledged that the clause could cause "serious institutional friction" between the President and the Senate, Justice Breyer in his opinion for the Court concluded that "friction between the branches is an inevitable consequence of our constitutional structure…That structure foresees resolution not only through judicial interpretation and compromise but also by the ballot box."

A opinion by Justice Scalia, concurring in the judgment only and joined by Chief Justice Roberts and Justices Alito and Thomas, contended that the text, structure, and history of the Clause permitted a President to make recess appointments only during an intra-session recess and only to fill vacancies that arose during that recess. The concurrence, citing *INS v. Chadha* (1983), explained that "[t]he Constitution is not a road map for maximally efficient government, but a system of 'carefully crafted restraints' designed to 'protect the people from the improvident exercise of power.'" The concurrence warned that "[t]he Court's embrace of the adverse-possession theory of executive power…will be cited in diverse contexts…and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for separation of powers."

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## Chapter 6. Limits on State Power: Preemption, the Dormant Commerce Clause, and the Privileges and Immunities Clause

### Section I. Preemption

[*Insert on page 535 after* Grier *and before the Note.*]

#### *Williamson v. Mazda* (2011): Note

In *Grier v. American Honda Motor Company, Inc.* (2000), the Supreme Court considered a state tort claim of negligence against an automobile manufacturer for failing to equip a vehicle with air bags. It held the claim was pre-empted by the Federal Motor Vehicle Safety Standard 208 (FMVSS 208). Following the decision, many lower courts read *Grier* broadly.

In *Williamson v. Mazda Motor of America, Inc.* (2011) the Court revisited preemption, this time in connection with rear seat lap belts and shoulder harnesses and "in light of the fact that several courts have interpreted *Grier* as indicating that FMVSS 208 pre-empts state tort suits claiming that manufacturers should have installed lap-and-shoulder belts, not lap belts alone, on rear inner seats."

In *Williamson* the Court held FMVSS 208 did not pre-empt state tort design defect claims regarding rear seat lap and shoulder harness installation. In an 8-0 decision (Justice Kagan recused herself from the case), the Court ruled against a broad reading of *Grier*. Instead, the Court held that the FMVSS 208 did not pre-empt a state tort suit against an automobile manufacturer for failing to equip a vehicle's rear inner seats with lap-and-shoulder seatbelts.

The 1989 version of the FMVSS 208 required auto manufacturers to install lap-and-shoulder seatbelts on all seats adjacent to the vehicle's doors or frames. But, on the rear inner seats of the vehicle (for example, middle seats or seats next to a minivan's aisle), the manufacturers were allowed to choose between installing either (1) lap seatbelts or (2) lap-and-shoulder seatbelts.

While riding in their 1993 Mazda minivan, the Williamson vehicle was struck by an oncoming vehicle. Two members of the Williamson family were wearing lap-and-shoulder seatbelts. They both survived the accident. Thanh Williamson was sitting in a rear inner seat of the minivan and was wearing only a lap seatbelt. She died in the accident. The Williamsons brought a state tort ("crashworthiness") suit against Mazda. They claimed that the automobile manufacturer should have installed lap-and-shoulder seatbelts in the rear inner seats of the minivan and that Thanh died because the rear inner seat was equipped with only a lap seatbelt.

When deciding *Williamson*, the Court followed the guidelines for analysis provided by the majority in *Grier*. The initial issue in both cases was "whether the statute's *express* pre-emption provision pre-empted the state tort suit." FMVSS 208 contained both an express pre-emption provision and a savings clause. The express pre-emption provision provided that a state may not "'establish, or…continue in effect…*any safety standard* applicable to the same aspect of performance' of a motor vehicle or item of equipment 'which is not identical to the Federal standard.'" The savings clause provided that "'[c]ompliance with' a federal safety standard 'does not exempt any person *from any liability under common law*.'"

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In *Grier*, the Court reasoned that because state tort suits are considered part of the common law, which is mentioned in the savings clause, these claims are not pre-empted by the express pre-emption provision. Still, there was a possibility of implied pre-emption if there was a conflict between state common law actions and the objectives of the federal regulatory plan for gradual installation of airbags. In *Grier*, the Court found such a conflict and implied preemption. In *Williamson*, the Court followed the *Grier* steps of analysis, but reached a different result:

> In light of *Grier*, the statute's express pre-emption clause cannot pre-empt the common-law tort action; but neither can the statute's saving clause foreclose or limit the operation of ordinary conflict pre-emption principles. We consequently turn our attention to *Grier's*…question, whether, in fact, the state tort action conflicts with the federal regulation.

The final step in *Grier's* method was to analyze asserted the conflict between the state tort action and the FMVSS 208 to see whether implied pre-emption applied. The issue was whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of a federal statute. If so, the state law was pre-empted. If not, the state law was not pre-empted. In making this determination, the Court looked to three factors. These included the regulation's "history, the promulgating agency's contemporaneous explanation of its objectives, and the agency's current views of the regulation's pre-emptive effect."

The Court distinguished *Williamson* from *Grier*. It found that in *Williamson* these three factors did not indicate that state law stood as an obstacle to the accomplishment of a significant federal regulatory objective. As to history, in *Grier* the Court found that the Department of Transportation (DOT) traditionally placed importance upon giving automobile manufacturers a choice of systems. Similarly, in *Williamson*, the Court conceded that the history of the seatbelt regulation was comparable to the history of airbag regulation; it left automobile manufacturers with a choice between different types of seatbelts for the rear inner seats.

Still, the Court found differences in the promulgating agency's contemporaneous explanation of its objectives. In *Grier*, the DOT's contemporaneous explanation emphasized the deliberate choice given to automobile manufacturers in its safety standards regarding air bags. This variety of choices was deliberate because of potential consumer backlash, the high cost of airbags, concerns for the safety of children, and the desire to spur development of alternative kinds of safety devices. Thus, "[i]n *Grier* we found that the state law stood as an 'obstacle to the accomplishment' of a significant federal regulatory objective, namely the maintenance of manufacturer choice."

In contrast, in *Williamson*, the Court found there was no evidence that the DOT's main, contemporaneous objective of the regulation was fear of potential consumer backlash, the high cost of airbags, concerns for the safety of children, or the desire to desire to spur development of alternative kinds of safety devises. Instead, the most important reason why the DOT provided automobile manufacturers with a choice between different types of seatbelts for the rear inner seats was because it was a cost-effective regulation. Therefore, the Court noted that "unlike *Grier*, we do not believe here that choice is a significant regulatory objective."

Finally, the Court found differences between the agency's current views of the regulation's pre-emptive effect. In *Grier*, the Solicitor General noted that a tort suit that required the use of airbags would be an obstacle to the accomplishment of the FMVSS's objective of manufacturer

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choice. In contrast, in *Williamson*, the Solicitor General told the Court that "DOT's regulation does not pre-empt this tort suit." Furthermore,

> [T]he Solicitor General explained that a standard giving manufacturers "multiple options for the design of" a device would not pre-empt a suit claiming that a manufacturer should have chosen one particular option, where "the Secretary did not determine that the availability of options was necessary to promote safety."

Thus, in *Williamson*, the regulation's history, the agency's contemporaneous explanation, and the agency's current viewpoint indicate that the safety provision in the FMVSS 208 did not seek to maintain automobile manufacturer choice in order to further significant regulatory objectives, as it did in *Grier*. Therefore, the Court concluded that "even though the state tort suit may restrict the manufacturer's choice, it does not 'stan[d] as an obstacle to the accomplishment…of the full purposes and objectives' of federal law. Thus, the regulation does not pre-empt this tort action."

Justice Sotomayor concurred in the opinion and wrote separately only to "emphasize the Court's rejection of an overreading of *Grier* that has developed since that opinion was issued."

Justice Thomas concurred only in the judgment of *Williamson*. He concluded that the FMVSS 208 did not pre-empt the state tort suit based on a plain-text reading of the Act's savings clause. He reasoned that

> Congress has instructed that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." This saving clause "explicitly preserv[es] state common-law actions. Here, Mazda complied with FMVSS 208 when it chose to install a simple lap belt. According to Mazda, the Williamson's lawsuit alleging that it should have installed a lap-and-shoulder seatbelt instead is pre-empted. That argument is foreclosed by the savings clause; the Williamsons' state tort action is not pre-empted.

Thus, in Thomas's opinion, the Court's analysis should have relied solely on the savings clause. This method would end the "majority's 'psychoanalysis' of the regulators" which produced the different outcomes in *Grier* and *Williamson*.

[*Insert on page 540 after* Grier v. American Honda Motor Company, Inc.: *Note.*]

### ***AT&T Mobility v. Concepcion* (2011): Note**

In 2002, the Concepcions entered into a cell phone contract with AT&T, which had advertised free phones as part of the deal. AT&T charged the Concepcions $30.22 a sales tax on these "free phones." AT&T said that the sales tax was based on the retail value of these phones. The contract provided for arbitration of all disputes between the parties, but did not permit classwide arbitrations.

The Concepcions sued in a California Federal District Court. The suit was consolidated with an arbitration class action against AT&T alleging false advertising and fraud. The federal district court ruled the no-class-action-in-arbitration provision unconscionable because it disallowed classwide arbitration actions. In doing so, it followed the rule in *Discover Bank v.*

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*Superior Court* (Ca. 2005). In *Discover Bank* the California Supreme Court had held class action waivers in consumer arbitration agreements are unconscionable if the agreement is an adhesion contract, if the disputes "involve small amounts of damages," and if "it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." In that situation, the California court said, "the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud.'"

The *Discover Bank* rule was an application of a more general California law. California law provided generally that courts may refuse to enforce any contract found "to have been unconscionable at the time it was made" or that the court may limit the application of any unconscionable clause of the contract.

The Ninth Circuit agreed that the provision was unconscionable under California law and held that the suit was not preempted by the federal arbitration act. In *AT&T Mobility v. Concepcion* (2011), the Court granted certiorari to determine whether application of the California common law rule was preempted by the Federal Arbitration Act (FAA).

Justice Scalia wrote for the majority, joined by Justices Roberts (C.J.), Kennedy, Thomas, and Alito. The Court held that the Federal Arbitration Act preempted application of the California rule set out in *Discover Bank.*

§2 of the FAA provided that arbitration provisions "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" As the majority recognized, prior precedent permitted agreements to arbitrate to be invalidated based on "'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration…. *Doctor's Associates, Inc. v. Casarotto* (1996)." The majority noted that where state law flatly prohibited arbitration of a particular type of claim, the state law is preempted. The Concepcions contended that their case was different because the rule about unconscionable contracts applied to any contract. So, the Concepcion's claimed, their claim fell within the savings provision of §2.

In response, the Court noted that where a generally applicable doctrine is alleged to have been applied to disfavor arbitration, the question is "more complex." It held that although §2's saving clause preserved generally applicable contract defenses, it did not preserve generally applicable state law contract rules that are an obstacle to the objectives of the Federal Arbitration Act, *cf*., *Geier v. American Honda Motor Co.* (2000).

While the Court conceded that the statute's saving clause covered the doctrine of unconscionability, it found that the *Discover Bank* rule was nevertheless preempted because it " 'st[ood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " in enacting the Federal Arbitration Act (FAA). The Court said that the FAA was a response to "widespread judicial hostility to arbitration agreements. The overarching purpose of

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the FAA…[was] to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."

Because it "interfere[d] with fundamental attributes of arbitration" by "[r]equiring the availability of classwide arbitration," the *Discover Bank* rule "created a scheme inconsistent with the FAA." The switch to classwide arbitration, the Court said, sacrificed informality and made the process slower, more costly, and increased the risk to defendants. The risk of error to the defendant could become unacceptable when many small claims are aggregated and decided at once.

Justice Thomas joined the opinion, but concurred, advocating a stronger limitation to §2's saving clause. According to Thomas, §4 of the FAA clarifies the scope of §2's saving clause. "§4 require[d] that 'upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,' the court must order arbitration 'in accordance with the terms of the agreement.'" Thus, for Thomas, "[c]ontract defenses unrelated to the making of the agreement–such as public policy defenses—could not be the basis for declining to enforce an arbitration clause." Since, by Justice Thomas' view, the *Discover Bank* rule does not relate to the making of an agreement, it did not fit with his "textual interpretation" of the FAA's saving clause. As a result, he concurred with the majority opinion that the *Discover Bank* rule is preempted.

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented. The dissenters argued that the *Discover Bank* rule "[was] consistent with the [FAA]'s language and primary objective," and thus was not preempted by the FAA. "Linguistically speaking, [the *Discover Bank* rule] falls directly within the scope of the Act's exception permitting courts to refuse to enforce arbitration agreements on grounds that exist 'for the revocation of *any* contract.' " (Emphasis added). "The *Discover Bank* rule d[id] not create a 'blanket policy in California against class action waivers in the consumer context,' " (*Provencher v. Dell, Inc.* (CD Cal. 2006)) but instead "represent[ed] the 'application of a more general [unconscionability] principle.' *Gentry v. Superior Ct.* (Cal. 2007)." Courts in California had enforced class action waivers in cases where they did not find them unconscionable.

The unconscionability rule " 'applie[d] equally to … contracts without arbitration agreements as it d[id] to…contracts with such agreements,' (*Discover Bank v. Superior Ct*. (Ca. 2005))…[so] it f[ell] directly within the scope of the [FAA's saving clause]." Believing "Congress' primary objective...was to secure the 'enforcement' of agreements to arbitrate" rather than "to guarantee…particular procedural advantages," the dissent maintained that the California rule "d[id] just what §2 require[d], namely, [put] agreements to arbitrate and agreements to litigate 'upon the same footing.' "

If efficiency comparisons were to be made, the dissent said the comparison should be between class actions in litigation and in arbitration. In any case, however, "[a] single class proceeding is surely more efficient than thousands of separate proceedings for identical claims."

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The dissenters recognized that the ban on classwide arbitration of identical claims had advantages for corporate defendants, as the majority said. But there were countervailing considerations. A "rational lawyer would not have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim." As the Seventh Circuit had recognized " '[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or fanatic sues for $30.00' " (quoting *Carnegie v. Household Int'l, Inc.* (7th Cir. 2004)).

Noting that "neither the history nor present practice suggest[ed] that class arbitration [was] fundamentally incompatible with arbitration itself," the dissenters found that the majority's view "that *Discover Bank* st[ood] as an 'obstacle' to the accomplishment of the federal law's objective" was "not well founded."

**Bruesewitz v. Wyeth LLC**
562 U.S. 223 (2011)

[Majority: Scalia, Roberts (C.J.), Kennedy, Thomas, Breyer, and Alito. Concurring: Breyer. Dissenting: Sotomayor and Ginsburg.]

[In 1992, Hannah Bruesewitz received a diphtheria, tetanus, and pertussis (DTP) vaccine. In the month following, she experienced over 100 seizures and was diagnosed with residual seizure disorder and developmental delay. Under the National Childhood Vaccine Injury Act (NCVIA) guidelines, a person injured by a vaccine may file a petition for compensation in the United States Court of Federal Claims. A special master then makes an informal adjudication of the petition within 240 days. Fast, informal adjudication is made possible by the Act's Vaccine Injury Table, which lists the vaccines covered under the Act. Claimants who show that a listed injury first manifested itself at the appropriate time are prima facie entitled to compensation. No showing of causation is necessary, unless the claimant also seeks to recover for unlisted side effects. In those cases, the claimant must prove causation to the satisfaction of the special master. The Court of Federal Claims must review objections to the special master's decision and enter final judgment under a similarly tight statutory deadline. At that point, a claimant may either accept the court's judgment and forgo a traditional tort suit for damages, or reject the judgment and seek tort relief from the vaccine manufacturer. Hannah's parents filed the petition for compensation, but the special master denied their claims. Hannah's illnesses were not contained in the Vaccine Injury Table nor were the Bruesewitzes successful in proving causation in fact for unlisted side effects. The Bruesewitzes rejected the unfavorable judgment and sued the company that produced the vaccine, Lederle (later Wyeth). Suing under Pennsylvania common law, they alleged that defective design of the vaccine caused Hannah's disabilities. They sought to recover from Lederle under theories of both strict liability and liability for negligent design. The Court granted certiorari to consider whether such common law design defect claims were pre-empted.]

**Justice Scalia delivered the opinion of the Court.**

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… [T]he elimination of communicable diseases through vaccination became one of the greatest achievements of public health in the 20th century…. But in the 1970's and 1980's vaccines became…so effective in preventing infectious diseases that the public became much less alarmed at the threat of those diseases, and much more concerned with the risk of injury from the vaccines themselves…. This led to a massive increase in vaccine-related tort litigation….

To stabilize the vaccine market and facilitate compensation, Congress enacted the National Childhood Vaccine Injury Act of 1986 (NCVIA ), establishing a no-fault compensation program "designed to work faster and with greater ease than the civil tort system." *Shalala v. Whitecotton* (1995)…. The *quid pro quo* for this, designed to stabilize the vaccine market, was the provision of significant tort-liability protections for vaccine manufacturers….

II-A. We set forth again the statutory text at issue:

> "No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine…if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings."

The "even though" clause…delineates the preventative measures that a vaccine manufacturer must have taken for a side-effect to be considered "unavoidable" under the statute. Provided that there was proper manufacture and warning, any remaining side effects, including those resulting from design defects, are deemed to have been unavoidable. State-law design-defect claims are therefore preempted….

Products-liability law establishes a classic and well known triumvirate of grounds for liability: defective manufacture, inadequate directions or warnings, and defective design. If all three were intended to be preserved, it would be strange to mention specifically only two, and leave the third to implication.… It seems that the statute fails to mention design-defect liability "by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co*. (2003)….

The mandates contained in the Act lead to the same conclusion. Design-defect torts, broadly speaking, have two beneficial effects: (1) prompting the development of improved designs, and (2) providing compensation for inflicted injuries. The NCVIA provides other means for achieving both effects…. And the Act provides many means of improving vaccine design. It directs the Secretary of Health and Human Services to promote "the development of childhood vaccines that result in fewer and less serious adverse reactions." It establishes a National Vaccine Program, …[which] is to set priorities for federal vaccine research and to coordinate federal vaccine safety and efficacy testing. The Act requires vaccine manufacturers and health-care providers to report adverse side effects, and provides for monitoring of vaccine safety through a collaboration with eight managed-care organizations. And of course whenever the [Food and Drug Administration (FDA)] concludes that a vaccine is unsafe, it may revoke the license.

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These provisions…once again suggest that §300aa–22(b)(1)'s silence regarding design-defect liability was not inadvertent. It instead reflects a sensible choice to leave complex epidemiological judgments about vaccine design to the FDA and the National Vaccine Program rather than juries…. For the foregoing reasons, we hold that the National Childhood Vaccine Injury Act preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects….

**Justice Breyer, concurring.**

In my view, the Court has the better of the purely textual argument. But the textual question considered alone is a close one. Hence, like the dissent, I would look to other sources, including legislative history, statutory purpose, and the views of the federal administrative agency, here supported by expert medical opinion. Unlike the dissent, however, I believe these other sources reinforce the Court's conclusion….

House Committee Report 99–908…lists two specific kinds of tort suits that the clause does not pre-empt (suits based on improper manufacturing and improper labeling), while going on to state that compensation for other tort claims, e.g., design-defect claims, lies in "the [NCVIA's no-fault] compensation system, not the tort system." …

The Department of Health and Human Services (HHS) decides when a vaccine is safe enough to be licensed and which licensed vaccines, with which associated injuries, should be placed on the Vaccine Injury Table.… A special master in the Act's compensation program determines whether someone has suffered an injury listed on the Injury Table and, if not, whether the vaccine nonetheless caused the injury.… To allow a jury in effect to second-guess those determinations is to substitute less expert for more expert judgment, thereby threatening manufacturers with liability (indeed, strict liability) in instances where any conflict between experts and nonexperts is likely to be particularly severe—instances where Congress intended the contrary.…

**Justice Sotomayor, with whom Justice Ginsburg joins, dissenting.**

In holding that §22(b)(1) of the National Childhood Vaccine Injury Act of 1986 pre-empts all design defect claims for injuries stemming from vaccines covered under the Act, the Court imposes its own bare policy preference over the considered judgment of Congress. In doing so, the Court excises 13 words from the statutory text, misconstrues the Act's legislative history, and disturbs the careful balance Congress struck between compensating vaccine-injured children and stabilizing the childhood vaccine market. Its decision leaves a regulatory vacuum in which no one ensures that vaccine manufacturers adequately take account of scientific and technological advancements when designing or distributing their products. Because nothing in the text, structure, or legislative history of the Vaccine Act remotely suggests that Congress intended such a result, I respectfully dissent….

Blackletter products liability law generally recognizes three different types of product defects: design defects, manufacturing defects, and labeling defects (e.g., failure to warn). The

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reference in the "even though" clause to a "properly prepared" vaccine "accompanied by proper directions and warnings" is an obvious reference to two such defects—manufacturing and labeling defects.… Given that the "even though" clause requires the absence of manufacturing and labeling defects, the "if " clause's reference to "side effects that were unavoidable" must refer to side effects caused by something other than manufacturing and labeling defects. The only remaining kind of product defect recognized under traditional products liability law is a design defect.… Because §22(b)(1) uses the conditional term "if," moreover, the text plainly implies that some side effects stemming from a vaccine's design are "unavoidable," while others are avoidable. Accordingly, …Congress must also have intended a vaccine manufacturer to demonstrate in each civil action that the particular side effects of a vaccine's design were "unavoidable." …

Indeed, when Congress intends to pre-empt design defect claims categorically, it does so using categorical (e.g., "all") and/or declarative language (e.g., "shall"), rather than a conditional term ("if ")…. The plain text and structure of the Vaccine Act thus compel the conclusion that §22(b)(1) pre-empts some—but not all—design defect claims. Contrary to the majority's and respondent's categorical reading, petitioners correctly contend that, where a plaintiff has proved that she has suffered an injury resulting from a side effect caused by a vaccine's design, a vaccine manufacturer may invoke §22(b)(1)'s liability exemption only if it demonstrates that the side effect stemming from the particular vaccine's design is "unavoidable," and that the vaccine is otherwise free from manufacturing and labeling defects….

[The House Energy and Commerce Committee Report accompanying the Vaccine Act, H. R. Rep. No. 99–908, pt. 1 (1986) (hereinafter 1986 Report)] expressly adopts comment k of §402A of the Restatement of Torts (Second) (1963–1964) (hereinafter Restatement), which provides that "unavoidably unsafe" products…are not defective…. Comment *k* (of the Restatement) provides that "seller[s]" of "[u]navoidably unsafe" products are "not to be held to strict liability" provided that such products "are properly prepared and marketed, and proper warning is given."

As the 1986 Report explains, Congress intended that the "principle in Comment K regarding 'unavoidably unsafe' products" apply to the vaccines covered in the bill. That intent, in turn, is manifested in the plain text of §22(b)(1)—in particular, Congress' use of the word "unavoidable," as well as the phrases "properly prepared" and "accompanied by proper directions and warnings," which were taken nearly verbatim from comment *k*…. Given Congress' expressed intent to codify the "principle in Comment K," 1986 Report 26, the term "unavoidable" in §22(b)(1) is best understood as a term of art, which incorporates the commonly understood meaning of "unavoidably unsafe" products under comment *k* at the time of the Act's enactment in 1986. Similarly, courts applying comment *k* had long required manufacturers invoking the defense to demonstrate that their products were not only "unavoidably unsafe" but also properly manufactured and labeled. By requiring "prope[r] prepar[ation]" and "proper

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directions and warnings" in §22(b)(1), Congress plainly intended to incorporate these additional comment k requirements….

The majority's decision today disturbs that careful balance (between providing adequate compensation for vaccine-injured children and conferring substantial benefits on vaccine manufacturers to ensure a stable vaccine supply) based on a bare policy preference that it is better "to leave complex epidemiological judgments about vaccine design to the FDA and the National Vaccine Program rather than juries." … [W]hatever the merits of the majority's policy preference, the decision to bar all design defect claims against vaccine manufacturers is one that Congress must make, not this Court. By construing §22(b)(1) to pre-empt all design defect claims against vaccine manufacturers for covered vaccines, the majority's decision leaves a regulatory vacuum in which no one—neither the FDA nor any other federal agency, nor state and federal juries—ensures that vaccine manufacturers adequately take account of scientific and technological advancements.… Nothing in the text, structure, or legislative history remotely suggests that Congress intended that result.

### *Chamber of Commerce v. Whiting* (2011): Note

The Immigration Reform and Control Act (IRCA) made it "unlawful for a person or other entity…to hire…an alien knowing the alien is an unauthorized alien." The Act expressly pre-empted "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ…unauthorized aliens." IRCA also required employers to take steps to verify an employee's eligibility for employment, one of which is E-Verify—an internet-based system employers could use to check the work authorization status of employees. The Legal Arizona Workers Act "provide[d] that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked." It required that all Arizona employers use E-Verify. The Chamber of Commerce of the United States and various business and civil rights organizations (collectively Chamber) filed suit arguing that the Arizona law was expressly and impliedly pre-empted by IRCA and that the mandatory use of E-Verify was implied pre-empted.

In *Chamber of Commerce v. Whiting* (2011), Chief Justice Roberts wrote for the majority, joined in full by Justices Scalia, Kennedy, and Alito, and joined as to parts I, II-A, and III-A by Justice Thomas. The Court held that the Legal Arizona Workers Act was not pre-empted by IRCA for two reasons: (1) it fit into IRCA's savings clause, which exempted "licensing and similar laws" from express pre-emption; and (2) it "implement[ed] the sanctions that Congress expressly allowed Arizona to pursue through licensing laws," and thus did not conflict with federal law triggering implied preemption. The Court found the term "licensing law" broad enough to include laws that only revoke or suspend, without granting, licenses, and thus the Court found the saving clause applied to the Arizona law.

The Court further noted:

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> Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects.... [A] state court "shall consider *only* the federal government's determination" when deciding "whether an employee is an unauthorized alien." … As a result, there can by definition be no conflict between state and federal law as to worker authorization….

The Court refuted the Chamber and the dissent's worry "that employers will err on the side of discrimination rather than risk the 'business death penalty' (termination of their licenses) by 'hiring unauthorized workers.' " According to the Court:

> All that is required to avoid sanctions under the Legal Arizona Workers Act is to refrain from knowingly or intentionally violating the employment law. Employers enjoy safe harbors from liability when they use…E-Verify—as Arizona law requires them to do. The most rational path for employers is to obey the law—both the law barring the employment of unauthorized aliens and the law prohibiting discrimination—and there is no reason to suppose that Arizona employers will choose not to do so.

Finally, the Court held the Arizona law's mandatory use of E-Verify was not impliedly pre-empted, because it "in no way obstructs achieving" Congress' goals "to ensure reliability in employment authorization verification, combat counterfeiting of identity documents, and protect employee privacy." The Court relied on testimony by the United States that " '[t]he government continues to encourage more employers to participate" in E-Verify' " and that "the program is 'the best means available to determine the employment eligibility of new hires.' "

Justice Breyer, joined by Justice Ginsburg, dissented. He argued that the Legal Arizona Workers Act was not a licensing law that would fit into IRCA's savings clause, but instead was a law which "impose[d] civil sanctions upon those who employ unauthorized aliens," and was thus expressly preempted by IRCA. Justice Breyer argued that the majority's broad definition of "licensing law" "would permit States to eviscerate the federal Act's preemption provision" and "subvert [IRCA] itself." He furthermore worried that the Arizona law encouraged employers to discriminate against potential employees who appear foreign, out of fear of license revocation ("the business death penalty"). Such an outcome would directly conflict with one of IRCA's main purposes, preventing such discrimination.

The relatively minor penalties in IRCA (limited to a range of a few thousand dollars per illegal worker) indicated to Justice Breyer that Congress did not intend "to permit far more drastic state penalties that would directly and mandatorily destroy entire businesses." Finally, he asserted that "[b]y making mandatory that which federal law seeks to make voluntary (the use of E-Verify), the state provision stands as a significant 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Crosby v. National Foreign Trade Council* (2000). And it is consequently pre-empted."

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Justice Sotomayor also wrote a dissenting opinion. She argued that the majority's reading of IRCA's savings clause could not "be reconciled with the rest of IRCA's comprehensive scheme." According to Justice Sotomayor:

> the savings clause can only be understood to preserve States' authority to impose licensing sanctions after a final federal determination that a person has violated IRCA…. Because the Legal Arizona Workers Act…creates a separate state mechanism for Arizona state courts to determine whether a person has employed an unauthorized alien, …it falls outside the savings clause and is preempted.

### *Arizona v. United States* (2012): Note

The Supreme Court invalidated three of the four key provisions of a politically controversial Arizona statute aimed at curbing illegal immigration. Although Arizona contended that its law complemented federal immigration law and assisted enforcement of federal immigration legislation, the Court found that Arizona had regulated conduct that was within the exclusive jurisdiction of Congress and that the Arizona law conflicted with federal law.

The Court explained that the Supremacy Clause requires state law to yield to federal law when Congress enacts a statute having "an express preemption provision;" when states regulate "conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance;" and when state laws "conflict with federal law." The preemption doctrine, the Court declared, is particularly relevant in the context of immigration because the federal government "has broad, undoubted power over the subject of immigration and the status of aliens," based upon the constitutional power to "establish a uniform Rule of Naturalization" and "its inherent power as sovereign to control and conduct relations with foreign nations." The Court observed that "immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.… Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad."

Applying these standards, the Court struck down sections of the statute that prohibited unauthorized aliens from willfully failing to carry alien registration documents and from applying for work as an employee or independent contractor. The Court also nullified the statute's authorization for law enforcement officials to arrest a person if the officer had reason to believe that the person had committed any public offense that made him removable from the United States. The Court refused to enjoin the statute's requirement that state law enforcement officers make a reasonable attempt to determine the immigration status of any person they stop, detain, or arrest for any reason if they have reasonable suspicion to believe that the person is unlawfully present in the United States.

The Court, by a vote of six to two, held that the registration document provision was unconstitutional under the doctrine of "field pre-emption" insofar as Congress had reserved for itself the entire subject of alien registration. "Permitting the State to impose its own penalties for the federal offenses here," the Court explained, "would conflict with the careful framework Congress created," particularly since the state and federal penalties were different.

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In contrast with the alien registration provision, "which replicates federal statutory requirements," the Court, by a vote of five to three, found that the employment section of the statute "enacts a state criminal prohibition where no federal counterpart exists." Although federal law imposes various criminal penalties on employers who hire illegal immigrants, Congress in enacting the Immigration Reform and Control Act of 1986 (IRCA) "made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." The Court concluded that the Arizona law "would interfere with the careful balance struck by Congress with respect to the unauthorized employment of aliens."

The Court likewise found, by a vote of five to three, that the provision for arrest of illegal immigrants would impair federal regulation of illegal immigration. The Court explained that "as a general rule it is not a crime for a removable alien to remain present in the United States" and that the Arizona statute "attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers." Pointing out that the Arizona law permitted the exercise of statutory authority "without any input from the Federal Government about whether an arrest is warranted in a particular case," the Court concluded that the statute "would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed. This is not the system Congress created."

In unanimously refusing to enjoin the provisions for determination of immigration status in connection with a stop, detention, or arrest, the Court explained that "consultation between federal and state officials is an important feature of the immigration system" and that "Congress has done nothing to suggest it is inappropriate to communicate with ICE [Immigration and Customs Enforcement] in these situations…. Indeed, it has encouraged the sharing of information about possible immigration violations." The Court acknowledged, however, that "there is a basic uncertainty about what the law means and how it will be enforced." Although the Court explained that "it would be inappropriate to assume" that the provision "will be construed in a way that creates a conflict with federal law," the Court warned that "this opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect." The Court appears to have been referring in part to the danger of racial profiling.

In his opinion for the Court, Justice Kennedy acknowledged that illegal immigration had created significant problems in Arizona, and that state officials were attempting to use the state's police power to address such issues, which they believed the federal government had neglected, even though, as Kennedy pointed out, "hundreds of thousands of aliens are removed by the Federal Government every year." Kennedy found that "Arizona bears many of the consequences of unlawful immigration" and that "the problems posed to the State by illegal immigration must not be underestimated." Kennedy explained that "these aliens are reported to be responsible for a disproportionate share of serious crime" and that "there is an 'epidemic of crime, safety risks, serious property damage, and environmental problems' associated with the influx of illegal immigration across private land near the Mexican border." Kennedy concluded, however, that "immigration policy shapes the destiny of the Nation…. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the States may not pursue policies that undermine federal law."

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In dissent, Justice Scalia argued that the Court's nullification of three parts of the statute intruded on state sovereignty because states have the inherent right to control their own borders. Scalia declared that "Arizona is entitled to have 'its own immigration policy' – including a more rigorous enforcement policy – so long as that does not conflict with federal law." Scalia wrote that "in light of the predominance of federal immigration restrictions in modern times, it is easy to lose sight of the States' traditional role in regulating immigration – and to overlook their sovereign prerogative to do so." He explained that "we are not talking here about a federal law prohibiting the States from regulating bubble-gum advertising, or even the construction of nuclear plants. We are talking about a federal law going to the core of state sovereignty: the power to exclude." In response to the Court's concerns about foreign repercussions, Scalia observed that "even in its international relations, the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers."

Averring that Arizona "citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy" and that "federal officials have been unable to remedy the problem," Scalia declared that "Arizona has moved to protect its sovereignty – not in contradiction of federal law, but in complete compliance with it."

In discussing the various provisions of the statute, Scalia argued that there was no reason why Arizona could not criminalize behavior that the federal government had not chosen to criminalize and that a state likewise "may make violation of federal law a violation of state law as well." Both Scalia and Justice Alito disagreed with the Court that IRCA could be interpreted as preventing the states from imposing criminal penalties on illegal immigrants who seek employment. In his dissent, Justice Thomas similarly concluded that there was no conflict between the ordinary meaning of the federal statutes and the provisions of the Arizona law.

In his opinion dissenting from the Court's ruling on the statute's employment and detention provisions, Alito offered a detailed explanation of why he did not believe that the statute's provisions for inquiries about immigration status, which the Court unanimously upheld, would likely "be enforced in a way that violates the Fourth Amendment or any other provision of the Constitution," an apparent reference at least in part to racial profiling. Although he acknowledged that enforcement of the legislation "will multiply the occasions on which sensitive Fourth Amendment issues will crop up," Alito argued that Arizona could mitigate the risk by providing officers with more information about the "circumstances that typically give rise to reasonable suspicion of unlawful presence" and that the state could "greatly mitigate" the problem by accepting licenses from most states as proof of legal status.

### *Mutual Pharmaceutical Co. v. Bartlett* (2013): Note

The Supreme Court held by a vote of five to four that the Federal Food, Drug, and Cosmetic Act (FDCA) pre-empted New Hampshire common law that imposed stricter safety requirements on pharmaceutical products. Karen Bartlett was severely disfigured and nearly blinded by a rare skin disease called toxic epidermal necrolysis (TEN) as a result of ingesting Clinoril, an anti-inflammatory drug manufactured by Mutual Pharmaceutical. At the time she was prescribed the medicine, Clinoril's label did not contain an explicit warning of the risks of TEN. Bartlett successfully sued Mutual Pharmaceutical on a "design defect" theory, a common

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law cause of action available under New Hampshire tort law. This theory essentially imposes a duty on all manufactures to ensure that the products they design are not "unreasonably dangerous." If they are, then the duty can only be satisfied by (1) changing the product's design to make it safer, or (2) changing the product's labeling to accurately reflect the inherent danger.

On appeal, the Supreme Court found a conflict between this state cause of action and the FDCA. The FDCA requires drug manufacturers to submit a massive application, involving thousands of pages of research conducted over a period of years, before marketing a drug. Once a generic drug (such as Clinoril) is on the market, the manufacturer is forbidden from deviating from the specifications listed on the application – including any changes to the ingredients or label of the drug. Thus, according to the Court, the FDCA effectively barred Mutual Pharmaceutical from meeting the burden imposed by state tort law (*i.e.* altering either the composition of Clinoril or its packaging).

Citing past pre-emption cases, the Court held that "when a federal law forbids an action required by state law, the state law is without effect." Applying this rule, the court found that federal law pre-empted state law in this case insofar as the FDCA prohibited the company from changing its ingredients or its warning labels without the permission of federal authorities. The Court further held that the company was not required to avoid the impossibility of complying with both federal and state law by not marketing the drug in New Hampshire. Finally, the Court suggested that Congress could remedy any potential injustice arising from this decision by enacting legislation that would relax the pre-emption doctrine with respect to the FDCA.

In separate dissenting opinions, Justices Breyer and Sotomayor argued that compliance with state law was not impossible because the company could have refrained from marketing its product in New Hampshire or could have paid a penalty for non-compliance. The dissenting justices also pointed out that the FDCA contained no specific pre-emption clause and that Congress and the Federal Drug Administration traditionally have regarded state common law tort suits as a complementary form of drug regulation.

### ***Northwest, Inc. v. Ginsberg* (2014): Note**

In a unanimous decision, the Supreme Court held that the federal Airline Deregulation Act [the ADA] preempts a state-law claim for breach of the implied covenant of good faith and fair dealing where the state law claim seeks to enlarge the contractual obligation that the parties had adopted. Binyomin Ginsberg became a member of the Northwest Airlines' frequent flyer program in 1999 and obtained Premium Elite Status in 2005. In 2008, Northwest terminated his membership, citing the terms of the frequent flyer program. Northwest claimed the program allowed Northwest Airlines sole discretion to remove participants who "abused" the program. Northwest claimed that Ginsberg had abused the program by having continually asked for compensation over and above its guidelines, by being awarded more than $1,900 in travel credit vouchers, 78,500 WorldPerks bonus miles, and $491 in cash reimbursements.

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In January 2009, Ginsberg sued Northwest Airlines and argued that, by terminating his membership in the frequent flyer program, the company breached both the contractual agreement and the implied doctrine of good faith and fair dealing under Minnesota law. The district court had dismissed the contractual claim and that part of the decision was not appealed. The Ninth Circuit reversed.

Before the Airline Deregulation Act, airlines had been regulated under the Federal Aviation Act of 1958. Because that act contained a saving provision preserving pre-existing statutory and common-law remedies, airlines were also regulated by state law. While the ADA did not repeal the saving provision, it included a pre-emption provision prohibiting States from enacting or enforcing a law, regulation or other provision having the force of law related to an airline's price, route, or service. This, the Court said, was designed to make sure that state regulation did not displace the federal statutory scheme of deregulation on these subjects. In essence, the Court found that a state law covenant of good faith and fair dealing did just that.

Justice Alito's opinion for the Court held that the phrase "other provision having the force and effect of law" in the preemption clause of the Airline Deregulation Act includes state common-law rules such as the implied covenant of good faith and fair dealing. That is so where the state law rule does not permit the parties to contract out of the covenant. The Minnesota rule did not permit parties to contract out of the covenant of fair dealing. In addition, the Court found a frequent-flier program is sufficiently related to airline rates and prices for ADA preemption to apply.

The Court held that the implied covenant of good faith and fair dealing claim under state law is preempted under the Airline Deregulation Act when the claim seeks to enlarge the contractual agreement of the parties. Since the state's enactment or enforcement of a law may undo federal deregulation with its own regulation, the Court found that the breach of implied covenant claim cannot be viewed as simply an attempt to vindicate the parties' implicit understanding of the contract. The implied covenant enlarged the contractual agreement in such a way that the Airline Deregulation Act preempts.

[Insert after *Northwest v. Ginsburg*]

### ***Oneok, Inc. v. Learjet, Inc.* (2015): Note**

In its most recent preemption decision, the Supreme Court held that the federal National Gas Act did not pre-empt state antitrust claims in a lawsuit in which purchasers of natural gas claimed that interstate pipelines had reported false information. Addressing only the issue of field preemption since the parties had not argued the issues of statutory preemption or conflict preemption, the Court by a vote of seven to two held that the statute "was drawn with meticulous regard for the continued exercise of state power" and that the antitrust claims at least partly involved retail prices, which were a matter of special concern to the states. The Court also

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pointed out that states traditionally have provided common law and statutory remedies against unfair business practices. Although the Court acknowledged that the statute gave the Federal Energy Regulatory Commission the authority to determine the reasonableness of rates for gas transported in interstate commerce, the Court explained that it left regulation of retail sales to the states. The Court concluded that the state laws therefore were not preempted because the alleged misconduct affected non-federally regulated retail prices as well as the wholesale prices that the Commission regulated.

Justice Scalia's dissent, joined by Chief Justice Roberts, argued that the state laws were preempted because they overlapped with the Commission's regulation of wholesale prices. They contended that the Court should focus "upon *what* the State seeks to regulate (a pipeline practice that is subject to regulation by the Commission), not *why* the State seeks to regulate it (to curb the practice's effects on retail sales)" (emphasis in original). Scalia pointed out that the statute was intended to promote uniformity of regulation even though it also was intended to promote state authority and that the Court's decision would force pipelines to "ensure that their behavior conforms to the discordant regulations of 50 States – or more accurately, to the discordant verdicts of untold state antitrust juries."

## Section III-B. The Current Approach to the Privileges and Immunities Clause of Article IV, §2

[*Insert on page 620 after* Supreme Court of Virginia v. Friedman (1988).]

### *McBurney v. Young (2013): Note*

In *McBurney v. Young* (2013), the Supreme Court unanimously held that the state of Virginia did not violate the Privileges and Immunities Clause of Article IV or the dormant commerce clause by denying non-citizens access to public records that the state made available to Virginia citizens pursuant to the state's Freedom of Information Act.

In rejecting the Privileges and Immunities claim, the Court concluded that the statute had "a distinctively nonprotectionist aim" because it was designed to enable citizens to ensure the accountability of the officials to which they had delegated their sovereign power. The Court explained the distinction between citizens and noncitizens also recognized that "Virginia taxpayers foot the bill for the fixed costs underlying recordkeeping in the Commonwealth." The Court also explained that much of the information that the plaintiffs sought through the statute could be obtained from judicial records that were available to anyone. Moreover, the Court re-affirmed its previous decisions holding that there is no constitutional right to obtain all the information provided by freedom of information laws insofar as the Constitution does not guarantee the existence of such laws and such laws are not "basic to the maintenance or well-being of the Union."

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In determining that the case was not governed by the dormant commerce clause, the Court reiterated that the statute was not protectionist and held that "Virginia neither prohibits access to an interstate market nor imposes burdensome regulation on that market. Rather, it merely creates and provides to its own citizens copies – which would not otherwise exist – of state records." The Court explained that the statute would not violate the dormant commerce clause even if that doctrine were relevant to the case because the state had created the market for the product (public records) and was its sole manufacturer.

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## Chapter 7: The Incorporation of the Bill of Rights

### Section VI-C. Early Interpretation of the 14th Amendment

[Insert on page 707 after line 4 "… *United States v. Cruikshank* (1876)." Replaces up to *** on p. 708]

Some scholars, in contrast, read *Slaughter-House* as consistent with incorporation of Bill of Rights liberties into the 14th Amendment and suggest that the change occurred in *Cruikshank* and later cases.

#### A Note on *United States v. Cruikshank* (1875)

Racial violence in the South often occurred as part of a virtual civil war as self-styled "Conservatives" attempted to achieve political dominance using race and political terror as a tool against black and white Republicans. *United States v. Cruikshank, 92 U.S. 542 (1875)*, arose in the context of pervasive political terror. According to Professor James Gray Pope, *Cruikshank* is one of the most important civil rights cases ever decided by the Supreme Court. *See* James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank* (1876) *Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385-447 (2014). Pope notes that *Cruikshank* announced the state action doctrine, rejected incorporation of the Bill of Rights, and established the requirement of intentional race discrimination for enforcing the 14th Amendment, and, so, helped to ensure the victory of white supremacist paramilitary insurgents over the integrated, Republican-controlled Reconstruction state governments and the Federal Government. For a discussion of *Cruikshank* emphasizing how it hobbled federal action against political terrorists, *see,* Michael Kent Curtis, *Reflections on Albion Tourgee's 1896 view of the Supreme Court: A "consistent enemy of personal liberty and equal rights"*? 5 Elon L Rev. 19, 44-55 (2013). For a fine book, *see,* Charles Lane, *The Day Freedom Died: The Colfax Massacred, the Supreme Court, and the Betrayal of Reconstruction* (2008).

*Cruikshank* followed a disputed Louisiana election. White and black Republicans claimed victory and Republicans sought to retain possession of a county courthouse in Colfax, Louisiana. They armed themselves against an expected assault by conservative Democrats.

The Democrats arrived, armed with rifles and a cannon. In the ensuing siege, the courthouse caught fire and the Republicans surrendered. They came out of the courthouse, waving a white flag, only to be killed. Their bodies were mutilated and left in the sun. Reports of the number of dead ranged from 50 to 280. News of the "Colfax Massacre" shocked the nation. When state officials did nothing, the federal government was forced to act. The defendants were indicted under the 1870 federal Enforcement Act (entitled "An Act to enforce the right of citizens of the United State to vote and for other purposes. Section 6 punished any person who went in disguise or on the public highway or on the premises of another with intent to injure,

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oppress, or threaten any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured by the Constitution of the United States, or because of his having exercised the same.

In *Cruikshank* the Court held the indictment under section 6 of the 1870 (anti-Klan) Act failed to state an offense for two reasons. First, since basic Bill of Rights liberties were protected only against the action of the national government, they could not be protected by the national government from threats from other quarters. Second, since the 14th Amendment limited only the states, power under it could not reach private violence in any case. This is a "state action limitation," and we will return to state action later. The state action argument is essentially a syllogism: The 14th Amendment limits only action by states. Private individuals are not states. Therefore, the 14th Amendment does not reach private individuals who invade the rights it protects.

The *Cruikshank* Court explained each basis for its decision:

> The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government…. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains…subject to State jurisdiction. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government.
>
> The 1st Amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone. *Barron v. Baltimore* (1833). It is now too late to question the correctness of this construction….
>
> The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been

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surrendered to the United States.

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States…. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.
>
> The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The 2nd Amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to [the states].

The Court also cited a second reason to dismiss the indictment: "The 14th Amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States." …

* * *

**Chapter 8. Substantive Due Process.**
Replace Current Sections V, VI, and VII (pp. 844-middle of 967)

**SectionV. Liberty and Sexual Privacy**

The Supreme Court has interpreted the word “liberty” to include a “right to privacy” that has been the basis for some of the most controversial decisions in the Court’s history. Beginning with the recognition that married couples could not be denied access to contraceptives, the Court eventually prevented states from outlawing women’s access to pre-viability abortions, criminalizing same sex sodomy, and denying gay couples access to marriage licenses. As you read these cases, consider whether or not recognition of *any* privacy right logically led to each subsequent development or if the cases could (or should) have reasonably stopped at some point. If the progression could have stopped—what point could you argue would have been a principled

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end to the expansion? Why? If the progression could not have reasonably stopped, does that make the initial recognition of the right to privacy more suspect or more justified?

### *Poe v. Ullman*: Background

In 1961, the Court considered for the first time the constitutionality of a state statute prohibiting the use of contraceptives—even by married couples. The Court dismissed the case of *Poe v. Ullman* on ripeness grounds, but Justice Harlan dissented from the dismissal and reached the merits of the challenge.

How does Justice Harlan justify striking down statutes banning birth control for married couples? What is his methodology? Put another way, Justice Harlan finds rights that are "implicit in ordered liberty" in the Due Process Clause. How does he determine what is implicit?

### Poe v. Ullman

367 U.S. 497 (1961)

[Majority: Frankfurter, Warren (C.J.), Clark, and Whitaker. Concurring: Brennan. Dissenting: Black, Douglas, Harlan, and Stewart.]

**Mr. Justice Harlan, dissenting.**

I am compelled, with all respect, to dissent from the dismissal of these appeals. In my view the course which the Court has taken does violence to established concepts of "justiciability," and unjustifiably leaves these appellants under the threat of unconstitutional prosecution....

I consider that this Connecticut legislation, as construed to apply to these appellants, violates the 14th Amendment. I believe that a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life.... Since [appellants'] contentions draw their basis from no explicit language of the Constitution, and have yet to find expression in any decision of this Court, I feel it desirable at the outset to state the framework of Constitutional principles in which I think the issue must be judged.

I. In reviewing state legislation, whether considered to be in the exercise of the State's police powers, or in provision for the health, safety, morals or welfare of its people, it is clear that what is concerned are "the powers of government inherent in every sovereignty."

It is but a truism to say that [the meaning of due process] is not self-explanatory….

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might

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take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. Cf. *Skinner v. Oklahoma* (1942), *Bolling v. Sharpe* (1954)....

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yard-stick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come." The matter was well put in *Rochin v. California* (1952):

> The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process…. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.
>
> On these premises I turn to the particular Constitutional claim in this case....

III. Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law.…

This, then, is the precise character of the enactment whose Constitutional measure we must take. The statute must pass a more rigorous Constitutional test than that going merely to the plausibility of its underlying rationale. This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of

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"liberty," the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to "strict scrutiny."

That aspect of liberty which embraces the concept of the privacy of the home receives explicit Constitutional protection at two places only. These are the 3rd Amendment, relating to the quartering of soldiers, and the 4th Amendment, prohibiting unreasonable searches and seizures. While these Amendments reach only the Federal Government, this Court has held in the strongest terms, and today again confirms, that the concept of "privacy" embodied in the 4th Amendment is part of the "ordered liberty" assured against state action by the 14th Amendment....

Perhaps the most comprehensive statement of the principle of liberty underlying these aspects of the Constitution was given by Mr. Justice Brandeis, dissenting in *Olmstead v. United States* (1928):

> The protection guaranteed by the (4th and 5th) Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual whatever the means employed, must be deemed a violation of the 4th Amendment....

I think the sweep of the Court's decisions, under both the 4th and 14th Amendments, amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character. [These] principles...affect the very essence of constitutional liberty and security.…

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.... This same principle is expressed in the *Pierce v. Society of the Sisters* (1925) and *Meyer v. State of Nebraska* (1923) cases. These decisions..."have respected the private realm of family life which the state cannot enter."

Of this whole "private realm of family life" it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations. We would indeed be straining at a gnat and swallowing a camel were we to show concern for the niceties of property law involved in our recent decision, under the 4th Amendment, in *Chapman v. United States* (1961) [landlord cannot give consent to search of tenant’s house], and yet fail at least to see any substantial claim

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here.

Of course, just as the requirement of a warrant is not inflexible in carrying out searches and seizures, so there are countervailing considerations at this more fundamental aspect of the right involved. "[T]he family...is not beyond regulation," and it would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime. The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced…. Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

In sum, even though the State has determined that the use of contraceptives is as iniquitous as any act of extra-marital sexual immorality, the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy, is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection....

Since, as it appears to me, the statute marks an abridgment of important fundamental liberties protected by the 14th Amendment, it will not do to urge in justification of that abridgment simply that the statute is rationally related to the effectuation of a proper state purpose. A closer scrutiny and stronger justification than that are required....

But conclusive, in my view, is the utter novelty of this enactment. [No other jurisdiction, state or federal had criminalized the use of contraception.] Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime. Indeed, a diligent search has revealed that no nation, including several which quite evidently share Connecticut's moral policy, has seen fit to effectuate that policy by the means presented here.

Though undoubtedly the States are and should be left free to reflect a wide variety of policies, and should be allowed broad scope in experimenting with various means of promoting those policies, I must agree with Mr. Justice Jackson that "There are limits to the extent to which a legislatively represented majority may conduct… experiments at the expense of the dignity and personality" of the individual. *Skinner v. Oklahoma*. In this instance these limits are, in my view, reached and passed....

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### *Griswold v. Connecticut*: Background and Questions

1. How is *Lochner v. New York* (1905) used by Justices Douglas and Black in *Griswold v. Connecticut*?

2. How does the majority opinion reach its result? What is a *penumbra*? Since the Court had applied most guarantees of the Bill of Rights to the states at the time of *Griswold*, presumably the penumbras of these rights would apply as well. However, incorporation of the 3rd Amendment, cited by Justice Douglas, has yet to be considered by the Court.

3. Why doesn't Justice Douglas simply base his opinion on the word "liberty" in the Due Process Clause of the 14th Amendment? Does the word "liberty" appear in the opinion? Why or why not? How does Justice Douglas treat the *Meyer v. Nebraska* (1923) decision —i.e., what constitutional text does he imply it is expounding? Is he re-interpreting the meaning of this precedent?

4. What do you think of the argument based on the 9th Amendment in Justice Goldberg's opinion? Does the logic of the dissent allow the state to limit families to one child, or to none, as Justice Goldberg suggests?

5 Why do Justices Harlan and White concur only in the judgment? How do their approaches differ from the others?

### Griswold v. Connecticut
381 U.S. 479 (1965)

[Majority: Douglas, Goldberg, Warren (C.J.), Clark, and Brennan. Concurring: Goldberg, Harlan, and White. Dissenting: Black and Stewart.]

**Mr. Justice Douglas delivered the opinion of the Court.**

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut.…

[He and others] gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are §§ 53-32 and 54-196 of the General Statutes of Connecticut. The former provides:

> Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Section 54-196 provides:

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> Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the 14th Amendment. The Appellate [courts] affirmed....

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the 14th Amendment. Overtones of some arguments suggest that *Lochner v. New York* (1905) should be our guide. But we decline that invitation as we did in [among others] *West Coast Hotel Co. v. Parrish* (1937) and *Williamson v. Lee Optical Co.* (1955). We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the 1st Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters* (1925), the right to educate one's children as one chooses is made applicable to the States by the force of the 1st and 14th Amendments. By *Meyer v. Nebraska* (1923), the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the 1st Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin v. City of Struthers* (1943)) and freedom of inquiry, freedom of thought, and freedom to teach (see *Wieman v. Updegraff* (1952))—indeed the freedom of the entire university community. *Sweezy v. New Hampshire* (1957). Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP v. Alabama* (1958) we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral 1st Amendment right.... In other words, the 1st Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. *NAACP v. Button* (1963)....

[W]hile [the freedom to associate] is not expressly included in the 1st Amendment its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the 1st Amendment is one, as we have seen. The 3rd Amendment in its prohibition against the

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quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The 4th Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The 5th Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The 4th and 5th Amendments were described in *Boyd v. United States* (1886), as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in *Mapp v. Ohio* (1961), to the 4th Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."

We have had many controversies over these penumbral rights of "privacy and repose." See *Skinner v. Oklahoma* (1942). These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

**Mr. Justice Goldberg, whom The Chief Justice [Warren] and Mr. Justice Brennan join, concurring.**

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process" as used in the 14th Amendment includes all of the first eight Amendments, I do agree that the concept of liberty protects those personal rights that are

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fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the 9th Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the 9th Amendment.... I add these words to emphasize the relevance of that Amendment to the Court's holding....

The language and history of the 9th Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement....

The 9th Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." ... It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected....

While this Court has had little occasion to interpret the 9th Amendment,[1] "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison* (1803). In interpreting the Constitution, "real effect should be given to all the words it uses." The 9th Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the 9th Amendment and to give it no effect whatsoever.... In sum, the 9th Amendment simply lends strong support to the view that the "liberty" protected by the 5th and 14th Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments....

The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family....

In a long series of cases this Court has held that where fundamental personal liberties are

[1] As far as I am aware, until today this Court has referred to the 9th Amendment only [5 times].

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involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose....

The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception....

In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right "retained by the people" within the meaning of the 9th Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the 14th Amendment from infringement by the States....

**Mr. Justice Harlan, concurring in the judgment.**

[T]he proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the 14th Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," *Palko v. Connecticut* (1937). For reasons stated at length in my dissenting opinion in *Poe v. Ullman* (1961), I believe that it does....

**Mr. Justice White, concurring in the judgment.** [Omitted.]

**Mr. Justice Black, with whom Mr. Justice Stewart joins, dissenting.**

I agree with my Brother Stewart's dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one....

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the 4th Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." ...

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the 4th Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and

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seizures....[2] I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision....

Of the cases on which my Brothers White and Goldberg rely so heavily, undoubtedly the reasoning of two of them supports their result here...*Meyer v. Nebraska* (1923) [and] *Pierce v. Society of Sisters* (1925). *Meyer* held unconstitutional, as an "arbitrary" and unreasonable interference with the right of a teacher to carry on his occupation and of parents to hire him, a state law forbidding the teaching of modern foreign languages to young children in the schools.[3] And in *Pierce*, relying principally on *Meyer*, Mr. Justice McReynolds said that a state law requiring that all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an "arbitrary, unreasonable, and unlawful interference" which threatened "destruction of their business and property." Without expressing an opinion as to whether either of those cases reached a correct result in light of our later decisions applying the 1st Amendment to the States through the 14th, I merely point out that the reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept....

My Brother Goldberg has adopted the recent discovery[4] that the 9th Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice," or is contrary to the "traditions and [collective] conscience of our people." ... [F]or a period of a century and a half no serious suggestion was ever made that the 9th Amendment...could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs....

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is

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[2] The phrase "right to privacy" appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890 which urged that States should give some form of tort relief to persons whose private affairs were exploited by others. *The Right to Privacy*, 4 Harv. L. Rev. 193.... Observing that "the right of privacy...presses for recognition here," today this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule....

[3] In *Meyer*, in the very same sentence quoted in part by my Brethren in which he asserted that the Due Process Clause gave an abstract and inviolable right "to marry, establish a home and bring up children," Mr. Justice McReynolds asserted also that the Due Process Clause prevented States from interfering with "the right of the individual to contract."

[4] See Patterson, *The Forgotten Ninth Amendment* (1955). Mr. Patterson urges that the Ninth Amendment be used to protect unspecified "natural and inalienable rights." P. 4. The Introduction by Roscoe Pound states that "there is a marked revival of natural law ideas throughout the world. Interest in the Ninth Amendment is a symptom of that revival."

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charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me.... I had thought that we had laid that [*Lochner v. New York* (1905)] formula, as a means for striking down state legislation, to rest once and for all in cases like *West Coast Hotel Co. v. Parrish* (1937)....

The late Judge Learned Hand, after emphasizing his view that judges should not use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their "personal preferences," made the statement, with which I fully agree, that:

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.

So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

**Mr. Justice Stewart, whom Mr. Justice Black joins, dissenting.**

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law.... But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do....

What provision of the Constitution...make[s] this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards…. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true 9th and 10th Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

* * *

For articles on the 9th Amendment and less textually explicit rights under the 14th Amendment, see *Constitutional Law Symposium: The Forgotten Constitutional Amendments,* 56 *Drake L. Rev. No.* 4, pp. 829-1111 (2008). An excerpt from a law review article by Robert Bork criticizing *Griswold* is posted on conlawincontext.com.

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## *Griswold v. Connecticut*: Notes

1 *A Note on Method.* At this point it is apparent that legislation impinging on fundamental rights will receive strict scrutiny. Mere economic legislation typically receives low-level rational basis review. The problem, of course, is to identify which rights are fundamental and which are not. What methods are available for identifying fundamental rights? The Court often uses various justifications. It appeals to the textual basis of rights in the Bill of Rights, to precedent, to reasoned judgment, to analogy from prior cases, to the penumbras of the Bill of Rights, to inherent liberties of Americans, to ethical aspirations, and to history and tradition.

Two of these types of justification are essentially different. Appeals to history and tradition may—and appeals to social consensus clearly do—look at what values the majority has traditionally accepted or has now come to accept. An inherent rights or natural rights approach looks to basic human rights, whether the majority accepts them or not. There are paradoxes connected to each approach.

2. The Supreme Court confronted another contraceptive case before addressing the even more volatile issue of abortion. In *Eisenstadt v. Baird* (1972), the defendant Baird had distributed contraceptive foam after a birth control lecture at Boston University. The party who received the contraceptive was unmarried. Baird was convicted under a Massachusetts statute that made it a crime, punishable by up to five years in prison, to "give[] away...any drug, medicine, instrument or article whatever for the prevention of conception." While *married* persons could obtain a prescription for contraceptives, *single* persons could not obtain contraceptives from anyone to prevent pregnancy. Married or single persons could obtain contraceptives from anyone to prevent, not pregnancy, but the spread of disease. This distinction between preventing conception and preventing disease (also recognized in Connecticut under the legislation challenged in *Griswold*) allowed the sale of condoms but not diaphragms, IUD's, oral contraceptives, etc. The Court based its decision on equal protection analysis and found the statute lacked rationality. Here, commentators suggest, we see a new type of rational basis analysis emerging, one far different from low-level rational basis. We will later explore this sort of "rational basis with bite" as a separate level of scrutiny. We will also see a merger of equal protection and substantive due process analysis as the Court analyzes statutes impacting on the "right to marry."

### Eisenstadt v. Baird
405 U.S. 438 (1972)

[Majority: Brennan, Douglas, Stewart, and Marshall. Concurring: Douglas, White, and Blackmun. Dissenting: Burger (C.J.)(Powell and Rehnquist, JJ., did not participate.)]

**Mr. Justice Brennan delivered the opinion of the Court**.

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… If the Massachusetts statute cannot be upheld as a deterrent to fornication or as a health measure, may it, nevertheless, be sustained simply as a prohibition on contraception? The Court of Appeals analysis "led inevitably to the conclusion that, so far as morals are concerned, it is contraceptives *per se* that are considered immoral—to the extent that *Griswold* will permit such a declaration." The Court of Appeals went on to hold:

> To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state.

We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.

If under *Griswold v. Connecticut* (1965) the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See *Stanley v. Georgia* (1969). See also *Skinner v. Oklahoma* (1942); *Jacobson v. Massachusetts* (1905).

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious. Mr. Justice Jackson, concurring in *Railway Express Agency v. New York* (1949), made the point:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Although Mr. Justice Jackson's comments had reference to administrative regulations, the

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principle he affirmed has equal application to the legislation here. We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, Massachusetts [law] violates the Equal Protection Clause.

[Concurring and dissenting opinions omitted.]

### *Roe v. Wade*: Background and Questions

After *Griswold* and *Eisenstadt*, opponents of state criminal abortion statutes began to lobby state legislatures to repeal these laws and to file lawsuits challenging their validity. In *Roe v. Wade* (1973), the Court considered two companion cases, from Georgia and Texas, challenging criminal abortion laws on constitutional grounds. The Court at this time operated under a rigid two-tier approach to judicial scrutiny and could only strike down abortion statutes by defining the right to an abortion as a fundamental right and then applying strict scrutiny. In a 7-2 decision, the Court announced that a woman's right to have an abortion is a fundamental right under the 14th Amendment's Due Process Clause; however, this right is not unlimited and must be weighed against competing state interests.

Justice Blackmun delivered the majority opinion (7-2), noting that despite the "sensitive and emotional nature of the abortion controversy," the Court has a duty "to resolve the issue by constitutional measurement, free of emotion and of predilection." Despite the heated controversy that emerged in the wake of *Roe*, the decision itself was well within the framework of existing precedent. Three of four Nixon appointees (Burger, C.J., and Blackmun and Powell, JJ.) voted with the majority, joining four of the five Warren Court holdovers (Douglas, Brennan, Stewart, and Marshall, JJ.). Only Justices White and Rehnquist dissented.

The Texas statute at issue in *Roe* made it illegal for a woman to get or attempt to get an abortion, unless it was necessary to save the life of the mother. At that time, these criminal abortion statutes were commonplace, existing in a majority of states. Opponents of criminal abortion statutes argued that these laws deprived a pregnant woman of her right to elect to have an abortion, a right that was argued to reside in the Due Process Clause of the 14th Amendment.

*** * ***

1. How does the Court justify its decision in *Roe v Wade* (1973)? What authority does it cite? What part of the Constitution does the Court rely upon in reaching its decision?

2. How does the Court decide if the fetus is a "person" within the meaning of the 14th Amendment? What difference would it make if the Court did find the fetus to be a person?

3. The Court finds that interests are possessed by the pregnant woman, the state, and the viable fetus. What are each party's interests?

4. The majority's trimester approach has been criticized for being closer to a legislative

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standard than a judicial standard. Is this criticism appropriate? Do the trimester dates have significance *in their own right* or merely as dates that represent the points, in 1973, at which certain interests shift? Would the ability of evolving medical technology to make younger and younger fetuses viable call for the reversal of *Roe,* or merely an ongoing reformulation of the trimester approach consistent with the *Roe* balancing of interests?

5. How do the dissenting opinions deal with the majority approach? Is the criticism of the dissenting opinions, by implication at least, broader than the actual *Roe* decision?

6. After the decision in *Roe,* assume that technology marches on. Assume that fetuses and fertilized eggs can now be raised in artificial wombs. The operation to remove the fetus or fertilized egg and transplant it into an artificial womb is no more risky than abortion. In all cases where women wish to terminate their pregnancy after viability, the law of the State of Florida forbids abortions but allows fetuses to be raised in artificial wombs, at state expense, and to be held for adoption by foster parents. Florida defines viability as the moment the sperm unites with the egg. Is the Florida statute constitutional? Why? Would your answers change if, under state law, natural parents could be required to pay child support to adoptive parents, though at a much reduced rate in recognition of the existence of the adoptive family's obligation and ability to support the child?

**Roe v. Wade**

410 U.S. 113 (1973)

[Majority: Blackmun, Burger (C.J.), Douglas, Brennan, Stewart, Marshall, and Powell. Concurring: Burger (C.J.), Douglas, and Stewart. Dissenting: White and Rehnquist.]

**Mr. Justice Blackmun delivered the opinion of the Court.**

… VI. [R]estrictive criminal abortion laws…derive from statutory changes effected, for the most part, in the latter half of the 19th century.…

[T]hus…at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century…a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today....

VII. Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

[The first reason concerns a social desire to discourage immoral sexual conduct. This was not a justification that Texas offered to defend its statute.] ...

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman....

Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first

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trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise.... Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake...should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

[The challengers disagreed, arguing that historically the purpose of abortion laws was entirely for the protection of the woman. The Court found support for the challengers' argument in earlier state court decisions interpreting abortion laws from the late 19th and early 20th centuries that focused on maternal health, not on protecting the unborn. Additionally, a woman involved in an illegal abortion could not be prosecuted under these statutes, thus underscoring the argument that these statutes were enacted to protect maternal and not fetal health.]

VIII. The Constitution does not explicitly mention any right of privacy. In a line of decisions, however...the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. [The Court cites cases finding a right of privacy within the 1st, 4th, 5th, and 9th Amendments; in the penumbras of the Bill of Rights; and within the concept of liberty guaranteed by the 14th Amendment.] These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut* (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia* (1967); procreation, *Skinner v. Oklahoma* (1942); contraception, *Eisenstadt v. Baird*; family relationships, *Prince v. Massachusetts* (1944); and child rearing and education, *Pierce v. Society of Sisters* (1925) [and] *Meyer v. Nebraska* (1923).

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of

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personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. [The Court referenced physical and psychological harm that may result from being required to carry a child that a woman is not prepared to care for, and also addressed the “continuing stigma of unwed motherhood [that] may be involved.”] All these are factors the woman and her responsible physician necessarily will consider in consultation....

[A]ppellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree.... The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate.... [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of...the abortion decision. The privacy right involved, therefore, cannot be said to be absolute....

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

[The Court discussed federal and state court decisions that found a right to abortion, but held that it is not an absolute right. These cases found that at some point during pregnancy the state’s interests in protecting health, regulating the medical field or protecting prenatal life outweigh a woman’s right to choose.] We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer v. Union Free School District* (1969); and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold v. Connecticut*....

IX. The District Court held that the [state] failed to meet [its] burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the [state] presented "several compelling justifications for [its abortion statute],” the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." [Roe] and [the state] both contest that holding....

IX-A. The [state] and certain *amici* argue that the fetus is a "person" within the language and meaning of the 14th Amendment.... If this suggestion of personhood is established, [Roe's] case...collapses, for the fetus' right to life would then be guaranteed...by the [14th] Amendment.... On the other hand, the [state] conceded...that no case could be cited that holds that a fetus is a person within the meaning of the 14th Amendment.

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[The Court held that an unborn fetus is *not* a "person" under the 14th Amendment. The Court looked to the many constitutional provisions that include "person" or "persons," and found that none of them were intended to apply before birth. Additionally, because abortions were largely unrestricted during most of the 19th century, the Court concluded "that the word 'person,' as used in the 14th Amendment, does not include the unborn...."]

IX-B. [However,] [t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus.... The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner* and *Pierce* and *Meyer* were respectively concerned.... [I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly

Texas urges that, apart from the 14th Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins….

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. [Justice Blackmun noted that physicians tended to focus on live birth or viability, the point in time where the fetus can live outside of the womb, even if it is with artificial aid.] Substantial problems for precise definition of [when life begins] are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as...the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs….

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life…begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. [The Court noted that traditionally tort law did not allow claims for injuries or death of an unborn fetus.] … In short, the unborn have never been recognized in the law as persons in the whole sense.

X. [W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman.... We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman...and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact...that until the end of

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the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. [The Court gives examples of permissible medical regulations including licensing requirements, facility requirements, and who may perform an abortion, etc.]

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here....

XI. To summarize and to repeat:

1. A state criminal abortion statute…that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the 14th Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother....

This holding, we feel, is consistent with the relative weights of the respective interests

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involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician....

**Mr. Justice Stewart, concurring.**

[Justice Stewart, who dissented in *Griswold* because he found no constitutional basis for a right to privacy, accepted that substantive due process had been revived by *Griswold*. He also accepted the application of the right of privacy to *Roe* based on *stare decisis,* and because "the 'liberty' protected by the Due Process Clause of the 14th Amendment covers more than those freedoms explicitly named in the Bill of Rights…."]

[Concurring opinions of Burger, C.J. and Douglas, J., omitted.]

**Mr. Justice White, with whom Mr. Justice Rehnquist joins, dissenting. …**

With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgment.…

In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, [policy] should be left with the people and to the political processes the people have devised to govern their affairs....

**Mr. Justice Rehnquist, dissenting.**

II. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case....

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty"...I agree.... But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law.... If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective....

[Justice Rehnquist compared the majority opinion to *Lochner v. New York* (1905).] As in *Lochner*...the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one...partakes more of judicial legislation than it does

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of a determination of the intent of the drafters of the 14th Amendment.

The fact that a majority of the States...have had restrictions on abortions for at least a century is a strong indication...that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts* (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe....

By the time of the adoption of the 14th Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion....

The only conclusion possible from this history is that the drafters did not intend to have the 14th Amendment withdraw from the States the power to legislate with respect to this matter....

* * *

**The Evolution of Privacy Holdings from Griswold to Casey: The Expansion and Subsequent Contraction of Privacy as a Fundamental Right [**Excerpts from the cases addressing the right to privacy between *Griswold* and *Casey* are posted on conlawincontext.com.]

***Planned Parenthood of Southeastern Pennsylvania v. Casey*: Background and Questions**

As illustrated in the cases set out above, repeated legislative attacks against *Roe v. Wade* (1973) and subsequent judicial narrowings of its holding had been occurring since *Maher v. Roe* in 1977. Nearly twenty years after *Roe*, the Court directly confronted the repeated demands to overrule *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). Great uncertainty surrounded the case. Both *Roe* dissenters remained: Byron White and now Chief Justice William Rehnquist. Only one member of the seven person *Roe* majority remained: Harry Blackmun. Eight of the sitting justices had been appointed by Republican presidents, with six by either Ronald Reagan or G.H.W. Bush, known opponents of *Roe*. John Paul Stevens was known to be a supporter of *Roe.* Antonin Scalia was known to agree with Rehnquist and White in calling for its demise. Sandra Day O'Connor and Anthony Kennedy had been critical of *Roe*, but to date had not aligned themselves with Scalia, White, and Rehnquist. David Souter and Clarence Thomas had yet to address the issue, though both were recently appointed by G.H.W. Bush, whose Solicitor General was calling for the overruling of *Roe*. Commentators openly speculated that *Roe* would be overruled.

A sharply divided court voted to reaffirm the central holding of *Roe*. That is not to say, however, that the constitutional analysis for abortion regulation remained unchanged. While the Court purported to reaffirm *Roe*, it also openly changed the constitutional test to be applied and downgraded the right to an abortion from a fundamental right to a liberty interest.

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In *Casey*, the Court considered a challenge to Pennsylvania's Abortion Control Act, a law that imposed a variety of restrictions on abortions. These restrictions included: a requirement that a woman must give informed consent for the procedure after receiving detailed information from a physician at least twenty-fours before she may have the abortion, spousal notification, parental consent for minors, and onerous reporting requirements for facilities that provide abortions. The District Court that heard the case struck down all of the restrictions as unconstitutional, but the Circuit Court of Appeals reversed, upholding all but the spousal notification requirement.

* * *

1. What are the tests for regulation of abortion suggested in *Casey*—by the lead opinion, by the two concurring Justices, and by the dissents?

2. Review the note on stare decisis that follows *Brown v. Board of Education*, *infra,* supplement at x. Whose analysis of stare decisis is more sound, that of Justices O'Connor, Kennedy, and Souter or that of Justices Rehnquist and Scalia? Why?

3. Whose analysis of the comparison of *Roe/Casey*, *Lochner/West Coast Hotel*, and

   *Plessy/Brown* is more sound? Why?

4. Whose application of the undue burden test to the issue of the 24-hour waiting period is more sound, the plurality's or Justice Stevens'? Why?

5. Is it beneficial or harmful to a society to have a contentious moral issue removed from the scope of ordinary legislation? Does lobbying for a constitutional amendment provide the judicial "losers" an adequate forum?

6. Would your answer to the constitutionality of the artificial womb statute hypothetical be affected by the decision in *Casey*? How might you use *Casey* on this question?

**Planned Parenthood of Southeastern Pennsylvania v. Casey**
505 U.S. 833 (1992)

[Majority (Parts I, II, III, V-A, V-C, and VI): O'Connor, Kennedy, Souter, Blackmun, and Stevens. Plurality (Part V-E): O'Connor, Kennedy, Souter, and Stevens. Plurality (Parts IV, V-B, and V-D): O'Connor, Kennedy, and Souter. Concurring (in part): Stevens. Dissenting: Rehnquist (C.J.), White, Scalia, and Thomas.]

**Joint opinion of Justices O'Connor, Kennedy and Souter.**

I. … After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

[The joint opinion reiterated the "essential holding of *Roe*": before viability a woman has

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a right to an abortion without undue interference from the State; States may restrict abortion after viability as long as there is a health exception; and, the State has a legitimate interest in the health of the woman and the life of a fetus from the beginning of pregnancy.]

II. … Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the 14th Amendment marks the outer limits of the substantive sphere of liberty which the 14th Amendment protects.…

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office....

Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest....

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the 14th Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it.... Abortion is a unique act...fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist…and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.... Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society....

While we appreciate the weight of the arguments made on behalf of the State in the cases before us...the reservations any of us may have in reaffirming the central holding of *Roe* are

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outweighed by the explication of individual liberty we have given combined with the force of stare decisis. We turn now to that doctrine.

III. [The joint opinion concluded that *Roe*'s holding should be reaffirmed because it has not become unworkable, society has come to rely on the availability of abortion, and no legal principle or material facts have changed so much as to require overturning *Roe*. The Court continued its stare decisis analysis by examining prior cases that overruled Supreme Court Precedent. Concluding its stare decisis analysis, the joint opinion argued that upholding *Roe* was necessary to preserve the Court's legitimacy. See note on stare decisis following *Brown v. Bd. of Education* in Equal Protection chapter of this supplement.]

Where...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.

The Court is not asked to do this very often, [b]ut when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it. Only the most convincing justification...could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure.... So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question....

IV. [Although] much criticism has been directed at *Roe*['s linedrawing], a criticism that always inheres when the Court draws a specific rule from what in the Constitution is but a general standard[,]…liberty must not be extinguished for want of a line that is clear. ...

We conclude the line should be drawn at viability[,]…so that before that time the woman has a right to choose to terminate her pregnancy....

[T]he concept of viability…is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.... The viability line also has...an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.

The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.

On the other side of the equation is the interest of the State in the protection of potential life.... We do not need to say whether each of us...would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability.... [T]he immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must

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be accorded to its holding. And we have concluded that the essential holding of *Roe* should be reaffirmed.

Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases [which] decided that any regulation touching upon the abortion decision must survive strict scrutiny....

[The Justices argue that the trimester framework of *Roe,* while intended to ensure that a woman has meaningful choice, was unnecessary to achieve that goal.]

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed....

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have been found to be inconsistent with the rigid trimester framework.... The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*....

The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause....

[T]he Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision. Those decisions went too far because the right recognized by *Roe* is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* (1972). Not all governmental intrusion is of necessity unwarranted; and that brings us to the other basic flaw in the trimester framework: [I]n practice it undervalues the State's interest in the potential life within the woman....

The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty....

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A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what, in our view, should be the controlling standard. Understood another way, we answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional. The answer is no.

Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden....

We give this summary:

(a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis.... An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester framework of *Roe v. Wade*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

(d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular

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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."

These principles control our assessment of the Pennsylvania statute, and we now turn to the issue of the validity of its challenged provisions.

V-A. [The Court upheld a narrow statutory definition of "medical emergency" that could justify an abortion under the Pennsylvania Act after the first trimester and upheld an informed consent requirement that requires that only a physician must tell a woman a great deal of information relating to fetal development.]

V-B. [The Court analyzed the 24-hour waiting period in Pennsylvania's statute, noting that a similar provision was struck in *Akron v. Akron Reproductive Health* (1983), where the Court held that the regulation did not reasonably serve the State's interest in ensuring that a woman's choice is informed. The Court concluded that *Akron I* was wrong.] The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable.... The statute...permits avoidance of the waiting period in the event of a medical emergency and the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk. In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden.

Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy is a closer question…. We do not doubt that, as the District Court held, the waiting period has the effect of "increasing the cost and risk of delay of abortions," but the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles. [U]nder the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. [W]e cannot say that the waiting period imposes a real health risk…. Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.

[The opinion addressed an argument that this provision is unconstitutional because it infringes a right to abortion on demand.] Even the broadest reading of *Roe*...has not suggested that there is a constitutional right to abortion on demand. Rather, the right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State....

V-C. [The joint opinion addressed the spousal notification requirement—a married woman must provide her doctor with a signed statement that she has notified her husband that she intends to have an abortion. The regulation allowed some exceptions: for medical

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emergencies, if the husband did not father the child or could not be located, if the pregnancy was the result of spousal rape that was reported, or if the woman fears for her *physical* safety.]

[T]here are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. [The Court argued that many married women who are victims of terrible forms of *psychological* abuse will not be exempt from the requirement.] ...

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases....

[The Court distinguished spousal notification from parental consent provisions for minors, arguing that it is reasonable for the legislature to assume that minors will benefit from talking to their parents (who have their best interests at heart) about the abortion decision.] We cannot adopt a parallel assumption about adult women....

The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.... A State may not give to a man the kind of dominion over his wife that parents exercise over their children....

Women do not lose their constitutionally protected liberty when they marry....

V-D. We next consider the parental consent provision. [The Court upheld this requirement.]

V-E. Under the recordkeeping and reporting requirements of the statute, every facility which performs abortions is required to file a report stating its name and address as well as the name and address of any related entity, such as a controlling or subsidiary organization. In the case of state-funded institutions, the information becomes public. [These requirements were upheld by the Court.] ...

**Justice Stevens, concurring in part and dissenting in part.**

[Justice Stevens dissented from parts IV, V-B, and V-D of the joint opinion. He joined the rest.]

**Justice Blackmun, concurring in part, concurring in the judgment in part, and dissenting in part.**

[Justice Blackmun would retain the trimester framework from *Roe* and strike all of Pennsylvania’s abortion regulations as unconstitutional. He would continue to recognize abortion as a fundamental right, the regulation of which must survive strict scrutiny.]

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I. Make no mistake, the joint opinion of Justices O'Connor, Kennedy, and Souter is an act of personal courage and constitutional principle. In contrast to previous decisions in which Justices O'Connor and Kennedy postponed reconsideration of *Roe v. Wade* (1973), the authors of the joint opinion today join Justice Stevens and me in concluding that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Ante.* In brief, five Members of this Court today recognize that "the Constitution protects a woman's right to terminate her pregnancy in its early stages."

III. ... If there is much reason to applaud the advances made by the joint opinion today, there is far more to fear from the Chief Justice's opinion.

The Chief Justice's criticism of *Roe* follows from his stunted conception of individual liberty. While recognizing that the Due Process Clause protects more than simple physical liberty, he then goes on to construe this Court's personal-liberty cases as establishing only a laundry list of particular rights, rather than a principled account of how these particular rights are grounded in a more general right of privacy.... This constricted view is reinforced by the Chief Justice's exclusive reliance on tradition as a source of fundamental rights.... Given the Chief Justice's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts.

Even more shocking than the Chief Justice's cramped notion of individual liberty is his complete omission of any discussion of the effects that compelled childbirth and motherhood have on women's lives....

Under his standard, States can ban abortion if that ban is rationally related to a legitimate state interest—a standard which the United States calls "deferential, but not toothless." Yet when pressed at oral argument to describe the teeth, the best protection that the Solicitor General could offer to women was that a prohibition, enforced by criminal penalties, *with no exception for the life of the mother*, "could raise very serious questions." Perhaps, the Solicitor General offered [arguing on behalf of the G.H.W. Bush administration to overrule *Roe*], the failure to include an exemption for the life of the mother would be "arbitrary and capricious." If, as the Chief Justice contends, the undue burden test is made out of whole cloth, the so-called "arbitrary and capricious" limit is the Solicitor General's "new clothes."

Even if it is somehow "irrational" for a State to require a woman to risk her life for her child, what protection is offered for women who become pregnant through rape or incest? ...

But, we are reassured, there is always the protection of the democratic process. While there is much to be praised about our democracy, our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election. A woman's right to reproductive choice is one of those fundamental liberties. Accordingly, that liberty need not seek refuge at the ballot box.

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IV. In one sense, the Court's approach is worlds apart from that of the Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

**Chief Justice Rehnquist, with whom Justice White, Justice Scalia, and Justice Thomas join, concurring in the judgment in part and dissenting in part.**

The joint opinion, following its newly minted variation on stare decisis, retains the outer shell of *Roe v. Wade* (1973), but beats a wholesale retreat from the substance of that case. We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases....

I. ... We have held that a liberty interest protected under the Due Process Clause of the 14th Amendment will be deemed fundamental if it is "implicit in the concept of ordered liberty." *Palko v. Connecticut* (1937). [I]n *Snyder v. Massachusetts* (1934), we referred to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." ...

In construing the phrase "liberty" incorporated in the Due Process Clause of the 14th Amendment, we have recognized that its meaning extends beyond freedom from physical restraint.... But a reading of these opinions makes clear that they do not endorse any all-encompassing "right of privacy."

In *Roe v. Wade*, the Court recognized a "guarantee of personal privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion "involves the purposeful termination of a potential life." *Harris v. McRae* (1980). The abortion decision must therefore "be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus.

Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is "fundamental." ...

II. [Chief Justice Rehnquist criticized the majority's analysis of stare decisis because while purporting to reaffirm *Roe*, the joint opinion changed the right to an abortion from a fundamental right to a liberty interest, rejected the trimester framework, and furthermore overruled, at least in part, several Supreme Court decisions that followed *Roe*'s line of reasoning. He further argued against upholding *Roe* based on principles of stare decisis because Supreme

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Court decisions can only be changed by a later overruling or by Constitutional Amendment, making it the Court's duty to reconsider and overrule prior decisions that it later decides were wrong.

[The Chief Justice also disagreed with the joint opinion's discussion of *Brown v. Board of Education* (1954) and *West Coast Hotel Co. v. Parrish* (1937). He argued that the justification offered for overruling *Plessy* based on society's *new* understanding of the impact of racial segregation was erroneous. The fact that segregation acted as a badge of inferiority was not a newly discovered idea, but had in fact been argued by Justice Harlan in his dissent in *Plessy*. Instead he reasoned that *Brown v. Board of Education*, in overruling *Plessy*, was not based on public opinion, but "a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it is beneficial."

[He also discussed the joint opinion's concern for maintaining the legitimacy of the Court in deciding to reaffirm *Roe*.]

The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman's right to abortion—the "undue burden" standard.... While we disagree with [*Roe*'s strict scrutiny] standard, it at least had a recognized basis in constitutional law at the time *Roe* was decided. The same cannot be said for the "undue burden" standard, which is created largely out of whole cloth by the authors of the joint opinion. It is a standard which even today does not command the support of a majority of this Court....

[T]his standard is based even more on a judge's subjective determinations than was the trimester framework.... Because the undue burden standard is plucked from nowhere, the question of what is a "substantial obstacle" to abortion will undoubtedly engender a variety of conflicting views....

We have stated above our belief that the Constitution does not subject state abortion regulations to heightened scrutiny. Accordingly, we think that the correct analysis is that set forth by the plurality opinion in *Webster*. A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest....

[The remainder of the dissent found all of the Pennsylvania statutes constitutional.]

**Justice Scalia, with whom The Chief Justice, Justice White, and Justice Thomas join, concurring in the judgment in part and dissenting in part**.

… The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting....

[T]he issue in these cases [is] not whether the power of a woman to abort her unborn

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child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion...for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed....

[A]pplying the rational basis test, I would uphold the Pennsylvania statute in its entirety.…

* * *

In *Casey*, Justices O'Connor, Souter, and Kennedy do not explicitly discuss the level of scrutiny required by undue burden analysis. They reject *Roe's* classification of the right to an abortion as a fundamental right. Is the plurality using some form of heightened scrutiny similar to rational basis with bite? By *heightened* scrutiny, we mean any form of scrutiny more exacting than low-level rational basis. At any rate, the decisional method seems to employ a form of ad hoc balancing in which the plurality considers the totality of the circumstances and weighs the degree of interference with the woman's liberty interest in deciding whether or not to beget a child against the state's interest in promoting potential life. The Court clarifies the operation of the *Casey* analysis in *Whole Woman's Health v. Hellerstadt* (2016).

### ***Whole Woman's Health v. Hellerstadt*: Background**

Following the Court's refusal to flatly overrule *Roe v.* Wade (1973) in *Planned Parenthood v. Casey* (1992), organizations opposed to abortion recognized that even if pre-viability abortions could not be banned, imposing new regulatory statutes on providers could place severe (but arguably not *undue*) burdens on access to abortion. For example, increasing regulatory costs had the potential to drive clinics out of business.

Another anti-abortion tactic that generated widespread publicity was seeking legislative bans on "intact dilation and extraction ("D&E")," a seldom-used late term procedure abortion opponents labeled "partial birth abortion." In *Stenberg v. Carhart*[5] (2000), the Court (including Justice O'Connor), voting 5–4, struck down a Nebraska ban on the procedure. The statute banned the use of the procedure unless it was necessary to save the life of the mother. Thus, the statute prevented a physician from using the procedure even if, in the physician's professional judgment, it was in the best interest of the patient's health. The Court condemned this restriction:

> [W]here substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception.…

[5] A more extensive discussion of *Stenberg v. Carhart* is posted on conlawincontext.com

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In *Gonzales v. Carhart* (2007)[6], the Court, voting 5–4, rejected a facial attack on a post-*Stenberg federal* ban. Justice Alito, the majority's fifth vote, had replaced Justice O'Connor in 2006. Justice Kennedy, writing for the Court, described the holding of *Casey* as follows:

> We assume the following principles [from *Casey*] for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Casey*, in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar.

Congressional drafters had intentionally left a health exception out of the federal act, rejecting a motion to include one on a party-line vote. They also included findings of fact in the statute, attempting to rebut the factual findings of the *Stenberg* trial court, which had been cited by the Supreme Court opinion. (These had also been approved on a party-line vote). Among these "facts" were numerous statements that a D&E was "never necessary to preserve the health of the mother." Expert testimony during the Gonzales litigation established that there *were* times when a D&E was in fact a superior alternative. Opposing testimony contended that alternative procedures, even if less effective in the opinion of the treating physician, were adequate. Justice Kennedy, writing for the *Gonzales* majority, rejected the facial attack: "

> Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.…
>
> The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.… Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.

[6] A more extensive discussion of *Gonzales v. Carhart* is posted on conlawincontext.com

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The *Gonzales* opinion stirred other controversy as well. The statute prohibited D&E's on pre-viable fetuses, the first time a practice had been prohibited *prior* to viability. Justice Kennedy also approvingly cited an amicus brief that argued that women might come to regret their decision to abort and suffer adverse psychological consequences. The opinion appeared to accept this reason as a legitimate goal of the state, leading some to wonder if *Casey's* statements about regulating, but not suppressing access to abortion were being questioned ("the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.")

While rejecting the facial attack, the Court emphasized that an applied challenge could still be brought. In order to bring an applied challenge, a doctor must break the law and risk arrest. The doctors' refusal to perform an abortion for fear of arrest led to the notorious death of Savita Halappanavar, a 31-year old dentist, who died on October 28, 2012, at University Hospital Galway in Ireland, due to complications of a septic miscarriage at 17 weeks gestation.

Justice Kennedy had joined the plurality opinion in *Casey*, but had sharply dissented in *Stenberg*. It was uncertain if his reasoning in *Gonzales* was driven by his views toward partial-birth abortion in particular or to abortion legislation in general. Anti-abortion activists, seizing on a potential weakening of *Casey*, soon introduced statutes designed to regulate abortion providers so that the cost of compliance might drive them out of business. Since the proponents could allege a medical basis for the statutes, they hoped the Court would read *Gonzales* to allow such statutes to stand.

In the 2010 midterm elections, Republicans won control of the state legislature in 26 states, whereas before they had only controlled 14. This allowed conservative legislators to begin pushing ever more restrictive abortion regulations. From 2010 to 2013, more state abortion measures were passed than in the previous decade. Just in 2013, 70 different regulations were adopted in 22 different states. According to the American Civil Liberties Union, a collective total of over 330 abortion restrictions were introduced in 43 state legislatures in just the first quarter of 2015. These laws typically involve restrictions on funding, limits on medication abortion, increased informed consent requirements, outright bans on abortion earlier in the pregnancy (e.g., 20 weeks), and what abortion rights supporters have dubbed "targeted regulation of abortion providers" or "TRAP" laws.

"TRAP" laws typically place tighter restrictions on who can perform abortions and where they can be performed. Legislatures enacting such measures have asserted that these laws serve to protect the health and safety of women who have abortions. Opponents argue that these laws are being enacted for the sole purpose of shutting down abortion clinics. Two typical requirements that legislatures have enacted are (1) that physicians who perform abortions must have admitting-privileges at a nearby hospital, and (2) that clinics that perform abortions must comply with the requirements for an ambulatory surgical center (ASC). ASCs specialize in same day or out-patient surgery for more minor operations, and are subject to strict guidelines relating to patient care, safety and construction.

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In states that impose admitting-privileges and ASC requirements for abortion providers, the facilities must either comply with those laws or close their doors. Even where the legislature allows a grace period for abortion providers to conform to the laws, providers may lack the ability or the financial means to comply. For instance, compliance with ASC standards can require a facility to entirely remodel the building to meet construction requirements or purchase adjoining land to comply with lot-size requirements. One example of an ASC minimum requirement is that the hallways must be wide enough for two gurneys to pass through.

Abortion providers, acting on their own behalf, and on behalf of their patients' substantive due process right to a pre-viability abortion, challenged these newly-emerging restrictions. They contended that the true purpose of these laws is to force many abortion facilities to close, making abortion services less accessible to women. In *Whole Woman's Health v. Hellerstadt*, the Court invalidated two Texas statutes, ruling that they were invalid under *Casey*. In so doing, the Court clarified two areas of uncertainty following *Gonzales*: the Court's proper role in balancing alleged benefits of a statute against the burdens on a woman's right to a pre-viability abortion and how to determine the relevant pool of affected women when determining the "fraction" of women affected by a proposed regulation.

**Whole Woman's Health v. Hellerstedt**
579 U.S. __ (2016)

[Majority: Breyer, Kennedy, Ginsburg, Sotomayor, and Kagan. Concurring: Ginsburg. Dissenting: Thomas, Alito, and Roberts (C. J.).]

**Justice Breyer delivered the opinion of the Court.**

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

We must here decide whether two provisions of Texas' House Bill 2 violate the Federal Constitution as interpreted in *Casey*. The first provision, which we shall call the "admitting-privileges requirement," says that

> "[a] physician performing or inducing an abortion…must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that… is located not further than 30 miles from the location at which the abortion is performed or induced." §171.0031(a).

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This provision amended Texas law that had previously required an abortion facility to maintain a written protocol "for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital." 38 Tex. Reg. 6546 (2013).

The second provision, which we shall call the "surgical-center requirement," says that "the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [Texas law] for ambulatory surgical centers." §245.010(a).

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

I-A. In July 2013, the Texas Legislature enacted House Bill 2 (H. B. 2 or Act). In September (before the new law took effect), a group of Texas abortion providers filed an action in Federal District Court seeking facial invalidation of the law's admitting-privileges provision. [That case was eventually rejected by the 5th Circuit and not appealed. On April 6, 2014, a second lawsuit was filed, challenging the same legislation. Some of the plaintiffs were new and some had been involved in the first suit. They sought an injunction preventing enforcement of the admitting-privileges provision as applied to physicians at two abortion facilities, one operated by Whole Woman's Health in McAllen and the other operated by Nova Health Systems in El Paso. They also sought an injunction prohibiting enforcement of the surgical-center provision anywhere in Texas.]

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

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

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

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

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

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5. Abortion facilities "will remain only in Houston, Austin, San Antonio, and the Dallas/Fort Worth metropolitan region." These include "one facility in Austin, two in Dallas, one in Fort Worth, two in Houston, and either one or two in San Antonio."

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

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

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

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

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

11. "Abortion, as regulated by the State before the enactment of House Bill 2, has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny." [District Court discusses risks associated with colonoscopies, vasectomies, endometrial biopsies, and plastic surgery.]

12. "Additionally, risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities."

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

14. "[T]here are 433 licensed ambulatory surgical centers in Texas," of which "336… are apparently either "grandfathered" or enjo[y] the benefit of a waiver of some or all of the surgical-center requirements."

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

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

I-C. … On June 9, 2015, the Court of Appeals reversed the District Court on the merits. With minor exceptions, it found both provisions constitutional and allowed them to take effect. *Whole Women's Health v. Cole* (5th Cir. 2015). Because the Court of Appeals' decision rests upon alternative grounds and fact-related considerations, we set forth its basic reasoning in some detail. The Court of Appeals concluded:

The District Court was wrong to hold the admitting-privileges requirement unconstitutional because (except for the clinics in McAllen and El Paso) the providers had not asked them to do so, and principles of res judicata barred relief. Because the providers could have brought their constitutional challenge to the surgical-center provision in their earlier lawsuit, principles of res judicata also barred that claim.

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

[B]oth the admitting privileges requirement and "the surgical-center requirement" were rationally related to a legitimate state interest, namely, "rais[ing] the standard and quality of care

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for women seeking abortions and…protect[ing] the health and welfare of women seeking abortions."

The [p]laintiffs failed "to proffer competent evidence contradicting the legislature's statement of a legitimate purpose."

[T]he district court erred by substituting its own judgment [as to the provisions' effects] for that of the legislature, albeit…in the name of the undue burden inquiry.

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

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

For these and related reasons, the Court of Appeals reversed the District Court's holding that the admitting-privileges requirement is unconstitutional and its holding that the surgical-center requirement is unconstitutional. The Court of Appeals upheld in part the District Court's more specific holding that the requirements are unconstitutional as applied to the McAllen facility and Dr. Lynn (a doctor at that facility), but it reversed the District Court's holding that the surgical-center requirement is unconstitutional as applied to the facility in El Paso. In respect to this last claim, the Court of Appeals said that women in El Paso wishing to have an abortion could use abortion providers in nearby New Mexico.

II. Before turning to the constitutional question, we must consider the Court of Appeals' procedural grounds for holding that (but for the challenge to the provisions of H. B. 2 as applied to McAllen and El Paso) petitioners were barred from bringing their constitutional challenges. [The majority rules that principles of res judicata do not prevent a hearing on all of the claims.]

III. Undue Burden—Legal Standard

We begin with the standard, as described in *Casey*. We recognize that the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe v. Wade* (1973). But, we

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added, “a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.” *Casey* (plurality opinion). Moreover, “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” *Id.*

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

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

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

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

IV. Undue Burden—Admitting-Privileges Requirement

Turning to the lower courts' evaluation of the evidence, we first consider the admitting-privileges requirement. Before the enactment of H. B. 2, doctors who provided abortions were required to "have admitting privileges *or* have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications." §139.56 (2009) (emphasis added). The new law changed this requirement by requiring that a "physician performing or inducing an abortion…must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that…is located not further than 30 miles from the location at which the abortion is performed or induced." §171.0031(a). The District Court held that the legislative change imposed an "undue burden" on a woman's right to have an abortion. We conclude that there is adequate legal and factual support for the District Court's conclusion.

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

We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a "working arrangement" with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health.

We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case. *See Tr. of Oral Arg.* 47. This answer is consistent with the findings of the other Federal District Courts that have considered the health benefits of other States' similar admitting-privileges laws.…

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At the same time, the record evidence indicates that the admitting-privileges requirement places a "substantial obstacle in the path of a woman's choice." *Casey* (plurality opinion). The District Court found, as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20. Eight abortion clinics closed in the months leading up to the requirement's effective date.… Eleven more closed on the day the admitting-privileges requirement took effect.

Other evidence helps to explain why the new requirement led to the closure of clinics. [T]he undisputed general fact [is] that "hospitals often condition admitting privileges on reaching a certain number of admissions per year." Returning to the District Court record, we note that, in direct testimony, the president of Nova Health Systems, implicitly relying on this general fact, pointed out that it would be difficult for doctors regularly performing abortions at the El Paso clinic to obtain admitting privileges at nearby hospitals because "[d]uring the past 10 years, over 17,000 abortion procedures were performed at the El Paso clinic [and n]ot a single one of those patients had to be transferred to a hospital for emergency treatment, much less admitted to the hospital." In a word, doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit.

… The admitting-privileges requirement [also] does not serve any relevant credentialing function.

In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding. [H]ere, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion. (Opinion of the District Court) (finding burden "undue" when requirement places "substantial obstacle to a woman's choice" in "a large fraction of the cases in which" it "is relevant").…

V. Undue Burden—Surgical-Center Requirement

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

H. B. 2 added the requirement that an "abortion facility" meet the "minimum standards…for ambulatory surgical centers" under Texas law. The surgical-center regulations include, among other things, detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements.…Surgical centers must meet numerous other spatial requirements, including specific corridor widths. Surgical centers must also have an advanced heating, ventilation, and air conditioning system, and must satisfy particular piping

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system and plumbing requirements. Dozens of other sections list additional requirements that apply to surgical centers.

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

The record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication. That is because, in such a case, complications would almost always arise only after the patient has left the facility. The record also contains evidence indicating that abortions taking place in an abortion facility are safe--indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements. The total number of deaths in Texas from abortions was five in the period from 2001 to 2012, or about one every two years (that is to say, one out of about 120,000 to 144,000 abortions). Nationwide, childbirth is 14 times more likely than abortion to result in death, but Texas law allows a midwife to oversee childbirth in the patient's own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion. See *ACOG Brief* 15 (the mortality rate for liposuction, another outpatient procedure, is 28 times higher than the mortality rate for abortion). Medical treatment after an incomplete miscarriage often involves a procedure identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center. And Texas partly or wholly grandfathers (or waives in whole or in part the surgical-center requirement for) about two-thirds of the facilities to which the surgical-center standards apply. But it neither grandfathers nor provides waivers for any of the facilities that perform abortions. These facts indicate that the surgical-center provision imposes “a requirement that simply is not based on differences” between abortion and other surgical procedures “that are reasonably related to” preserving women's health, the asserted “purpos[e] of the Act in which it is found.” *Doe v. Bolton* (1973), (quoting *Morey v. Doud* (1957).

Moreover, many surgical-center requirements are inappropriate as applied to surgical abortions. [Court cites ways in which abortions differ from ordinary surgery, including the fact that the focus on maintaining a sterile environment in a surgical-center is misplaced when abortion involves the birth canal, a non-sterile environment.] Further, since the few instances in which serious complications do arise following an abortion almost always require hospitalization, not treatment at a surgical center, surgical-center standards will not help in those instances either.

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

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

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

For one thing, the record contains charts and oral testimony by Dr. Grossman, who said that, as a result of the surgical-center requirement, the number of abortions that the clinics would have to provide would rise from "14,000 abortions annually to 60,000 to 70,000"--an increase by a factor of about five. The District Court credited Dr. Grossman as an expert witness. The Federal Rules of Evidence state that an expert may testify in the "form of an opinion" as long as that opinion rests upon "sufficient facts or data" and "reliable principles and methods." Rule 702. In this case Dr. Grossman's opinion rested upon his participation, along with other university researchers, in research that tracked "the number of open facilities providing abortion care in the state by…requesting information from the Texas Department of State Health Services…[t]hrough interviews with clinic staff[,] and review of publicly available information." The District Court acted within its legal authority in determining that Dr. Grossman's testimony was admissible.…

For another thing, common sense suggests that, more often than not, a physical facility that satisfies a certain physical demand will not be able to meet five times that demand without expanding or otherwise incurring significant costs.… The dissent takes issue with this general, intuitive point by arguing that many places operate below capacity and that in any event, facilities could simply hire additional providers. We disagree that, according to common sense, medical facilities, well known for their wait times, operate below capacity as a general matter.

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And the fact that so many facilities were forced to close by the admitting-privileges requirement means that hiring more physicians would not be quite as simple as the dissent suggests. Courts are free to base their findings on commonsense inferences drawn from the evidence. And that is what the District Court did here. …

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

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

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

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

First, Texas argues that facial invalidation of both challenged provisions is precluded by H. B. 2's severability clause. [Majority rejects argument, concluding that when a statute is pervasively unconstitutional and satisfies current standards for facial invalidity, the Court does not have to segregate out all the applications and treat the case as one involving a series of applied challenges.]

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

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

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

It is so ordered.

**Justice Ginsburg, concurring**.

The Texas law called H. B. 2 inevitably will reduce the number of clinics and doctors allowed to provide abortion services. Texas argues that H. B. 2's restrictions are constitutional because they protect the health of women who experience complications from abortions. In truth, "complications from an abortion are both rare and rarely dangerous." *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F. 3d 908 (7th Cir. 2015). Many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to ambulatory-surgical-center or hospital admitting-privileges requirements.… Given those realities, it is a beyond rational belief that H. B. 2 could genuinely protect the health of women, and certain that the law "would simply make it more difficult for them to obtain abortions." *Id.* When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety. So long as this Court adheres to *Roe v. Wade* (1973), and *Planned Parenthood of Southeastern Pa. v. Casey* (1992), Targeted Regulation of Abortion Providers laws like H. B. 2 that "do little or nothing for health, but rather strew impediments to abortion," *Planned Parenthood of Wis.,* cannot survive judicial inspection.

**Justice Thomas, dissenting.**

Today the Court strikes down two state statutory provisions in all of their applications, at the behest of abortion clinics and doctors.… As Justice Alito observes, today's decision creates an abortion exception to ordinary rules of res judicata, ignores compelling evidence that Texas' law imposes no unconstitutional burden, and disregards basic principles of the severability doctrine. I write separately to emphasize how today's decision perpetuates the Court's habit of applying different rules to different constitutional rights--especially the putative right to abortion.…

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This case also underscores the Court's increasingly common practice of invoking a given level of scrutiny—here, the abortion-specific undue burden standard—while applying a different standard of review entirely. Whatever scrutiny the majority applies to Texas' law, it bears little resemblance to the undue-burden test the Court articulated in *Planned Parenthood of Southeastern Pa. v. Casey* (1992), and its successors. Instead, the majority eviscerates important features of that test to return to a regime like the one that *Casey* repudiated.…

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

I remain fundamentally opposed to the Court's abortion jurisprudence. Even taking *Casey* as the baseline, however, the majority radically rewrites the undue-burden test in three ways. First, today's decision requires courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer."

Second, today's opinion tells the courts that, when the law's justifications are medically uncertain, they need not defer to the legislature, and must instead assess medical justifications for abortion restrictions by scrutinizing the record themselves. *Ibid*. Finally, even if a law imposes no "substantial obstacle" to women's access to abortions, the law now must have more than a "reasonabl[e] relat[ion] to…a legitimate state interest." *Ibid*. These precepts are nowhere to be found in *Casey* or its successors, and transform the undue-burden test to something much more akin to strict scrutiny.

First, the majority's free-form balancing test is contrary to *Casey*. When assessing Pennsylvania's recordkeeping requirements for abortion providers, for instance, *Casey* did not weigh its benefits and burdens. Rather, *Casey* held that the law had a legitimate purpose because data collection advances medical research, "so it cannot be said that the requirements serve no purpose other than to make abortions more difficult." (Joint opinion of O'Connor, Kennedy, and Souter, JJ.). The opinion then asked whether the recordkeeping requirements imposed a "substantial obstacle," and found none. *Ibid.* Contrary to the majority's statements, *Casey* did not balance the benefits and burdens of Pennsylvania's spousal and parental notification provisions, either. Pennsylvania's spousal notification requirement, the plurality said, imposed an undue

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burden because findings established that the requirement would "likely…prevent a significant number of women from obtaining an abortion"--not because these burdens outweighed its benefits. And *Casey* summarily upheld parental notification provisions because even pre-*Casey* decisions had done so. *Id.*

Decisions in *Casey*'s wake further refute the majority's benefits-and-burdens balancing test.…

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

Today, however, the majority refuses to leave disputed medical science to the legislature because past cases "placed considerable weight upon the evidence and argument presented in judicial proceedings." But while *Casey* relied on record evidence to uphold Pennsylvania's spousal-notification requirement, that requirement had nothing to do with debated medical science.

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

Today's opinion does resemble *Casey* in one respect: After disregarding significant aspects of the Court's prior jurisprudence, the majority applies the undue-burden standard in a way that will surely mystify lower courts for years to come. As in *Casey*, today's opinion "simply…highlight[s] certain facts in the record that apparently strike the…Justices as particularly significant in establishing (or refuting) the existence of an undue burden." (Scalia, J., concurring in judgment in part and dissenting in part). As in *Casey*, "the opinion then simply

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announces that the provision either does or does not impose a 'substantial obstacle' or an 'undue burden.'" *Id.*…

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

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

I respectfully dissent.

**Justice Alito, with whom The Chief Justice and Justice Thomas join, dissenting.** [Omitted.]

*** * ***

**Review: The Language of "Fundamental Rights" versus "Liberty Interests;" The Application of "Strict scrutiny" versus "The Undue Burden Test." [**A note examining how the court's methodology evolved from *Roe* (1973) to *Casey* (1992) to *Gonzales* (2007) to *Whole Woman's Health* (2016) is posted on conlawincontext.com.]

**Abortion Politics:** Excerpts from recent platforms of the Democratic and Republican parties relating to abortion and reproductive health are posted on conlawincontext.com.

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## Section VI. Liberty and the Family

Following the Court's decisions in *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973), challenges were soon brought against statutes that regulated all manner of familial and intimate non-familial relationships—not just contraceptives and abortion. The Court struggled as it attempted to develop a coherent approach to analyzing cases brought under the so-called "Right to Privacy." The cases evolved from challenges regarding the rights of traditional families (grandmothers and grandchildren who wished to live together, heterosexual inter-racial couples who wished to marry), to a non-traditional family (a biological father's desire to visit his child resulting from an adulterous affair who lived with the mother, who was still married to the legally "presumed" father.) We will see in the following sections that the right soon expanded to include privacy claims related to consensual sex acts (or and anal sex) between adults in private and relating to sexual orientation. The Court first struck criminal sodomy laws and eventually recognized the right of same-sex couples to marry.

### *Moore v. City of East Cleveland*: Background and Questions

1. What precedent does the Court grapple with in *Moore v. City of East Cleveland* (1977)? How does it deal with it? How successful is the distinction?

2. Does *Moore* reveal any potential limitations on the Court's decision in *Roe v. Wade* (1973)? What does the fact that Justice Powell was unable to get 4 votes for his opinion portend for the future of the "Right to Privacy"?

3. Should the liberty interest in the Due Process Clause be construed to include liberties that are less explicitly stated in the text, such as a right to birth control, abortion, or the right of a grandmother to have her grandson live with her after the death of the child's parents?

4. What fundamental problems with the Court's due process jurisprudence does Justice White suggest?

5. How does the Court go about judging the constitutionality of the ordinance in *Moore*? What method does it use to evaluate the state's asserted purpose for the ordinance? Why does it find that the ordinance falls short?

### Moore v. City of East Cleveland

431 U.S. 494 (1977)

[Plurality: Powell, Brennan, Marshall, and Blackmun. Concurring: Brennan, Marshall, and Stevens. Dissenting: Burger (C.J.), Stewart, White, and Rehnquist.]

**Mr. Justice Powell announced the judgment of the Court.**

[Inez Moore lived in her East Cleveland, Ohio, home with her son, Dale Moore, Sr., and two grandsons Dale, Jr., and John Moore, Jr. (who were first cousins). John had come to live with his grandmother after his mother's death. An East Cleveland housing ordinance limited occupancy of a dwelling unit to members of a single family, but defined "family" in such a way that appellant's household with the second grandson did not qualify. Appellant was convicted of a criminal violation of the ordinance. Her conviction was upheld on appeal over her claim that

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the ordinance violated her right to privacy. The city contended that the ordinance should be sustained under *Village of Belle Terre v. Boraas* (1974), which had upheld (while using low level rational basis review) an ordinance providing that no more than two unrelated persons could occupy a single dwelling unit.]

East Cleveland's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members of a single family. § 1351.02. But the ordinance contains an unusual and complicated definitional section that recognizes as a "family" only a few categories of related individuals, § 1341.08. Because her family, living together in her home, fits none of those categories, appellant stands convicted of a criminal offense. The question in this case is whether the ordinance[1] violates the Due Process Clause of the 14th Amendment.

I. … In early 1973, Mrs. Moore received a notice of violation from the city, stating that John was an "illegal occupant" and directing her to comply with the ordinance. When she failed to remove him from her home, the city filed a criminal charge. Mrs. Moore moved to dismiss, claiming that the ordinance was constitutionally invalid on its face. Her motion was overruled, and upon conviction she was sentenced to five days in jail and a $25 fine. The Ohio Court of Appeals affirmed after giving full consideration to her constitutional claims, and the Ohio Supreme Court denied review. We noted probable jurisdiction. …

II. The city argues that our decision in *Village of Belle Terre v. Boraas*, requires us to sustain the ordinance attacked here. Belle Terre, like East Cleveland, imposed limits on the types of groups that could occupy a single dwelling unit. Applying the constitutional standard announced in this Court's leading land-use case, *Euclid v. Ambler Realty Co.* (1926), we sustained the Belle Terre ordinance on the ground that it bore a rational relationship to permissible state objectives.

But one overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only *unrelated* individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and in sustaining the ordinance we were careful to note that it promoted "family needs" and "family values." East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here.

When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the 14th Amendment." *Cleveland Board of Education v. LaFleur* (1974). … A host of cases, tracing their lineage to *Meyer v. Nebraska*

[1] [The crucial section of the ordinance provides]: "'Family'" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

> (a) Husband or wife of the nominal head of the household. (b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them. (c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household. (d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household. (e) A family may consist of one individual.

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(1923) and *Pierce v. Society of Sisters* (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." *Prince v. Massachusetts* (1944). *See, e.g., Roe v. Wade* (1973), *Griswold v. Connecticut* (1965), *Poe v. Ullman* (1961) (Harlan, J., dissenting), *Skinner v. Oklahoma* (1942). Of course, the family is not beyond regulation. See *Prince v. Massachusetts*. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

When thus examined, this ordinance cannot survive. The city seeks to justify it as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best. For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household. We need not labor the point. Section 1341.08 has but a tenuous relation to alleviation of the conditions mentioned by the city.

III. The city would distinguish the cases based on *Meyer* and *Pierce*. It points out that none of them "gives grandmothers any fundamental rights with respect to grandsons," and suggests that any constitutional right to live together as a family extends only to the nuclear family—essentially a couple and their dependent children.

To be sure, these cases did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to childbearing, or with the rights of parents to the custody and companionship of their own children, or with traditional parental authority in matters of child rearing and education. But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the 14th Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.

Understanding those reasons requires careful attention to this Court's function under the Due Process Clause. Mr. Justice Harlan described it eloquently:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.
>
> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints,…and which also recognizes, what a reasonable

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and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. *Poe v. Ullman* (dissenting opinion).

Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society." *Griswold v. Connecticut* (Harlan, J., concurring). Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State. *Pierce* struck down an Oregon law requiring all children to attend the State's public schools, holding that the Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." … By the same token the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.

Reversed.

**Mr. Justice Brennan, with whom Mr. Justice Marshall joins, concurring. …**

"*If any freedom not specifically mentioned in the Bill of Rights enjoys a "preferred position" in the law it is most certainly the family*." [The] plurality recognizes today, that the choice of the "extended family" pattern is within the "freedom of personal choice in matters of…family life [that] is one of the liberties protected by the Due Process Clause of the 14th Amendment." …

**Mr. Justice Stevens, concurring in the judgment.** [Omitted. Justice Stevens concluded that the ordinance effected a taking and did not join the argument related to Due Process.]

**Mr. Chief Justice Burger, dissenting.** [Omitted.]

**Mr. Justice Stewart, with whom Mr. Justice Rehnquist joins, dissenting.**

In *Village of Belle Terre v. Boraas* (1974), the Court considered a New York village ordinance that restricted land use within the village to single-family dwellings. That ordinance defined "family" to include all persons related by blood, adoption, or marriage who lived and cooked together as a single-housekeeping unit; it forbade occupancy by any group of three or more persons who were not so related. We held that the ordinance was a valid effort by the village government to promote the general community welfare, and that it did not violate the 14th Amendment or infringe any other rights or freedoms protected by the Constitution.

The present case brings before us a similar ordinance of East Cleveland, Ohio, one that also limits the occupancy of any dwelling unit to a single family, but that defines "family" to include only certain combinations of blood relatives. The question presented, as I view it, is whether the decision in *Belle Terre* is controlling, or whether the Constitution compels a different result because East Cleveland's definition of "family" is more restrictive than that before us in the *Belle Terre* case. …

In my view, the appellant's claim that the ordinance in question invades constitutionally

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protected rights of association and privacy is in large part answered by the *Belle Terre* decision. The argument was made there that a municipality could not zone its land exclusively for single-family occupancy because to do so would interfere with protected rights of privacy or association. We rejected this contention, and held that the ordinance at issue "involve[d] no 'fundamental' right guaranteed by the Constitution, such as…the right of association, *NAACP v. Alabama* (1958); or any rights of privacy, cf. *Griswold v. Connecticut* (1965)." …

The *Belle Terre* decision thus disposes of the appellant's contentions to the extent they focus not on her blood relationships with her sons and grandsons but on more general notions about the "privacy of the home." Her suggestion that every person has a constitutional right permanently to share his residence with whomever he pleases, and that such choices are "beyond the province of legitimate governmental intrusion," amounts to the same argument that was made and found unpersuasive in *Belle Terre.* …

The appellant [contends] that the East Cleveland ordinance intrudes upon "the private realm of family life which the state cannot enter." *Prince v. Massachusetts* (1944). Several decisions of the Court have identified specific aspects of what might broadly be termed "private family life" that are constitutionally protected against state interference. *See, e.g., Roe v. Wade* (1973) (woman's right to decide whether to terminate pregnancy); *Loving v. Virginia* (1967) (freedom to marry person of another race); *Griswold v. Connecticut*.

Although the appellant's desire to share a single-dwelling unit also involves "private family life" in a sense, that desire can hardly be equated with any of the interests protected in the cases just cited. The ordinance about which the appellant complains did not impede her choice to have or not to have children, and it did not dictate to her how her own children were to be nurtured and reared. The ordinance clearly does not prevent parents from living together or living with their unemancipated offspring.

… The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition. …

**Mr. Justice White, dissenting.**

… That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. [T]he Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.

… Mrs. Moore's interest in having the offspring of more than one dependent son live with her qualifies as a liberty protected by the Due Process Clause; but, because of the nature of that particular interest, the demands of the Clause are satisfied once the Court is assured that the challenged proscription is the product of a duly enacted or promulgated statute, ordinance, or regulation and that it is not wholly lacking in purpose or utility….

* * *

For two recent powerful and deeply researched law review articles suggesting a strong historical basis for finding substantive rights in the word "liberty" in the Due Process Clause of the 5th or 14th Amendments, *see*, Frederick Mark Gedicks, *An Originalist Defense of Substantive*

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*Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585, (1999) (explaining the use of the "law of land" provision in English Constitutional law of the late 17th Century and discussing its influence in America in the 18th and 19th centuries) and Steven G. Calabresi and Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299 (2015) (examining state constitutional law from 1776 to1868—the date the 14th Amendment was ratified—and concluding that "'liberty,' in the context of the Fourteenth Amendment, is best understood broadly to encompass natural rights and to require that civil and political rights be extended to minorities, a finding of particular relevance to the debate on gay marriage."

* * *

The Court revisited the issue of grandparents' rights in *Troxel v. Granville* (2000). In a plurality decision, the Court struck down a Washington statute that allowed third parties (often grandparents) to gain visitation with children, even over the objection of a fit parent, if it were in the best interest of the child. The Court was concerned about the overbreadth of the statute, which seemed not to give appropriate deference to a parent's right to raise a child. While the various opinions were fragmented, a majority of the Court appeared to continue to recognize a fundamental right in parents to raise their children and a liberty interest in grandparents to have contact with their grandchildren.

* * *

### *Zablocki v. Redhail*: Background and Questions

1. A year after *Moore*, in *Zablocki v. Redhail*, the Court considered a regulation affecting who can marry. What is the classification employed in this case?

2. What level of scrutiny does the Court apply? Why?

3. What scrutiny is used in *Zablocki*? What are the key phrases? Are these the typical strict scrutiny words?

4. Can you reconcile the holding of *Zablocki* with the holding of *Rodriguez v. San Antonio Independent School District* in 1973?

5. The Court says it is basing its holding on the Equal Protection Clause, yet repeatedly discusses marriage as being of fundamental importance rather than discussing the nature of the class to which the plaintiff belongs. Justice Stewart concurs in the result, but refuses to join the opinion. Why the conflict?

### Zablocki v. Redhail

434 U.S. 374 (1978)

[Majority: Marshall, Burger (C.J.), Brennan, White, and Blackmun. Concurring: Burger (C.J.), Stewart, Powell, and Stevens. Dissenting: Rehnquist.]

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

[This case addressed the constitutionality of a Wisconsin statute that required a Wisconsin resident who "ha[s] minor issue [children] not in his custody and which he is under obligation to support by any court order or judgment" to get court permission to get married to

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another woman before being issued a marriage license. Wis.Stat. §§ 245.10(1), (4), (5) (1973). Before a court would grant permission, the marriage applicant must submit proof that he had complied with his support obligations to any child he has, and that the child is "not likely thereafter to become a public charge." The statute not only prevented Wisconsin citizens from being granted the court's permission to marry without satisfying those conditions, but it also declared void any marriages entered into without such permission, including marriages performed out of state. Violations of the statute subjected a person to criminal penalties.]

After being denied a marriage license because of his failure to comply with § 245.10, appellee brought this class action under 42 U.S.C. § 1983, challenging the statute as violative of the Equal Protection and Due Process Clauses of the 14th Amendment and seeking declaratory and injunctive relief. The United States District Court for the Eastern District of Wisconsin held the statute unconstitutional under the Equal Protection Clause and enjoined its enforcement. We noted probable jurisdiction and we now affirm.

I. Appellee Redhail is a Wisconsin resident who, under the terms of § 245.10, is unable to enter into a lawful marriage in Wisconsin or elsewhere so long as he maintains his Wisconsin residency. [In 1972, a paternity action was brought against Roger Redhail, who had fathered a baby girl born out of wedlock when he was a minor and high school student. He admitted he was the father and the court entered an order requiring him to pay monthly child support. From May, 1972 until August, 1974, Redhail was unemployed and indigent and could not make any of his support payments. In September, 1974, Redhail applied for a marriage license with the County Clerk, Zablocki, and was denied an application because he had not obtained a court order granting him permission. The parties stipulated that he would not have been able to satisfy either requirement of the statute: he owed over $3,700 in child support arrearages, and the child had been receiving government assistance since her birth. Even if Redhail had been current on his payments, the child would have still required state support.]

On the merits, the three-judge panel [of the District Court] analyzed the challenged statute under the Equal Protection Clause and concluded that "strict scrutiny" was required because the classification created by the statute infringed upon a fundamental right, the right to marry.[2] The court then proceeded to evaluate the interests advanced by the State to justify the statute, and, finding that the classification was not necessary for the achievement of those interests, the court held the statute invalid and enjoined the county clerks from enforcing it.

Appellant brought this direct appeal pursuant to 28 U.S.C. § 1253, claiming that the three-judge court erred in finding §§ 245.10(1), (4), (5) invalid under the Equal Protection Clause. Appellee defends the lower court's equal protection holding and, in the alternative, urges affirmance of the District Court's judgment on the ground that the statute does not satisfy the

[2] The court found an additional justification for applying strict scrutiny in the fact that the statute discriminates on the basis of wealth, absolutely denying individuals the opportunity to marry if they lack sufficient financial resources to make the showing required by the statute, citing *San Antonio Independent School Dist. v. Rodriguez* (1973).

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requirements of substantive due process. We agree with the District Court that the statute violates the Equal Protection Clause.

II. In evaluating §§ 245.10(1), (4), (5) under the Equal Protection Clause, "we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected." Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that "critical examination" of the state interests advanced in support of the classification is required.

The leading decision of this Court on the right to marry is *Loving v. Virginia* (1967). In that case, an interracial couple who had been convicted of violating Virginia's miscegenation laws challenged the statutory scheme on both equal protection and due process grounds. The Court's opinion could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry. The Court's language on the latter point bears repeating:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. …

Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals. Long ago, in *Maynard v. Hill* (1888), the Court characterized marriage as "the most important relation in life," and as "the foundation of the family and of society, without which there would be neither civilization nor progress." In *Meyer v. Nebraska* (1923), the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause, and in *Skinner v. Oklahoma* (1942), marriage was described as "fundamental to the very existence and survival of the race."

More recent decisions have established that the right to marry is part of the fundamental "right of privacy" implicit in the 14th Amendment's Due Process Clause. In *Griswold v. Connecticut* (1965), the Court observed:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. …
>
> Cases subsequent to *Griswold* and *Loving* have routinely categorized the decision to

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marry as among the personal decisions protected by the right of privacy. …

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child, see *Roe v. Wade* (1973), or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings. Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.[3]

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. … The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.

Under the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court order, and marriages contracted in violation of the statute are both void and punishable as criminal offenses. Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental.

III. When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. Appellant asserts that two interests are served by the challenged statute: the permission-to-marry proceeding furnishes an opportunity to counsel the applicant as to the necessity of fulfilling his prior support obligations; and the welfare of the out-of-custody children is protected. We may accept for present purposes that these are legitimate and substantial interests, but, since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be

[3] Wisconsin punishes fornication as a criminal offense: "Whoever has sexual intercourse with a person not his spouse may be fined not more than $200 or imprisoned not more than 6 months or both." Wis.Stat. § 944.15 (1973).

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sustained.

There is evidence that the challenged statute, as originally introduced in the Wisconsin Legislature, was intended merely to establish a mechanism whereby persons with support obligations to children from prior marriages could be counseled before they entered into new marital relationships and incurred further support obligations. Court permission to marry was to be required, but apparently permission was automatically to be granted after counseling was completed. The statute actually enacted, however, does not expressly require or provide for any counseling whatsoever, nor for any automatic granting of permission to marry by the court, and thus it can hardly be justified as a means for ensuring counseling of the persons within its coverage. Even assuming that counseling does take place—a fact as to which there is no evidence in the record—this interest obviously cannot support the withholding of court permission to marry once counseling is completed.

With regard to safeguarding the welfare of the out-of-custody children, appellant's brief does not make clear the connection between the State's interest and the statute's requirements. At argument, appellant's counsel suggested that, since permission to marry cannot be granted unless the applicant shows that he has satisfied his court-determined support obligations to the prior children and that those children will not become public charges, the statute provides incentive for the applicant to make support payments to his children. This "collection device" rationale cannot justify the statute's broad infringement on the right to marry.

First, with respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children. More importantly, regardless of the applicant's ability or willingness to meet the statutory requirements, the State already has numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute's and yet do not impinge upon the right to marry. Under Wisconsin law, whether the children are from a prior marriage or were born out of wedlock, court-determined support obligations may be enforced directly via wage assignments, civil contempt proceedings, and criminal penalties. And, if the State believes that parents of children out of their custody should be responsible for ensuring that those children do not become public charges, this interest can be achieved by adjusting the criteria used for determining the amounts to be paid under their support orders.

There is also some suggestion that § 245.10 protects the ability of marriage applicants to meet support obligations to prior children by preventing the applicants from incurring new support obligations. But the challenged provisions of § 245.10 are grossly underinclusive with respect to this purpose, since they do not limit in any way new financial commitments by the applicant other than those arising out of the contemplated marriage. The statutory classification is substantially overinclusive as well: Given the possibility that the new spouse will actually better the applicant's financial situation, by contributing income from a job or otherwise, the statute in many cases may prevent affected individuals from improving their ability to satisfy

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their prior support obligations. And, although it is true that the applicant will incur support obligations to any children born during the contemplated marriage, preventing the marriage may only result in the children being born out of wedlock, as in fact occurred in appellee's case. Since the support obligation is the same whether the child is born in or out of wedlock, the net result of preventing the marriage is simply more illegitimate children.

The statutory classification created by §§ 245.10(1), (4), (5) thus cannot be justified by the interests advanced in support of it. The judgment of the District Court is, accordingly, Affirmed.

**Mr. Chief Justice Burger, concurring.** [Omitted.]

**Mr. Justice Stewart, concurring in the judgment.**

[Justice Stewart disagrees with the majority's equal protection analysis, because the statute deals with an impermissible intrusion on protected freedom, not a discriminatory classification, and accordingly, he argues, it should be struck as unconstitutional under the Due Process Clause.]

I. [Justice Stewart notes that marriage is a "privilege" that is left largely to the states to define, and that state regulations may interfere with or even prohibit the decision to marry in many instances. E.g., bigamy laws, age restrictions, laws prohibiting incestuous marriages, etc.] But, just as surely, in regulating the intimate human relationship of marriage, there is a limit beyond which a State may not constitutionally go.

The Constitution does not specifically mention freedom to marry, but it is settled that the "liberty" protected by the Due Process Clause of the 14th Amendment embraces more than those freedoms expressly enumerated in the Bill of Rights. And the decisions of this Court have made clear that freedom of personal choice in matters of marriage and family life is one of the liberties so protected.

It is evident that the Wisconsin law now before us directly abridges that freedom. The question is whether the state interests that support the abridgment can overcome the substantive protections of the Constitution.

The Wisconsin law makes permission to marry turn on the payment of money in support of one's children by a previous marriage or liaison. Those who cannot show both that they have kept up with their support obligations and that their children are not and will not become wards of the State are altogether prohibited from marrying.

If Wisconsin had said that no one could marry who had not paid all of the fines assessed against him for traffic violations, I suppose the constitutional invalidity of the law would be apparent. For while the state interest would certainly be legitimate, that interest would be both disproportionate and unrelated to the restriction of liberty imposed by the State. But the invalidity of the law before us is hardly so clear, because its restriction of liberty seems largely to be imposed only on those who have abused the same liberty in the past. …

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On several occasions this Court has held that a person's inability to pay money demanded by the State does not justify the total deprivation of a constitutionally protected liberty. In *Boddie v. Connecticut* (1971), the Court held that the State's legitimate purposes in collecting filing fees for divorce actions were insufficient under the Due Process Clause to deprive the indigent of access to the courts where that access was necessary to dissolve the marital relationship. In *Tate v. Short* (1971) and *Williams v. Illinois* (1970) the Court held that an indigent offender could not have his term of imprisonment increased, and his liberty curtailed, simply by reason of his inability to pay a fine.

The principle of those cases applies here as well. The Wisconsin law makes no allowance for the truly indigent. …

II. In an opinion of the Court half a century ago, Mr. Justice Holmes described an equal protection claim as "the usual last resort of constitutional arguments." *Buck v. Bell* (1927). Today equal protection doctrine has become the Court's chief instrument for invalidating state laws. Yet, in a case like this one, the doctrine is no more than substantive due process by another name.

Although the Court purports to examine the bases for legislative classifications and to compare the treatment of legislatively defined groups, it actually erects substantive limitations on what States may do. Thus, the effect of the Court's decision in this case is not to require Wisconsin to draw its legislative classifications with greater precision or to afford similar treatment to similarly situated persons. Rather, the message of the Court's opinion is that Wisconsin may not use its control over marriage to achieve the objectives of the state statute. Such restrictions on basic governmental power are at the heart of substantive due process.

The Court is understandably reluctant to rely on substantive due process. See *Roe v. Wade* (1973). But to embrace the essence of that doctrine under the guise of equal protection serves no purpose but obfuscation. "[C]ouched in slogans and ringing phrases," the Court's equal protection doctrine shifts the focus of the judicial inquiry away from its proper concerns, which include "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." …

To conceal this appropriate inquiry invites mechanical or thoughtless application of misfocused doctrine. To bring it into the open forces a healthy and responsible recognition of the nature and purpose of the extreme power we wield when, in invalidating a state law in the name of the Constitution, we invalidate *pro tanto* the process of representative democracy in one of the sovereign States of the Union.

**Mr. Justice Powell, concurring in the judgment.** [Omitted].

**Mr. Justice Stevens, concurring in the judgment.** [Omitted].

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**Mr. Justice Rehnquist, dissenting.**

… I would view this legislative judgment in the light of the traditional presumption of validity. I think that under the Equal Protection Clause the statute need pass only the "rational basis test," and that under the Due Process Clause it need only be shown that it bears a rational relation to a constitutionally permissible objective. *Williamson v. Lee Optical of Oklahoma, Inc.* (1955). The statute so viewed is a permissible exercise of the State's power to regulate family life and to assure the support of minor children, despite its possible imprecision in the extreme cases envisioned in the concurring opinions. …

I would reverse the judgment of the District Court.

* * *

### *Michael H. v. Gerald D.* (1989): Note

In *Michael H. v. Gerald D.,* 491 U.S. 110 (1989), the Court struggled to decide whether or not a novel domestic problem was covered by the "liberty" of the Fourteen Amendment. Gerald was married to Carole. During the marriage, Carole had an affair with Michael and conceived a child, Victoria. At various times during the marriage, Carole left Gerald and she and Victoria lived with Michael. As a result, Victoria developed psychological bonds with both her biological father, Michael and her mother's husband, Gerald. At the time of this litigation, Carole had decided to resume the marriage, and she and Victoria were living with Gerald. Michael and Victoria wanted to continue to visit one another, a desire opposed by Carole and Gerald. The issue in the case was whether Michael was entitled to a judicial hearing to decide if it were in Victoria's best interest to continue visitation. Michael's right to this hearing depended on whether he had a liberty interest in visitation with his biological child.

Under California law, a child born to a married woman living with her husband is presumed to be a child of the marriage. This presumption was rooted in the common law's desire to avoid imposing the stigma of illegitimacy upon children whenever possible. (It also arose in the era before conclusive DNA testing was available to resolve paternity.) The case presented the claim that this presumption infringes upon the due process rights of a man who wishes to establish his paternity of a child born to the wife of another man, and the claim that it infringes upon the constitutional right of the child to maintain a relationship with her natural father.

The Court rejected the claim 5-4, but was unable to render a majority opinion. Justice Scalia announced the judgment of the Court and delivered an opinion, in which the Chief Justice joined, and in all but footnote 6 of which O'Connor and Kennedy joined. (Justice Stevens provided the fifth vote, but concurred only in the judgment.)

In terms of constitutional theory, the controversy surrounding footnote 6 is the most significant aspect of the case. The imprecise contours of the content of the "liberty" protected by the Due Process Clause have sparked raging conflicts over the propriety of courts invalidating legislation. Most theorists agree that the analysis of any given topic should involve some mixture

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of 1) an analysis of the text of the Constitution, 2) consideration of historical evidence regarding the drafting of the text at issue, 3) consideration of historical evidence regarding the topic involved in the litigation throughout American history, and finally 4) the use of analogical reasoning, as the court considers how similar the issue at bar is to instances where history shows courts have protected *similar* activities in the name of "liberty." *Michael H.* is significant in that Justice Scalia could only get one vote, Chief Justice Rehnquist's, for the proposition that analogical reasoning is so unbounded that judicial treatment of similar activities should not occur if there is any historical evidence of society's views on the *specific* activity at issue.

Justice Scalia:

"III. … Michael contends as a matter of substantive due process that, because he has established a parental relationship with Victoria, protection of Gerald's and Carole's marital union is an insufficient state interest to support termination of that relationship. This argument is, of course, predicated on the assertion that Michael has a constitutionally protected liberty interest in his relationship with Victoria.

"It is an established part of our constitutional jurisprudence that the term "liberty" in the Due Process Clause extends beyond freedom from physical restraint. *See, e.g., Pierce v. Society of Sisters* (1925); *Meyer v. Nebraska* (1923). Without that core textual meaning as a limitation, defining the scope of the Due Process Clause "has at times been a treacherous field for this Court," giving "reason for concern lest the only limits to…judicial intervention become the predilections of those who happen at the time to be Members of this Court." *Moore v. East Cleveland* (1977)….

"In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts* (1934) (Cardozo, J.). …

"Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts. …

"What Michael asserts here is a right to have himself declared the natural father and thereby to obtain parental prerogatives. What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded *such* a father parental rights, or at least has not traditionally denied

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them (emphasis added). … What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made."

It is at this point that Justice Scalia inserts footnote 6:

"Justice Brennan criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally "whether parenthood is an interest that historically has received our attention and protection." …

"We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-a-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon "parenthood." Why should the relevant category not be even more general—perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the dissent has no basis for the level of generality it would select, we do: We refer to the *most specific level* at which a relevant tradition protecting, or denying protection to, the asserted right can be identified (emphasis added). If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.

… Because such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference—or at least to announce, as Justice Brennan declines to do, some other criterion for selecting among the innumerable relevant traditions that could be consulted—is well enough exemplified by the fact that in the present case Justice Brennan's opinion and Justice O'Connor's opinion…which disapproves this footnote, both appeal to tradition, but on the basis of the tradition they select reach opposite results. Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all. …

Justice Scalia concluded his discussion of Michael's claim: "It is a question of legislative policy, and not constitutional law, whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted." This statement suggests that for the plurality, if a plaintiff fails to plead a plausible liberty interest, the Court should not even engage in rational basis review.

Justice O'Connor and Justice Kennedy, who otherwise joined the opinion, refused to join Footnote 6.

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"I concur in all but footnote 6 of Justice Scalia's opinion. This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the 14th Amendment that may be somewhat inconsistent with our past decisions in this area. See *Griswold v. Connecticut* (1965)*; Eisenstadt v. Baird* (1972). On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level" available. ... See *Loving v. Virginia* (1967); *Turner v. Safley* (1987); cf. *United States v. Stanley* (1987) (O'Connor, J., concurring in part and dissenting in part). I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis. *Poe v. Ullman* (1961) (Harlan, J., dissenting)."

**J**ustice Brennan, with whom Justice Marshall and Justice Blackmun joined, dissented:

"I. Once we recognized that the "liberty" protected by the Due Process Clause of the 14th Amendment encompasses more than freedom from bodily restraint … the concept was cut loose from one natural limitation on its meaning. This innovation paved the way, so the plurality hints, for judges to substitute their own preferences for those of elected officials. Dissatisfied with this supposedly unbridled and uncertain state of affairs, the plurality casts about for another limitation on the concept of liberty.

"It finds this limitation in "tradition." Apparently oblivious to the fact that this concept can be as malleable and as elusive as "liberty" itself, the plurality pretends that tradition places a discernible border around the Constitution. The pretense is seductive; it would be comforting to believe that a search for "tradition" involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history. Yet, as Justice White observed in his dissent in *Moore v. East Cleveland* (1977): "What the deeply rooted traditions of the country are is arguable." … Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of "liberty," the plurality has not found the objective boundary that it seeks. …

"It is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents. … Just as common-law notions no longer define the "property" that the Constitution protects, see *Goldberg v. Kelly* (1970), neither do they circumscribe the "liberty" that it guarantees. On the contrary, "'[l]iberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts…purposely left to gather meaning from experience. [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.'" *Board of Regents of State Colleges v. Roth* (1972).

"It is not that tradition has been irrelevant to our prior decisions. Throughout our decisionmaking in this important area runs the theme that certain interests and practices—freedom from physical restraint, marriage, childbearing, childrearing, and others—form the core of our definition of "liberty." Our solicitude for these interests is partly the result of the fact that

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the Due Process Clause would seem an empty promise if it did not protect them, and partly the result of the historical and traditional importance of these interests in our society. In deciding cases arising under the Due Process Clause, therefore, we have considered whether the concrete limitation under consideration impermissibly impinges upon one of these more generalized interests.

"Today's plurality, however, does not ask whether parenthood is an interest that historically has received our attention and protection; the answer to that question is too clear for dispute. Instead, the plurality asks whether the specific variety of parenthood under consideration — a natural father's relationship with a child whose mother is married to another man—has enjoyed such protection.

"If we had looked to tradition with such specificity in past cases, many a decision would have reached a different result. Surely the use of contraceptives by unmarried couples, *Eisenstadt v. Baird* (1972), or even by married couples, *Griswold v. Connecticut* (1965); the freedom from corporal punishment in schools, *Ingraham v. Wright* (1977); the freedom from an arbitrary transfer from a prison to a psychiatric institution, *Vitek v. Jones* (1980); and even the right to raise one's natural but illegitimate children, *Stanley v. Illinois* (1972), were not "interest[s] traditionally protected by our society," at the time of their consideration by this Court. If we had asked, therefore, in *Eisenstadt*, *Griswold*, *Ingraham*, *Vitek*, or *Stanley* itself whether the specific interest under consideration had been traditionally protected, the answer would have been a resounding "no." That we did not ask this question in those cases highlights the novelty of the interpretive method that the plurality opinion employs today.

"… In the plurality's constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did. [B]y describing the decisive question as whether Michael's and Victoria's interest is one that has been "traditionally protected by our society," rather than one that society traditionally has thought important (with or without protecting it), and by suggesting that our sole function is to "discern the society's views," the plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. Transforming the protection afforded by the Due Process Clause into a redundancy mocks those who, with care and purpose, wrote the 14th Amendment. …

"II. The plurality's reworking of our interpretive approach is all the more troubling because it is unnecessary. …

"The better approach…is to ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected to be deemed an aspect of "liberty" as well. On the facts before us, therefore, the question is not what "level of

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generality" should be used to describe the relationship between Michael and Victoria, see ante, n. 6, but whether the relationship under consideration is sufficiently substantial to qualify as a liberty interest under our prior cases…."

Justice White, who had rejected the grandmother's claim in *Moore v. City of East Cleveland*, would have ruled in favor of Michael D. He wrote a separate dissent.

Justice Scalia conceded that there is not a "core textual meaning" to the "liberty" found in the 14th Amendment's Due Process Clause. In order to limit judicial discretion, he contends that the clause should protect individuals only if their behavior falls within the "most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." What is the role of judicial reasoning by analogy to prior cases in this standard? Does history provide clear and crisp answers?

Recall the text of the 9th Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Reconsider also the remarks of Senator Howard, speaking to the Senate on behalf of the Committee that drafted the 14th Amendment. In speaking of the scope of the new Privileges or Immunities Clause, he makes reference to Justice Washington's discussion of Article IV, § 2, in *Corfield v. Coryell* (1823). He then continues:

> Such is the character of the privileges and immunities spoken of in the second section of the 4th article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances….

What does Senator Howard mean when he says that these rights "are not and cannot be fully defined in their entire extent and precise nature"? What should a court do with such rights? Should it do anything? What rights does the 9th Amendment "retain" for the people?

What problems are avoided by Justice Scalia's approach? What problems are created? If this approach is taken to the Due Process Clause, should it also apply to the Equal Protection Clause? If so, what result in *Brown v. Board of Education*?

**SectionVII. Liberty and Sexual Autonomy: Restrictions on Private Sexual Behavior**

Historically, states regulated sexual practices under their police powers, prohibiting conduct such as fornication, sodomy, adultery, and statutory rape. Should recognition of greater privacy rights in marital relationships lead to greater privacy rights for those engaging in non-traditional practices? The Supreme Court in *Bowers v. Hardwick* (1986) initially rejected a challenge by a homosexual to a Georgia statute that criminalized sodomy. Following *Bowers*,

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several states invalidated sodomy statutes under their state constitutions—including, ironically, Georgia. *See e.g., Powell v. State* (Ga. 1998)*; Gryczan v. State* (Mont. 1997); *Kentucky v. Wasson* (Ky. 1992). In 2003, the Supreme Court revisited the topic in *Lawrence v. Texas*, overruling *Bowers* and holding that same-sex intimacy between consenting adults was a right protected by the federal constitution.

## SectionVII-A. Liberty and Sodomy: *Bowers*

### *Bowers v. Hardwick*: Background and Questions

1. What was the narrow holding of *Bowers v. Hardwick* (1986)? What clause of the Constitution is the Court considering?

2. What was the implication of the decision for fundamental rights that had been recognized at that time yet were not explicitly set out in the text of the Constitution?

3. What was the significance of the Court's decision for future claims based on *asserted* fundamental rights not explicitly set out in the text?

4. Assume that after *Bowers*, a heterosexual unmarried couple was apprehended engaging in oral sex. They are prosecuted and convicted under the North Carolina Crime Against Nature statute and sentenced to six years in prison. Would the statute be valid as applied in this case? Would it make any difference if the couple were married?

5. What methods and tests are used by the majority in its examination of the claim of a fundamental right to sexual privacy in *Bowers*? How did it decide if Mr. Hardwick had a fundamental right to sexual privacy? How did the majority in *Kentucky v. Wasson*, *infra*, approach this issue?

* * *

In 1982, Hardwick (the respondent) was charged with violating the Georgia sodomy statute. The statute held in relevant part: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another…." The penalty ranged from one to twenty years in prison.

The charge arose when a police officer came to Hardwick's apartment to serve a warrant in an unrelated case. A guest let the officer in and told him Hardwick was in the bedroom, which is where the officer found Hardwick and another man having oral sex. The officer charged Hardwick with violating the statute.

The district attorney elected not to prosecute, but Hardwick nonetheless filed a civil action seeking to have the statute declared unconstitutional. The 11th Circuit agreed with him and the Supreme Court granted review. A heterosexual couple had joined Hardwick, but their challenge was dismissed on procedural grounds (ripeness). This ruling was not appealed to the Supreme Court.

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In an interview, Michael Hardwick recounted his experience. What follows is taken from his account published in *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*, by Peter Irons. Copyright © 1988 by Peter Irons.; the words in quotation marks are Michael Hardwick's words.

Hardwick was working long hours at a gay bar that was preparing to open. He had been helping to install insulation and worked through the night and until seven in the morning. When he left, his employer gave him a beer. Deciding instead to go home and rest, Hardwick threw the beer in the trash by the front door of the bar. Around the time Hardwick was at the door a police officer drove by. Hardwick walked about a block when the officer stopped Hardwick and began questioning Hardwick, including about what he had done with the beer. Hardwick said he worked at the bar, which identified him as homosexual, and said he had thrown it in the trash can by the door, a story the officer rejected. The officer made him get in the car where he remained for 20 minutes, unable to open the door and leave. Though the officer drove back to the bar, he left Hardwick locked in the back seat and announced he could not see the beer from the street. The officer was "just busting my chops because he knew I was gay.

Officer Torick issued Hardwick a ticket for drinking in public with a Tuesday court date, though at the top of the warrant the officer had written that the court date was Wednesday. As a result, Hardwick missed his Tuesday court date, and returned home that day to learn that an officer had been by to serve a warrant on him for failing to appear. Although it normally takes 48 hours to process a warrant, the officer who had issued the ticket had then processed the warrant himself that same day—a virtually unheard of occurrence. Hardwick then went to the court house to resolve the issue and paid a $50 fine.

Several weeks later, a friend came to visit Hardwick in Atlanta. While Hardwick was at work at the bar, another one of Hardwick's friends had too much to drink, so Hardwick called a cab and sent him to his own home to sleep it off on his couch.

After Hardwick got off work, he and the visiting friend returned home and went to sleep in his bedroom while the other friend remained on the couch. That next morning Officer Torick arrived with the warrant that Hardwick had taken care of three weeks earlier.

Here is Hardwick's account of what happened next:

> Officer Torick came in and woke up the guy who was passed out on my couch, who didn't know I was there and had a friend with me.
>
> Officer Torick then came to my bedroom. The door was cracked, and the door opened up and I looked up and there was nobody there. I just blew it off as the wind and went back to what I was involved in, which was mutual oral sex. About thirty-five seconds went by and I heard another noise and looked up, and this officer is standing in my bedroom. He identified himself when he realized I had seen him. He said, "My name is Officer Torick. Michael Hardwick, you are under arrest." I said, "For what? What are you doing in my

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> bedroom?" He said, "I have a warrant for your arrest." I told him the warrant isn't any good. He said, "It doesn't matter, because I [am] acting under good faith."
>
> I asked Torick if he would leave the room so we could get dressed and he said, "There's no reason for that, because I have already seen you in your most intimate aspect." He stood there and watched us get dressed, and then he brought us over to a substation. We waited in the car for about twenty-five minutes, handcuffed to the back floor. Then he brought us in and made sure everyone in the holding cells and guard and people who were processing us knew I was in there for "cocksucking" and that I should be able to get what I was looking for. The guards were having a real good time with that.

What do you make of Hardwick's account? Is it relevant to you now as a citizen or some day as a lawyer, a judge, or a legislator?

**Bowers v. Hardwick**
478 U.S. 186 (1986)

[Majority: White, Burger (C.J.), Powell, Rehnquist, and O'Connor. Concurring: Burger (C.J.) and Powell. Dissenting: Blackmun, Stevens, Brennan, and Marshall.]

**Justice White delivered the opinion of the Court.**

… The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. [The Court outlines cases conferring rights of privacy under substantive due process, such as *Meyers v. Nebraska* (1923), *Pierce v. Society of Sisters* (1925), *Skinner v. Oklahoma* (1942), *Loving v. Virginia* (1967), *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), and *Roe v. Wade* (1973).]

Accepting the decisions in these cases…we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. … Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. …

Precedent aside, however, respondent would have us announce…a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do….

Striving to assure itself and the public that announcing rights not readily identifiable in

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the Constitution's text involves much more than the imposition of the Justices' own choice of values…, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut* (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland* (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition."

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. … Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the 14th Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. [The Court references the decisions of the *Lochner* era to caution against such judicial action.] There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home, [relying on *Stanley v. Georgia* (1969), which held that the 1st Amendment prevents conviction for possessing and reading obscene material in the privacy of one's home.]

*Stanley* did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the 1st Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the 14th Amendment. Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. [The Court mentions possession of illegal drugs, firearms and stolen goods as examples of illegal conduct that is not permissible, even in the privacy of the home.] And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit

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the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

[The Court addresses respondent's final argument that the sodomy law does not survive rational basis review because it is based on morality. This argument is dismissed by stating that it is within the police power of the states to legislate based on moral concerns, and states frequently do so within constitutional limits.]

Accordingly, the judgment of the Court of Appeals is Reversed.

**Chief Justice Burger, concurring.** [Omitted. He noted that sodomy had been condemned throughout Western civilization and that Blackstone considered the crime worse than rape.]

**Justice Powell, concurring.** [Omitted. He noted that an actual criminal prosecution might raise serious concerns under the 8th Amendment.]

**Justice Blackmun, with whom Justice Brennan, Justice Marshall, and Justice Stevens join, dissenting.**

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than *Stanley v. Georgia* (1969), was about a fundamental right to watch obscene movies, or *Katz v. United States* (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." *Olmstead v. United States* (1928) (Brandeis, J., dissenting). …

**Justice Stevens, with whom with whom Justice Brennan and Justice Marshall join, dissenting.** [Omitted.]

*** * ***

### Justice Powell's Reconsideration

In 1990, following his retirement from the Supreme Court, former Justice Lewis Powell, when asked how he could reconcile his vote in *Roe v. Wade* (1973) with his vote in *Bowers*, responded: "I think I probably made a mistake in that one. I do think it was inconsistent in a general way with *Roe*. When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments." He added: "My vote was the deciding vote that made the decision 5–4." New York Law Journal, Oct. 26, 1990, p.1.

## SectionVII-B. Liberty and Sodomy: *Bowers* Repudiated

### *Kentucky v. Wasson* (1992): Note

In 1992, the Supreme Court of Kentucky granted greater protections to homosexuals under Kentucky's Constitution than what was required by the Federal Constitution (under *Bowers*). In this case, Jeffrey Wasson was charged with violating a Kentucky statute that

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criminally punished soliciting a crime. The crime "solicited" was "deviate sexual intercourse with another person *of the same sex*." Wasson's defense was that the underlying "crime" solicited was in fact not a crime—because the sodomy statute, as applied to Wasson, was unconstitutional under the Kentucky constitution.

Lexington police conducted a downtown undercover operation where officers engaged people in conversation to see if the officers would be invited to engage in illegal sexual conduct. An officer spoke to Wasson for approximately 20-25 minutes, and Wasson invited the officer to his home, the officer pressed Wasson for details, and Wasson suggested oral sex. There was no offer or solicitation of money, the conduct was to be consensual, and was to occur in a private residence. The state sodomy statute prohibits same-sex sexual conduct regardless of consent, privacy or a lack of financial exchange.

The Kentucky Supreme Court affirmed the decision of both lower courts that struck the sodomy statute, being very careful to emphasize that its holding rested on due process and equal protection grounds under the *Kentucky* Constitution. The Kentucky Constitution provides: "§ 2. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority. § 3. All men, when they form a social compact, are equal." The court held:

> Both courts below decided the issues solely on state constitutional law grounds, and our decision today, affirming the judgments of the lower courts, is likewise so limited.
>
> Federal constitutional protection under the Equal Protection Clause was not an issue reached in the lower courts and we need not address it. *Bowers v. Hardwick* (1986) held federal constitutional protection of the right of privacy was not implicated in laws penalizing homosexual sodomy. We discuss *Bowers* in particular, and federal cases in general, not in the process of construing the United States Constitution or federal law, but only where their reasoning is relevant to discussing questions of state law. …
>
> The guarantees of individual liberty provided in our 1891 Kentucky Constitution offer greater protection of the right of privacy than provided by the Federal Constitution…the statute in question is a violation of such rights; and, further, we hold that the statute in question violates rights of equal protection as guaranteed by our Kentucky Constitution.

In defense of the statute, the Commonwealth argued that the law was justified by a history of criminal prohibitions of homosexual sodomy in Kentucky, stating: "[T]he majority, speaking through the General Assembly, has the right to criminalize sexual activity it deems immoral." The court discredited the argument, pointing out that the older statute punished only anal sex between men, while the newer statute included oral sex and acts between women. The court dismissed the Commonwealth's morality argument as violative of § 2 of the Kentucky Constitution which prohibits arbitrary power over its citizens "even in the largest majority."

The *Wasson* Court held that homosexuals are free to engage in private sexual conduct under a right of privacy rationale because, "'[i]t is *not within the competency of government to*

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*invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned*, or to prohibit him any liberty the exercise of which will not directly injure society.'" [Quoting *Commonwealth v. Campbell* (Ky. 1909). *Campbell* held a prohibition statute that covered private use of intoxicants unconstitutional. The *Campbell* Court also cited John Stuart Mill's book, *On Liberty*.] The *Wasson* Court emphasized the fact that the statute prohibited private conduct between consenting individuals: "The clear implication [of *Campbell*] is that immorality in private which does 'not operate to the detriment of others,' is placed beyond the reach of state action by…the Kentucky Constitution." The Court also noted similar comments from framers of the Kentucky Constitution.

The Court also relied on the equality guarantee of the Kentucky Constitution. The Court distinguished the statute here in question from the Georgia statute upheld in *Bowers v. Hardwick* (1986). There, the Georgia statute criminalized both heterosexual and homosexual sodomy, making the question one of due process turning on the rights contained in "liberty." In contrast, "[t]he issue here is not whether sexual activity traditionally viewed as immoral can be punished by society, but whether it can be punished solely on the basis of sexual preference."

Rather than using the indicia of suspect class status to justify heightened scrutiny, the Court found that a desire to harm any class is not rational under Kentucky law:

> To be treated equally by the law is a broader constitutional value than due process of law as discussed in the *Bowers* case. We recognize it as such under the Kentucky Constitution, without regard to whether the United States Supreme Court continues to do so in federal constitutional jurisprudence. … In Kentucky [equality] is more than a mere aspiration. It is part of the "inherent and inalienable" rights protected by our Kentucky Constitution. Our protection against exercise of "arbitrary power over the...liberty...of freemen" by the General Assembly (Section Two) and our guarantee that all persons are entitled to "equal" treatment (in Section Three) forbid a special act punishing the sexual preference of homosexuals. It matters not that the same act committed by persons of the same sex is more offensive to the majority because Section Two states such "power...exists nowhere in a republic, not even in the largest majority." …
>
> We need not speculate as to whether male and/or female homosexuals will be allowed status as a protected class if and when the United States Supreme Court confronts this issue. They are a separate and identifiable class for Kentucky constitutional law analysis because no class of persons can be discriminated against under the Kentucky Constitution. All are entitled to equal treatment, unless there is a substantial governmental interest, a rational basis, for different treatment. … We have concluded that it is "arbitrary" for the majority to criminalize sexual activity solely on the basis of majoritarian sexual preference, and that it denied "equal" treatment under the law when there is no rational basis, as this term is used and applied in our Kentucky cases.

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The Court found the Commonwealth's arguments in support of different treatment of homosexuals unpersuasive or "simply outrageous."[1] The only offered justification "with superficial validity" was that AIDS is more readily spread by anal sodomy. However, the court dismissed this argument, noting that there is "stark evidence that AIDS is not only a male homosexual disease," and further that "this statute was enacted in 1974 before the AIDS nightmare was upon us."

The Kentucky court was also unpersuaded by the Commonwealth's assertion that homosexuals should not be protected under equal protection because "this law punishes the act and not the preference of the actor" and is not based on race or gender. The Court cited to the record in the case as well as medical, scientific, and social science data to suggest that homosexuals should be afforded greater constitutional protection under equal protection analysis regardless of the level of scrutiny applied by the United States Supreme Court: "As subjects of age-old discrimination and disapproval, homosexuals form virtually a discrete and insular minority. Their sexual orientation is in all likelihood 'a characteristic determined by causes not within [their] control.'" (Quoting *American Constitutional Law*, 2d 3d. 1988, Laurence H. Tribe, p. 1616.)

The court refused to do as the Commonwealth requested and "march in lock step with the United States Supreme Court in declaring when [implicit, rather than explicit ] rights exist." To the contrary, the court argued it had a "responsibility to interpret and apply our state constitution independently," and was free to grant individual rights based on Kentucky's constitution, "so long as state constitutional protection does not fall below the federal *floor*."

Although at this time many states still prohibited homosexual sodomy and no state had yet granted any rights to same-sex marriage or civil unions, *Wasson* was a significant step toward greater protections for homosexuals in American society based on state constitutional protections.

### ***Lawrence v. Texas*: Background**

In *Lawrence v. Texas*, decided seventeen years after *Bowers v. Hardwick*, the Supreme Court overruled its decision in *Bowers* which had held that homosexuals do not have a constitutional right to engage in private, consensual sex free from criminal sanctions. Although the *Lawrence* Court did not state that there is a fundamental right to engage in homosexual sodomy, Justice Kennedy, writing for the majority, announced that homosexual individuals have a right to make decisions concerning their intimate private lives free from government intrusion. This right, he argued, is contained within the "liberty" of the 14th Amendment's Due Process Clause which promises "'that there is a realm of personal liberty which the government may not enter.'"

[1] The Commonwealth argued "'that homosexuals are more promiscuous than heterosexuals, …that homosexuals enjoy the company of children, and that homosexuals are more prone to engage in sex acts in public.'"

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Although it took the Court seventeen years to reach this result after *Bowers* was decided, there was one major case in the interim in which the Supreme Court took a major step toward protecting the interests of the gay community. In *Romer v. Evans* (1996), the Court struck an anti-gay amendment to the Colorado Constitution as violative of the Equal Protection Clause. Several Colorado cities had enacted general ordinances that prohibited discrimination based on sexual orientation (heterosexual, bisexual, or homosexual) in employment, public accommodation, housing, and the like. In response to these ordinances, "Amendment 2" was proposed and passed by referendum vote. It provided that neither the state or any of its subdivisions or creatures, "shall enact, adopt or enforce any statue, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual conduct, practices or relationships shall constitute or otherwise be the basis of …any claim of minority status, quota preferences, protected status ,or claim of discrimination.

Justice Kennedy wrote the opinion in *Romer*, and held that the state constitutional amendment was improper legislation that was enacted out of "'a bare…desire to harm a politically unpopular group.'" [Quoting *United States Dept. of Agriculture v. Moreno* (1973)]. He found that the amendment created a "broad and undifferentiated disability" for a class of citizens without any legitimate basis under the police powers of the state. While not recognizing gays as a suspect class or basing the analysis on any fundamental rights, he used a heightened form of rational basis review and invalidated the referendum.

The majority opinion in *Lawrence*, also authored by Justice Kennedy, cited *Romer* as a case that seriously eroded the foundations of *Bowers*.

**Lawrence v. Texas**
539 U.S. 558 (2003)

[Majority: Kennedy, Stevens, Souter, Ginsburg, and Breyer. Concurring: O'Connor. Dissenting: Scalia, Rehnquist (C.J.), and Thomas.]

**Justice Kennedy delivered the opinion of the Court.**

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

I. The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

[John Geddes Lawrence and another man were arrested and charged with violating Texas' sodomy statute. The officers had been dispatched to a private residence and entered Lawrence's apartment. The officers found Lawrence engaged in sex with another consenting

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adult in the privacy of his home. The officers' right to enter his home was not in question. Lawrence was convicted of violating the statute that prohibits "deviate sexual intercourse with another individual of the same sex." Tex. Penal Code Ann. § 21.06(a) (2003). The statute defines "deviate sexual intercourse" to include: "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." The charge described the crime as "'deviate sexual intercourse, namely anal sex with a member of the same sex (man).'"]

II. We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the 14th Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers v. Hardwick* (1986).

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases; but the most pertinent beginning point is our decision in *Griswold v. Connecticut* (1965).

[The Court traced its prior decisions recognizing a right of privacy within the "liberty" protected by the penumbras of the Bill of Rights or by the Due Process Clause—including *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), and *Roe v. Wade* (1973)—to establish that at the time when *Bowers* was decided liberty under the Due Process Clause included the right to make decisions that bear significantly on an individual's personal life. These cases demonstrated that this right was not limited to procreative sex within marriage, but belonged to the individual.]

The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. …

[Justice Kennedy criticized the decision in *Bowers* for mischaracterizing the liberty that was at stake by asking whether homosexuals have a fundamental right to engage in sodomy. Justice Kennedy perceived this as demeaning to the constitutional claims of the challenger, just as it would be demeaning to a married couple if marriage were viewed as involving only the couple's right to have sex.] The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. …

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the

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conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. [The Court traced the history of sodomy laws in England and in 19th century America, arguing that these laws were not directed at homosexuals, but were rather aimed at all forms of non-procreative sexual behavior. The Court further observed that sodomy laws have a history of non-enforcement against consenting adults engaging in acts of sodomy in private.]

[F]ar from possessing "ancient roots," American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880–1995 are not always clear in the details, but a significant number involved conduct in a public place.

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. [Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, Oklahoma and Tennessee.] Post-*Bowers* even some of these States did not adhere to the policy of suppressing homosexual conduct. [Citing four state decisions finding the statutes violated *state* constitutions and remedial action by the Nevada legislature.] Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. [Citing the same authorities noted above.]

In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions. … These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of*

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*Southeastern Pa. v. Casey* (1992). …

In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *County of Sacramento v. Lewis* (1998) (Kennedy, J., concurring).

This emerging recognition should have been apparent when *Bowers* was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. In 1961 Illinois changed its laws to conform to the Model Penal Code. Other States soon followed.

In *Bowers* the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. …

[The Court noted that other Western countries had decriminalized homosexual sodomy when *Bowers* was decided. *See, Wolfenden Report* (1963) (recommending British Parliament repeal laws punishing homosexual conduct); *Dudgeon v. United Kingdom* (Eur. Ct. H. R. 1981) (decriminalizing homosexual sodomy in member countries of the Council of Europe).]

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. *State v. Morales* (Tex. App. 1992).

Two principal cases decided after *Bowers* cast its holding into even more doubt. In *Casey*, the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause…again confirm[ing] that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty

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> protected by the 14th Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. …

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.

The second post-*Bowers* case of principal relevance is *Romer v. Evans* (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual…and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose.

[The Court next addressed its position that it is important to strike down the statute at issue based on due process rather than equal protection principles. Justice Kennedy noted that striking the statute under the Equal Protection Clause would leave the question open as to whether or not the conduct could be prohibited if it were prohibited for same-sex and opposite-sex couples alike. Furthermore, he argued that the Court now had the opportunity to reconsider the holding of *Bowers* and should do so because criminalizing homosexual conduct was “an invitation to subject homosexual persons to discrimination,” and it “demeans the lives of homosexual persons.”]

The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*. When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. … The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the 14th Amendment….

The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers* Justice Stevens came to these conclusions:

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the 14th Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.

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*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey.* The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the 5th Amendment or the 14th Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom….

**Justice O'Connor, concurring in the judgment.**

[Justice O'Connor, who joined the majority in *Bowers*, would not vote to overrule the earlier decision. (It should be recalled that the Georgia statute at issue in *Bowers* applied to both homosexuals and heterosexuals.) Instead, she would find the Texas statute unconstitutional on equal protection grounds, using a more stringent rational basis test. She argued that "[m]oral disapproval of [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."

While finding that a desire to harm an unpopular group is not a legitimate interest, Justice O'Connor did state that preserving the traditional institution of marriage is a legitimate state interest, suggesting that she would vote to uphold a ban on same-sex marriage.]

**Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting.**

… Most of…today's opinion has no relevance to its actual holding—that the Texas statute "furthers no legitimate state interest which can justify" its application to petitioners under rational-basis review. (Overruling *Bowers* to the extent it sustained Georgia's anti-sodomy statute under the rational-basis test.) Though there is discussion of "fundamental proposition[s]," and "fundamental decisions," nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a

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"fundamental right." Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: "[R]espondent would have us announce…a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." *Bowers*. Instead the Court simply describes petitioners' conduct as "an exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case….

II. Having decided that it need not adhere to *stare decisis*, the Court still must establish that *Bowers* was wrongly decided and that the Texas statute, as applied to petitioners, is unconstitutional.

Texas Penal Code Ann. § 21.06(a) (2003) undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to "liberty" under the Due Process Clause, though today's opinion repeatedly makes that claim….

Our opinions applying the doctrine known as "substantive due process" hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Glucksberg*. We have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for this so-called "heightened scrutiny" protection—that is, rights which are "'deeply rooted in this Nation's history and tradition,'"…. All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.

*Bowers* held, first, that criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny because they do not implicate a "fundamental right." … Noting that "[p]roscriptions against that conduct have ancient roots," that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights," and that many States had retained their bans on sodomy, *Bowers* concluded that a right to engage in homosexual sodomy was not "'deeply rooted in this Nation's history and tradition.'"

The Court today does not overrule this holding. Not once does it describe homosexual sodomy as a "fundamental right" or a "fundamental liberty interest," nor does it subject the Texas statute to strict scrutiny. Instead,…the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers*' holding to the contrary….

I shall address that rational-basis holding presently. First, however, I address some aspersions that the Court casts upon *Bowers'* conclusion that homosexual sodomy is not a "fundamental right"—even though, as I have said, the Court does not have the boldness to reverse that conclusion. …

IV. I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord

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with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," *Bowers*—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual." The Court embraces instead Justice Stevens' declaration in his *Bowers* dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.

V. [Justice Scalia next attacks the challenger's equal protection argument, and the equal protection argument offered by Justice O'Connor in her concurrence. He argues that the Texas law applies equally to all, homosexuals and heterosexuals. (Both heterosexuals and homosexuals could be punished for having gay sex.) Further, he stated that because prohibitions on same-sex marriage are permitted, the statute's line-drawing, whereby only two female partners or two male partners are prohibited from engaging in sodomy, is permissible.]

Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring"; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so. …

**Justice Thomas, dissenting.** [Omitted.]

**Section VIII. Constitutionality of Same-sex Marriage**

Protecting public morality was an easy justification for denying homosexuals the right to marry as long as sodomy statutes were constitutional. *Lawrence v. Texas* was a significant case because once homosexual conduct among consenting adults was constitutionally protected, the government was hard-pressed to articulate legitimate justifications for refusing to allow same-sex marriage. Challenges to restrictive marriage laws quickly followed the *Lawrence* decision.

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## Section VIII-A. Homosexuality and Politics

Selections from recent party platforms regarding LGBTQ issues are posted on conlawincontext.com.

## Section VIII-B. The Constitutional Status of Same-sex Marriage before *Obergefell v. Hodges*

A History of Same-sex Marriage[*]

The battle over marriage for same-sex couples has been raging for over forty years. *Baker v. Nelson* (Minn. 1971) is considered by many to be the "first" gay marriage case. In that case, a male couple applied for a marriage license in Minnesota. Ultimately, on a "marriage for procreation" rationale, the Minnesota appellate courts denied the plaintiffs' claims, rejecting federal due process and equal protection claims, stating simply, "We do not find support for [these arguments] in any decision of the United States Supreme Court."

Early victories for gay marriage advocates in the 1990s were met by strong resistance in many states. After courts in Hawaii and Alaska ruled favorably for same-sex couples seeking the right to marry, but before those rulings took effect, the electorate of both states quickly passed state constitutional amendments defining marriage as an exclusively opposite-sex relationship. *See, Baehr v. Lewin* (Haw. 1993); *Brause v. Bureau of Vital Statistics* (Alaska Super. Ct. 1998).

Between 1995 and 2001, after the Hawaii and Alaska litigation, 34 states enacted laws expressly providing that marriage be limited to one man and one woman and also providing that those states would not recognize same-sex marriages from other states. In 1996, Congress passed the Defense of Marriage Act ("DOMA") (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C), which provided that no state was obliged to recognize a same-sex marriage from another state.

In spite of these setbacks, the struggle for gay marriage continued. Some states began granting “civil union” status to same-sex couples. In 1997, three same-sex couples brought suit against the State of Vermont and their towns for denying them marriage licenses. On December 20, 1999, the Vermont Supreme Court, in *Baker v. Vermont* (Vt. 1999), unanimously held that denying the benefits of marriage to same-sex couples in Vermont violated the state constitution's "common benefits clause." The court directed the Vermont legislature to address the problem by either granting same-sex couples marriage rights or by creating a new institution that would assure same-sex couples the same rights and responsibilities under state law as married couples. *Baker v. Vermont* (Vt. 1999). In response, the Vermont legislature passed, and Governor Dean signed, "An Act Relating to Civil Unions." The act created a "civil union" status for same-sex couples that granted them all of the rights and responsibilities under Vermont law that married couples enjoyed.

In 2003, the Massachusetts Supreme Judicial Court held that lesbian and gay citizens of Massachusetts must be given the same civil marriage rights as same-sex couples. *Goodridge v.*

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*Dept. of Public Health* (Ma. 2003). The court rejected the state's justifications for reserving marriage for opposite-sex couples: procreation, optimal child rearing, conservation of financial resources, and that gay relationships were unstable and undeserving of legal recognition.

The Massachusetts court noted that same-sex couples were deprived of the panoply of statutory benefits extended to married couples, ranging from tax and medical benefits to property rights and standing to bring civil claims if one partner is wrongfully killed or injured. Using "rational basis with bite," the Court found the state's justifications wanting under the Massachusetts constitution on due process and equal protection grounds. The court not only struck the ban on same-sex marriages, but also went further, rejecting a proffered legislative compromise that would have created civil unions instead of same-sex marriage.

On May 17, 2004, the fiftieth anniversary of *Brown v. Board*, Cambridge, Massachusetts issued the first legally authorized marriage license to a same-sex couple. Thousands of gay couples have married and continue to marry legally in Massachusetts. In 2004, many other locales began opening marriage to same-sex couples and issuing marriage licenses, including San Francisco, California; Sandoval, New Mexico; Portland, Oregon; and New Paltz, New York. State courts halted all of these efforts to expand marriage.

As noted, successful efforts for gay marriage have often been followed by a backlash, and that was so after *Goodridge*. Twenty-four states amended their constitutions expressly to ban same-sex marriage or were considering such a move in *Goodridge's* wake, and some even prohibited a legally recognized civil union or domestic partnership for gay couples. In 2006 and successive years, more states added amendments banning same-sex marriage.

Despite setbacks, progress continued with Connecticut, New Jersey, and New Hampshire granting civil unions, and Oregon granting domestic partnerships to same-sex couples. In New Jersey, the grant of civil unions to same-sex partners came as the result of *Lewis v. Harris*, a 2006 decision of the New Jersey Supreme Court holding that the state’s marriage laws violated the equal protection clause of the New Jersey Constitution. The New Jersey court mandated that the state either grant the right to same-sex marriage or create civil union status for same-sex couples to afford them the same burdens and benefits of opposite-sex married couples.

In 2008, the California Supreme Court held that California's bifurcated system of partnership recognition (marriage for straights, domestic partnerships for gays) violated privacy and due process provisions of the state constitution by denying a fundamental right—to marry. *In re Marriage Cases* (Cal. 2008). The court held that this different designation of same-sex relationships denied same-sex partners "one of the core elements" of the right to marry: the right to the "same dignity, respect, and stature as that accorded to all other officially recognized family relationships" in California. The court also held the system unconstitutional on equal protection grounds, declaring for the first time that sexual orientation is a suspect classification. Gay couples began legally marrying in California in June 2008, although the right to marry was overturned by Proposition 8, a state constitutional amendment passed that same year. Same-sex marriage was suspended while litigation surrounding Proposition 8 occurred in both state and

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federal court. Proposition 8 was eventually found to be unconstitutional and same-sex marriages resumed in 2013. *See, Perry v. Schwarzenegger* (9th Cir. 2012), *Hollingsworth v. Perry* (2013).

These victories for same-sex partnerships have raised further issues about interstate recognition of same-sex unions lawfully entered into in another state. Several states, including Rhode Island, New Jersey, and New York announced that lawful same-sex relationships would be recognized as valid for purposes of state law, even though not all of those states allowed same-sex marriages or civil unions at that time.

In 2009, the Iowa Supreme Court ruled unanimously that a state law limiting marriage to opposite-sex couples violated the equality guarantee of the Iowa constitution. *Varnum v. Brien* (Iowa 2009). The court found the state's assertion that the law does not violate equal protection because gay persons are free to marry, just not a person of the same-sex, to be preposterous. The court noted that this would be about as appealing to a gay person as marriage to a person of the same-sex would be to a heterosexual person.

The Iowa court also found the state's argument that limiting marriage to opposite sex couples promotes procreation to be untenable. The court stated that the real issue is "whether *exclusion* of gay and lesbian individuals from the institution of civil marriage will result in *more* procreation?" The court noted that the only way this interest would be served by a same-sex marriage ban is if "the unavailability of civil marriage for same-sex partners caused homosexual individuals to 'become' heterosexual in order to procreate within the present traditional institution of civil marriage."

Additionally, the court found that the interest in "maintain[ing] the traditional understanding of marriage" creates a classification that exists for the classification's sake and does not act in furtherance of any separate government interest. The court found this improper under the state constitution because "[i]f a simple showing that discrimination is traditional satisfies equal protection, previous successful equal protection challenges of invidious racial and gender classifications would have failed."

In 2009, Vermont was again a leader (having enacted the first civil union law in the nation in 2000), this time successfully enacting marriage equality by legislative initiative and without a judicial mandate. The law was enacted by a legislative supermajority override of a veto by Republican governor Jim Douglas. In 2010, Connecticut also enacted a marriage equality law in direct response to the Connecticut Supreme Court's decision in *Kerrigan v. Comm. of Public Health* (Conn. 2008), holding that state laws restricting marriage *qua* marriage (Connecticut had created civil unions for same-sex couples by legislative initiative in 2005) to opposite-sex couples violated state constitutional equal protection guarantees.

While state recognition of same-sex marriage had proceeded incrementally since *Goodridge,* the pace of legalization surged following the Supreme Court's decision in *United States v. Windsor* (2013), *infra,* that section 3 of DOMA was unconstitutional. Applying the reasoning of *Windsor*, lower federal courts routinely struck down same-sex marriage bans. At the

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time the Supreme Court ruled in *Obergefell v. Hodges* (2015), *infra*, that bans on same-sex marriage were unconstitutional, same-sex couples could marry in 37 states and the District of Columbia.

### *United States v. Windsor* (2013): Note (Supreme Court Recognition of State-sanctioned Same-Sex Marriage)

In 1996 Congress enacted the Defense of Marriage Act (DOMA), defining marriage as being between one man and one woman for purposes of all federal laws and regulations. A challenge was brought by Edith Windsor, a resident of New York who was denied a spousal federal tax exemption after she inherited the estate of her deceased wife, Thea Spyer. At that time, New York, along with 11 other states and the District of Columbia gave same-sex marriage legal recognition. Windsor filed a refund suit in federal court challenging DOMA's marriage definition as unconstitutional.

In 2013, Justice Kennedy, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, struck down DOMA's marriage definition as violative of the implied equal protection guarantees of the 5th Amendment. Justice Kennedy argued that "[b]y history and tradition the definition and regulation of marriage…has been treated as being within the authority and realm of the separate States." The majority argued that DOMA far exceeded the authority of Congress by nullifying the definition of marriage chosen by those states that recognize same-sex marriage for purposes of federal law thus denying federal benefits and protections to same-sex couples lawfully married in their state of residence. "Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import…[and] enhanced the recognition, dignity, and protection of the class in their own community." Yet, "[t]he Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities."

The majority also looked to DOMA's text and legislative history and found that DOMA's deviation from the tradition of states' right to define marriage, "is strong evidence of a law having the purpose and effect of disapproval of that class." Because "DOMA writes inequality into the entire United States Code" by treating same-sex marriages differently for purposes of federal law, the majority argued that DOMA treated gay and lesbian couples as being in "second-tier" marriages, "undermin[ing] both the public and private significance of [their] state-sanctioned same-sex marriages."

> [DOMA] imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this

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protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the 5th Amendment.

Chief Justice Roberts, along with Justices Scalia, Alito, and Thomas dissented. Chief Justice Roberts argued that DOMA was proper legislation to further Congress' interests in uniformity and stability in federal law. He was also troubled by the majority's assertion that Congress enacted DOMA with "sinister motives," cautioning that he "would not tar the political branches with the brush of bigotry." Justice Scalia was similarly troubled by the majority's conclusion, without more evidence, that DOMA was enacted to disapprove of state same-sex marriage laws.

Each dissenting opinion expressed concern that this decision could pave the way for challenges to state laws prohibiting same-sex marriage . Such state laws limited marriage to "one man and one woman." Justice Scalia stated: "The real rationale of today's opinion, whatever disappearing trail of its legalistic argle-barle one choses to follow, is that DOMA is motivated by "'bare…desire to harm'" same-sex couples. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status."

* * *

By the time the issue of the constitutionality of same-sex marriage bans reached the Supreme Court, gay marriage had already been made legal in 37 states and the District of Columbia — by either state constitutional law, legislative or voter action, or by federal courts that (largely on the basis of *Windsor*) had overturned state' bans.

## Section VIII-C. A Fundamental Right to Marry

### *Obergefell v. Hodges*: Background and Questions

1. Review *Zablocki v. Redhail and Loving v. Virginia*. Does Justice Kennedy or Chief Justice Roberts have the better reading of these cases?

2. Is Chief Justice Roberts' analogy to *Dred Scott* and *Lochner* persuasive?

3. Is Chief Justice Roberts' analogy to polygamy persuasive?

### Obergefell v. Hodges

576 U. S. ____ (2015)

[Majority: Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan. Dissenting: Roberts (C. J.), Scalia, Thomas, and Alito.]

**Justice Kennedy delivered the opinion of the Court.**

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

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I. These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. … This Court granted review, limited to two questions. The first…is whether the 14th Amendment requires a State to license a marriage between two people of the same sex. The second…is whether the 14th Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II. Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

II-A. From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. … It is fair and necessary to say these references [to marriage through history] were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. …

The petitioners acknowledge this history but contend that these cases cannot end there. … Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their *immutable* nature dictates that same-sex marriage is their only real path to this profound commitment [emphasis added].

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." He brought suit to be shown as the surviving spouse on Arthur's death certificate. [Justice Kennedy recites the compelling facts of two other couples: one, denied the right to marry, confronted uncertainty regarding parental status for the couple's children and one, where a spouse was a member of the military, lost their rights as a married couple if the soldier was transferred to a state that did not recognize same sex marriage.]

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

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, *Commentaries on the Laws of England* 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. These [changes] worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. …

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

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

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. …

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick* (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans* (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas*.

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Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U. S. C. §7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge v. Department of Public Health* (Mass. 2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. Two Terms ago, in *United States v. Windsor* (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." *Id*.

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. … With the exception of the opinion here under review and one other, see *Citizens for Equal Protection v. Bruning* (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. …

III. Under the Due Process Clause of the 14th Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana* (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. *See, e.g., Eisenstadt v. Baird* (1972); *Griswold v. Connecticut* (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe v. Ullman* (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. … History and tradition guide and discipline this inquiry but do not set its outer boundaries. …

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The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the 14th Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia* (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki v. Redhail* (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley* (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. *See, e.g., M.L B. v. S.L.J.* (1996); *Cleveland Bd. of Ed. v. LaFleur* (1974); *Griswold, supra*; *Skinner v. Oklahoma* (1942); *Meyer v. Nebraska* (1923).

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

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. … And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. …

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

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

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A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception[, noting] that marriage is a right "older than the Bill of Rights." …

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that"[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." …

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters* (1925); *Meyer*. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki* (quoting *Meyer*). …

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

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. … For that reason, just as a couple vows to support each other, so does society pledge to support the couple…. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. … The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the

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more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. …

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg* (1997), which called for a "'careful description'" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving*; *Lawrence*.

… Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the *imprimatur* of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. …

The right of same-sex couples to marry that is part of the liberty promised by the 14th Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M. L. B.*; *Bearden v. Georgia* (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." With this link to equal protection the Court proceeded to hold the

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prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the 14th Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." It was the essential nature of the marriage right, discussed at length in *Zablocki*, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other. …

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. …

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

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the 14th Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV. … The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation

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and marriage…. The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. …

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The 1st Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. … The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V. These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. …

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right. The judgment of the Court of Appeals for the Sixth Circuit is reversed.

*It is so ordered.*

[Appendix A and B to opinion of the Court (*State and Federal Judicial Decisions Addressing Same-Sex Marriage, State Legislation and Judicial Decisions Legalizing Same-Sex Marriage*) omitted.]

**Chief Justice Roberts, with whom Justice Scalia and Justice Thomas join, dissenting.**

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. … But this Court is not a legislature. Whether

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same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. …

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. … The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition. …

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. … Just who do we think we are?

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

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

I. Petitioners and their *amici* base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, *ante*, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us. *Town of Greece v. Galloway* (2014).

I-A. As the majority acknowledges, marriage "has existed for millennia and across civilizations." *Ante*. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. ([P]etitioners conced[e] that they are not aware of any society that permitted same-sex marriage before 2001). …

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This universal definition of marriage as the union of a man and a woman is no historical coincidence. … It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. … Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond. … As one prominent scholar put it, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." J. Q. Wilson, *The Marriage Problem* 41 (2002). …

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." *Windsor* (2013). There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. …

This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. …

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

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." *Ante*. They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. …

I-B. Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker v. Nelson* (1972).

… After the Massachusetts Supreme Judicial Court in 2003 interpreted its State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has shifted rapidly. … In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that

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same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage. …

[The decision below] interpreted the Constitution correctly, and I would affirm.

II. Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. The majority nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause.

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

II-A. Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an *enumerated* constitutional right. … They argue instead that the laws violate a right *implied* by the 14th Amendment's requirement that "liberty" may not be deprived without "due process of law." …

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington v. Glucksberg* (1997). …

In a series of early 20th-century cases, most prominently *Lochner v. New York*, this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law." *Id.* …

Eventually, the Court recognized its error and vowed not to repeat it. … Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Okla., Inc.* (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for "judicial self-restraint." *Collins v. Harker Heights* (1992). Our

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precedents have required that implied fundamental rights be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*. …

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

II-B-1. The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. *Ante*. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner v. Safley* (1987); *Zablocki*; see *Loving*. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving*, the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki*, restrictions based on child support debts did not suffice. In *Turner*, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. … As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." *Ante*.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. … Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

II-B-2. The majority suggests that "there are other, more instructive precedents" informing the right to marry. *Ante*. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental "right of privacy." *Griswold* [*and Lawrence.*]. …

Neither [*Griswold* nor] *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion.

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They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. …

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the *shield* provided by constitutional liberties into a *sword* to demand *positive entitlements* from the State [emphasis added]. See *DeShaney v. Winnebago County Dept. of Social Servs.* (1989); *San Antonio Independent School Dist. v. Rodriguez* (1973). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no *affirmative right* to redefine marriage and no basis for striking down the laws at issue here [emphasis added].

II-B-3. … Ultimately, only one precedent offers any support for the majority's methodology: *Lochner v. New York.* …

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Cf. *Brown v. Buhman*, (D. Utah 2013), appeal pending, (10th Cir.). Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," *ante*, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," *ante*, why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," *ante*, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? …

II-B-4. … The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike

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down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the "nature of injustice is that we may not always see it in our own times." *Ante*. As petitioners put it, "times can blind." Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. "The past is never dead. It's not even past." W. Faulkner, *Requiem for a Nun* 92 (1951).

III. In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. *Ante*. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. …

> Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. *Ante*. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence* (O'Connor, J., concurring in judgment).

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

IV. The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." *Republican Party of Minn. v. White* (2002) (Kennedy, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in

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deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. …

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. …

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. *Ante*. The 1st Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. … It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted. *Ante*.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. … And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

**Justice Scalia, with whom Justice Thomas joins, dissenting.**

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I join The Chief Justice's opinion in full. I write separately to call attention to this Court's threat to American democracy. …

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.[1]

**Justice Thomas, with whom Justice Scalia joins, dissenting,** [Omitted].

**Justice Alito, with whom Justice Scalia and Justice Thomas join, dissenting.** [Omitted.]

*** * ***

**Akhil Amar's Equal Protection Perspective on Same-sex Marriage**

Shortly after the decision in *Obergefell v. Hodges* was handed down, a renowned constitutional law professor authored an article with a hypothetical opinion that he would have told Justice Kennedy to write if he could have "been whispering in Kennedy's ear." Akhil Reed Amar, *What the Same-Sex Marriage Opinion Should Have Said (and Almost Did).*[2] Amar's hypothetical opinion makes much stronger equal protection arguments than Justice Kennedy, focusing on the language and intent of the 14th Amendment and its core principle—that all citizens are born equal:

> America is dedicated to the proposition that all are created equal—'born' equal, in the language of the amendment. Persons born black are equal in civil rights to those born white. Persons born male are equal in civil rights to those born female. Persons born out of wedlock are equal in civil rights to those born in wedlock. … And today we make clear that those born gay or lesbian are no less in civil rights than those born straight."

Amar notes that while the most evident purpose of the 14th Amendment was combating racial inequality, the framers intentionally wrote the "text at the proper level of generality, condemning not just racially discriminatory laws but all laws creating unequal civil rights on the basis of birth status." He further argues that this principle is evident in our constitutional jurisprudence that treats as suspect legal classifications "discriminating on the basis of race, sex, ethnicity, or illegitimacy," but granting a high degree of deference for ordinary economic legislation.

---

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

[2] available at http://www.slate.com/blogs/outward/2015/07/10/supreme_court_gay_marriage_what_kennedy_s_opinion_should_have_said.html.

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Amar's opinion argues that legislation based on immutable classifications of birth must receive heightened scrutiny "to ensure that they do not create an improper caste-like system" that "demean[s] and degrade[s]" citizens based on immutable traits. Gay-marriage laws deserve precisely this careful scrutiny because most, if not all, homosexuals are "quite simply, 'born this way,'" a realization that has only become well-established in recent decades.

He further argues that the prohibition of same-sex marriage is essentially sex-based legislation. Gender classifications have been subjected to heightened scrutiny "under our longstanding sex-discrimination case law—case law deeply rooted in the text and spirit of the 14th Amendment." Because states' heterogeneous marriage laws attempt to enforce gender stereotypes, that women must act like women, and men must act like men, Amar argues that "such laws are a violation of genuine sex equality and also of liberty."

While Amar acknowledges that Justice Kennedy is on the right side of history and of our constitutional law, he observes that Kennedy's reliance on the Due Process Clause is limited. Amar's proposed opinion, with its focus on birth-equality, is firmly rooted in "knockdown historical points about the Framers of the amendment," and brings more coherence and continuity to the court's treatment of invidious discrimination based on conditions of birth. Furthermore, Amar's hypothetical opinion dismantles a common argument among the dissenters, that the Court's ruling now opened the door to legalizing polygamy. As Amar notes, "[n]o strong evidence has yet been presented to suggest that a vast number of persons are in fact born polygamous." This brings polygamy out of his proposed birth equality analysis.

Justice Kennedy did discuss equal protection analysis in his *Obergefell* opinion, albeit rather obliquely, speaking of equal protection as having a synergistic effect with due process, whereby one helps define and bolster the other. It appears that Amar's approach to the issue, with his emphasis on birth-equality, certainly strengthens the argument that bans on same-sex marriage are improper under constitutional principles.

Do you prefer Kennedy's or Amar's approach or neither? What benefits, if any, are there to Kennedy's approach? What benefits, if any, are there to Amar's approach? Possibly because Kennedy spent relatively little time on the equal protection argument, Roberts similarly spent little time rebutting it. Is there a persuasive rebuttal to Amar's position?

## Section IX. Liberty and the "Right" to Die

### *Cruzan v. Director, Missouri Department of Health* (1990): Note

A person in a "persistent vegetative state" is one who has no brain function and must be kept alive by medical intervention. Many people desire to be allowed to die in such a situation. In *Cruzan v. Director, Missouri Department of Health* (1990), the Court addressed the issue of whether a state could require the higher civil proof standard of "clear and convincing evidence," rather than the usual "preponderance of the evidence," in hearings to determine whether such a patient (who had not made a living will) wished to refuse treatment. *Cruzan* is referred to repeatedly in *Glucksberg v. Washington* (1997), *infra*.

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Nancy Cruzan was a young woman who had been profoundly injured in an automobile collision and was in a persistent vegetative state. She was kept alive by tubes that provided food and water. Missouri had a "living will" statute that allowed people to avoid extraordinary life sustaining care in such cases. In cases where a person had not made a living will, their families were required to prove the patient's desire by the higher civil proof standard of clear and convincing evidence. Nancy Cruzan had not made a living will. Her parents wanted to stop her treatment, but a trial judge found that they failed to prove Nancy's intent by the higher burden of proof. The Court, in an opinion by Chief Justice Rehnquist, upheld the standard.

The Court characterized the patient's interest as a "liberty interest" rather than a "fundamental right":

> Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a 14th Amendment liberty interest. See *Bowers v. Hardwick* (1986).

The Court held that "for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition," but ruled that Missouri "may *legitimately* seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements." The Court then listed reasons why the legislation was rational.

The Court summarized its approach as follows:

> The 14th Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions. In *Jacobson v. Massachusetts* (1905), for instance, the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease. Decisions prior to the incorporation of the 4th Amendment into the 14th Amendment analyzed searches and seizures involving the body under the Due Process Clause and were thought to implicate substantial liberty interests. *See, e.g., Breithaupt v. Abram* (1957) ("As against the right of an individual that his person be held inviolable…must be set the interests of society….")
>
> Just this Term, in the course of holding that a State's procedures for administering antipsychotic medication to prisoners were sufficient to satisfy due process concerns, we recognized that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the 14th Amendment." *Washington v. Harper* (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"). Still other cases support the recognition of a general liberty interest in refusing

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medical treatment. *Vitek v. Jones* (1980) (transfer to mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); *Parham v. J.R.* (1979) ("[A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment").

But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry; "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." *Youngberg v. Romeo* (1982).

Justice O'Connor joined the opinion, but concurred. She noted:

I also write separately to emphasize that the Court does not today decide the issue whether a State must also give effect to the decisions of a surrogate decisionmaker. In my view, such a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment. Few individuals provide explicit oral or written instructions regarding their intent to refuse medical treatment should they become incompetent…. Delegating the authority to make medical decisions to a family member or friend is becoming a common method of planning for the future….

Justice Scalia also concurred:

While I agree with the Court's analysis today, and therefore join in its opinion, I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life; that the point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory….

Justices Brennan, Blackmun, and Marshall dissented, arguing that one "has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State, and…the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right." Justice Stevens also dissented: "The Court…permits the State's abstract, undifferentiated interest in the preservation of life to overwhelm the best interests of Nancy Beth Cruzan, interests which would, according to an undisputed finding, be served by allowing her guardians to exercise her constitutional right to discontinue medical treatment." Justice Stevens found this interest would not satisfy rational basis review.

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## *Washington v. Glucksberg*: Background and Questions

1. Why does the Court in *Cruzan v. Director* (1990) and *Washington v. Glucksberg* (1997), analyze the right to die as a liberty interest and not as a fundamental right? What is the difference between the analysis used to evaluate a challenge involving a liberty interest versus a fundamental right?

2. Why would Justices O'Connor and Kennedy join Chief Justice Rehnquist's opinion in *Glucksberg* after refusing to join Justice Scalia's footnote 6 in *Michael H.*? What is the difference in approach?

3. How would a conclusion that plaintiffs in *Michael H.*, *Cruzan*, and *Glucksberg* were asserting a fundamental right have affected the reasoning in those cases?

5. In *Glucksberg*, the Court refers to a companion case, *Vacco v. Quill* (1997). In *Vacco*, the Court, using rational basis analysis, rejected an equal protection challenge to New York's prohibition on assisting suicide.

6. After *Cruzan* and *Glucksberg*, assume that *S*tate X requires proof of desire to die in circumstances like those of *Cruzan* by proof beyond a reasonable doubt. Is this requirement constitutional? Assume another state requires execution of a written and witnessed living will. Is this requirement constitutional?

7. Consider the following hypothetical. Dr. Herb is a homeopathic physician in the state of Virginia. He was trained and licensed as an M.D. and then went to Europe for further training in homeopathic medicine. Homeopathic physicians treat illnesses by prescribing very small doses of medicines that would produce similar symptoms to the patient's problem if given to a healthy individual. For example, it is the medical system that pioneered treating malaria with quinine. The system is recognized in three states and in many European countries. Homeopathic practice was largely suppressed in this country for many years through the efforts of the medical establishment.

   A proceeding is brought to bar Dr. Herb from practicing medicine. Evidence indicates that none of his patients were harmed and some were helped. The statute permits barring doctors who deviate from standards of acceptable and prevailing medical practice. One of Dr. Herb's patients, Dr. Groat — herself an M.D. — is being treated by him for a gastrointestinal disorder. She saw 12 doctors before Doctor Herb and experienced no improvement. Under Doctor Herb's care she has improved, but is still under treatment. She contends that the action against Dr. Herb violates her right to privacy. What result? Why?

   On what clause of the Constitution will Dr. Groat rely? What is the first question to ask in analyzing Dr. Groat's privacy claim? What factors are relevant to analyzing that question? How does the answer to that question affect the rest of the analysis? How does

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level of scrutiny fit in?

**Washington v. Glucksberg**

521 U.S. 702 (1997)

[Majority: Rehnquist (C.J.), O'Connor, Scalia, Kennedy, and Thomas. Concurring: O'Connor, Stevens, Souter, Ginsburg, and Breyer.]

**Chief Justice Rehnquist delivered the opinion of the Court.**

The question presented in this case is whether Washington's prohibition against "caus[ing]" or "aid[ing]" a suicide offends the 14th Amendment to the United States Constitution. We hold that it does not.

It has always been a crime to assist a suicide in the State of Washington. In 1854, Washington's first Territorial Legislature outlawed "assisting another in the commission of self-murder." Today, Washington law provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." Wash. Rev. Code § 9A.36.060(1) (1994). "Promoting a suicide attempt" is a felony, punishable by up to five years' imprisonment and up to a $10,000 fine. §§ 9A.36.060(2) and 9A.20.021(1)(c). At the same time, Washington's Natural Death Act, enacted in 1979, states that the "withholding or withdrawal of life-sustaining treatment" at a patient's direction "shall not, for any purpose, constitute a suicide." Wash. Rev. Code § 70.122.070(1)….

The plaintiffs asserted "the existence of a liberty interest protected by the 14th Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide." Relying primarily on *Planned Parenthood v. Casey* (1992), and *Cruzan v. Director, Missouri Dept. of Health* (1990), the District Court agreed, and concluded that Washington's assisted-suicide ban is unconstitutional because it "places an undue burden on the exercise of [that] constitutionally protected liberty interest." …

[The 9th Circuit Court of Appeals, sitting en banc, affirmed and] emphasized our *Casey* and *Cruzan* decisions. The court also discussed what it described as "historical" and "current societal attitudes" toward suicide and assisted suicide, and concluded that "the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death — that there is, in short, a constitutionally-recognized 'right to die.'" After "[w]eighing and then balancing" this interest against Washington's various interests, the court held that the State's assisted-suicide ban was unconstitutional "as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians." … We granted certiorari, and now reverse.

I. We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices. *See, e.g., Casey*; *Cruzan*; *Moore v. East Cleveland* (1977) (plurality opinion) (noting importance of "careful 'respect for the teachings of history'"). In almost every

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State—indeed, in almost every western democracy—it is a crime to assist a suicide.[3] The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. … [S]ee *Stanford v. Kentucky* (1987) ("[T]he primary and most reliable indication of [a national] consensus is…the pattern of enacted laws"). Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages.

More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide. [The Court reviews English, American colonial, and American history.]

Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses. Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect. Many States, for example, now permit "living wills," surrogate health-care decision making, and the withdrawal or refusal of life-sustaining medical treatment. At the same time, however, voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide.

The Washington statute at issue in this case was enacted in 1975 as part of a revision of that State's criminal code. Four years later, Washington passed its Natural Death Act, which specifically stated that the "withholding or withdrawal of life-sustaining treatment…shall not, for any purpose, constitute a suicide" and that "[n]othing in this chapter shall be construed to condone, authorize, or approve mercy killing…." (Wash. Rev. Code §§ 70.122.070(1), 70.122.100 (1994)). In 1991, Washington voters rejected a ballot initiative which, had it passed, would have permitted a form of physician-assisted suicide. Washington then added a provision to the Natural Death Act expressly excluding physician-assisted suicide….

Thus, the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues….

Attitudes toward suicide itself have changed since [the 13th century], but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition. Against this backdrop of history, tradition, and practice, we now turn to respondents' constitutional claim.

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[3]. [Court noted that 44 states, the District of Columbia, and several western European countries prohibit or condemn assisted suicide.]

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II. The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. *Collins v. Harker Heights* (1992) (Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them'"). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests….

But we "have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," [or "so rooted in the traditions and conscience of our people as to be ranked as fundamental",] and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking", "that direct and restrain our exposition of the Due Process Clause." …

Justice Souter, relying on Justice Harlan's dissenting opinion in *Poe v. Ullman* (1961), would largely abandon this restrained methodology, and instead ask "whether [Washington's] statute sets up one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the Due Process Clause of the 14th Amendment." In our view, however, the development of this Court's substantive-due-process jurisprudence, described briefly [above], has been a process whereby the outlines of the "liberty" specially protected by the 14th Amendment — never fully clarified, to be sure, and perhaps not capable of being fully clarified — have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review. In addition, by establishing a threshold requirement — that a challenged state action implicate a fundamental right — before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.

Turning to the claim at issue here, the Court of Appeals stated that "[p]roperly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death," or, in other words, "[i]s there a right to die?" Similarly, respondents

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assert a "liberty to choose how to die" and a right to "control of one's final days," and describe the asserted liberty as "the right to choose a humane, dignified death," and "the liberty to shape death." As noted above, we have a tradition of carefully formulating the interest at stake in substantive-due-process cases. For example, although *Cruzan* is often described as a "right to die" case, we were, in fact, more precise: We assumed that the Constitution granted competent persons a "constitutionally protected right to refuse lifesaving hydration and nutrition." The Washington statute at issue in this case prohibits "aid[ing] another person to attempt suicide," and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.

We now inquire whether this asserted right has any place in our Nation's traditions. Here, as discussed [above], we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State. …

According to respondents, our liberty jurisprudence, and the broad, individualistic principles it reflects, protects the "liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference." The question presented in this case, however, is whether the protections of the Due Process Clause include a right to commit suicide with another's assistance. With this "careful description" of respondents' claim in mind, we turn to *Casey* and *Cruzan*.

In *Cruzan*, we considered whether Nancy Beth Cruzan, who had been severely injured in an automobile accident and was in a persistive vegetative state, "ha[d] a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment" at her parents' request…. "[W]e assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." We concluded that, notwithstanding this right, the Constitution permitted Missouri to require clear and convincing evidence of an incompetent patient's wishes concerning the withdrawal of life-sustaining treatment. …

[T]he Court of Appeals concluded [below] that "*Cruzan*, by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily recognize[d] a liberty interest in hastening one's own death."

The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.

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Indeed, the two acts are widely and reasonably regarded as quite distinct. In *Cruzan* itself, we recognized that most States outlawed assisted suicide — and even more do today — and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide.

Respondents also rely on *Casey*.… In reaching [its] conclusion, the opinion discussed in some detail this Court's substantive-due-process tradition of interpreting the Due Process Clause to protect certain fundamental rights and "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and noted that many of those rights and liberties "involv[e] the most intimate and personal choices a person may make in a lifetime."

The Court of Appeals, found *Casey* "highly instructive" and "almost prescriptive" for determining "'what liberty interest may inhere in a terminally ill person's choice to commit suicide'":

> Like the decision of whether or not to have an abortion, the decision how and when to die is one of "the most intimate and personal choices a person may make in a lifetime," a choice "central to personal dignity and autonomy." …

That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise.

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests. … This requirement is unquestionably met here. As the court below recognized,[4] Washington's assisted-suicide ban implicates a number of state interests. …

We need not weigh exactingly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection. We therefore hold that [the ban] does not violate the 14th Amendment, either on its face or "as applied to competent, terminally ill adults

[4]. The court identified and discussed six state interests: (1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding future movement toward euthanasia and other abuses.

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who wish to hasten their deaths by obtaining medication prescribed by their doctors."[5]

Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society. The decision of the en banc Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

**Justice Souter, concurring in the judgment**. [Omitted. His review of substantive due process is posted on conlawincontext.com.]

**Justice O'Connor, concurring, and Justices Stevens, Ginsburg, and Breyer, concurring in the judgment.** [Omitted.]

**Section IX. The Takings Clause.**
[*Insert on page 1010 after paragraph two above the* ***]

***Horne v. Department of Agriculture* (2015): Note**

In its most recent interpretation of the Takings Clause, the Supreme Court by an eight to one vote extended the scope of the Takings Clause to include personal property. It also held that the government may not avoid paying just compensation by reserving to the property owner a contingent interest in a portion of the value of the property and that a governmental mandate to relinquish specific and identifiable property as a condition of permission to engage in commerce constitutes a per se taking.

In *Horne*, a family raisin farm challenged the Secretary of Agriculture's authority to require raisin growers to set aside part of their raisin crop, free of charge, for use by the federal government. The Secretary's authority was based upon a 1937 statute that was designed to maintain stable markets for agricultural crops during the Great Depression. The federal allocation was substantial: 47 percent in 2002-03 and 30 percent in 2003-04.

In holding that the Takings Clause applies to personal property, the Court explained that the text makes no distinction between real property and personal property and that the Takings

[5]. Justice Stevens states that "the Court does conceive of respondents' claim as a facial challenge — addressing not the application of the statute to a particular set of plaintiffs before it, but the constitutionality of the statute's categorical prohibition. …" We emphasize that we today reject the Court of Appeals' specific holding that the statute is unconstitutional "as applied" to a particular class. Justice Stevens agrees with this holding, but would not "foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge." Our opinion does not absolutely foreclose such a claim. However, given our holding that the Due Process Clause of the 14th Amendment does not provide heightened protection to the asserted liberty interest in ending one's life with a physician's assistance, such a claim would have to be quite different from the ones advanced by respondents here.

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Clause was placed in the Constitution in part because the Framers wanted to protect personal property, which had been seized from the colonists by both sides during the American Revolution.

The Court also determined that the reserve requirement was "a clear physical taking" rather than a regulatory taking because "[a]ctual raisins are transferred from the growers to the Government." The Court found that a physical taking occurred even though the government returned to the growers the net proceeds of reserve raisins that it had sold, after deducting expenses and subsidies for growers. The Court explained that a physical taking may occur even when a property owner is not deprived of all of the property's economic value, citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning* Agency, 535 U.S. 302, 323 (2002).

The Court also rejected the government's argument that the reserve requirement was not a taking because the growers voluntary chose to participate in the raisin market. The Court explained that "[s]elling produce in interstate commerce, although certainly subject to reasonable government regulation, is…not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection."

Justices Breyer, Ginsburg, and Kagan dissented from the final part of the Court's opinion, which held that there was no need for a separate calculation of just compensation, which the government already had calculated when it fined the growers the fair market value of the reserved raisins. The dissenters contended that the growers had not established that the government had taken the raisins without just compensation because, according to the dissenters, the taking of the reserved raisins may have enhanced the value of the raisins that were not taken.

Justice Sotomayor contended that the case should have been decided under the law of regulatory takings rather than physical takings and that there had been no per se regulatory taking because the raisin growers had retained some of their property.

In an earlier decision involving the same parties, *Horne v. Department of Agriculture*, 569 U.S. ___ (2013), the Court held that a property owner may commence a Takings Clause action in federal district court without first seeking redress in the United States Court of Federal Claims.

**Volume II**

**Chapter 9. Procedural Due Process.**

**Section III-C. Is There a Postconviction Due Process Constitutional Right to Obtain Evidence Which Could Demonstrate Actual Innocence?**

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[*Insert on page 1076 after* District Attorney's Office for the Third Judicial District v. Osborne.]

### ***Skinner v. Switzer* (2011): Note**

Although, the issue was presented in *District Attorney's Office for Third Judicial Dist. v. Osborne* (2009), the Supreme Court left unresolved the question of whether "a convicted state prisoner seeking DNA testing of crime-scene evidence [may] assert that claim in a civil rights action under 42 U.S.C. §1983, or is such a claim cognizable in federal court only when asserted in a petition for a writ of habeas corpus under 28 U.S.C. §2254." In *Skinner v. Switzer* (2011), the Court addressed this issue. In a 6-3 decision, written by Justice Ginsburg and joined by Chief Justice Roberts and Justices Scalia, Breyer, Sotomayor, and Kagan, it held that "a postconviction claim for DNA testing is properly pursued in a §1983 action."

Henry Skinner was sentenced to death for the murder of his girlfriend and her two sons. In preparation for Skinner's trial, the prosecution did not DNA test all of the biological evidence in its possession. Untested items included knives, an axe handle, vaginal swabs, fingernail clippings, and hair samples.

Under Texas' Article 64, prisoners are allowed postconviction DNA testing under limited circumstances. The prisoner could show that "at trial the testing…was 'not available.' " Or, the prisoner could show that "the evidence was not previously tested 'through no fault' on his part, and that 'the interests of justice' require a postconviction order for testing." Twice, Skinner invoked Article 64 in an attempt to have the untested biological evidence DNA tested. Twice, Skinner's request was denied.

In this suit, Skinner used §1983 to allege "that the State's refusal 'to release the biological evidence for testing…has deprived [him] of his liberty interest in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence….' " Essentially, "he challenges, as denying him procedural due process, Texas' postconviction DNA statute 'as construed' by the Texas courts."

The Court relied on *Wilkinson v. Dotson* (2005) to find §1983 appropriate. In *Dotson*, prisoners properly pursued a §1983 action to challenge the constitutionality of parole decisions that denied them parole eligibility. A §1983 suit was applicable because the prisoners did not seek immediate or faster release into the community and a favorable judgment would not mean that their sentence or conviction was invalid. Similarly, here the Court reasoned that

> Measured against our prior holdings, Skinner has properly invoked §1983. Success in his suit for DNA testing would not 'necessarily imply' the invalidity of his conviction. While test results might prove exculpatory, that outcome is hardly inevitable; as earlier observed, results might prove inconclusive or they might further incriminate Skinner.

Justice Thomas, along with Justices Kennedy and Alito dissented, finding that "*Dotson* does not control this case." Alternatively, Thomas wrote, the controlling precedent was those cases regarding constitutional challenges to the validity of a conviction. Under this line of cases, prisoners may not pursue a §1983 action. A similar decision in this case would thus "limit §1983 and prevent it from intruding into the boundaries of habeas corpus." Instead, the dissent worried that the "majority provides a roadmap for any unsuccessful state habeas petitioner to relitigate his claim under §1983: After state habeas is denied, file a §1983 suit challenging the state habeas

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process rather than the result. What prisoner would not avail himself of this additional bite at the apple?"

### *Connick v. Thompson* (2011): Note

In 1985, Orleans Parish District Attorney, Harry Connick, charged John Thompson with two crimes, murder and attempted armed robbery. During the armed robbery trial, prosecutors failed to disclose to the defense a crime lab report that contained exculpatory blood evidence. Subsequently, Thompson was convicted of attempted armed robbery. Because of his previous conviction, Thompson did not testify at the murder trial and he was found guilty. He was sentenced to death and spent 18 years in prison and 14 years on death row.

A private investigator discovered the crime lab report one month before Thompson's scheduled execution. The state court then vacated his armed robbery conviction. And although the district attorney's office retried Thompson for the 1985 murder, a jury found him not guilty.

Thompson then brought this suit against Connick, the district attorney's office, and others using 42 U.S.C. §1983 claiming a *Brady* violation. Under *Brady v. Maryland* (1963), prosecutors are required to "disclose to the defense evidence in its possession that is favorable to the accused." In this case, Thompson had the burden of proving "both (1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the need to train the prosecutors about their *Brady* disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the *Brady* violation…."

Connick admitted that the failure to produce the crime lab report was a *Brady* violation. However, he argued that "Thompson did not prove that [Connick] was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training." The Supreme Court agreed with Connick in a 5-4 decision written by Justice Thomas and joined by Justices Roberts (C.J.), Scalia, Kennedy, and Alito. In *Connick v. Thompson* (2011), the Court reversed the jury award granting Thompson $14 million and held that Connick should have been granted summary judgment.

Generally, a pattern of similar constitutional violations is necessary to demonstrate deliberate indifference regarding the need to train prosecutors about *Brady*. Here, the majority opinion dismissed this possibility, saying

> [Thompson] points out that, during the ten years preceding his armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office. Those four reversals could not have put Connick on notice that the office's *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here. None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.

Therefore, "Thompson relies on the 'single-incident' liability that this Court hypothesized in *Canton*." In *Canton v. Harris* (1989), the Court allowed for the possibility that a single incident might demonstrate an obvious need for specific legal training and a deliberate indifference to training. The Court hypothesized a situation that would meet these requirements. For example, it imagined that a city armed a police force to capture felons yet failed to train the

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police officers regarding the constitutional limits on the use of deadly force. In this situation, the failure to train the police officers "could reflect the city's deliberate indifference to the 'highly predictable consequence,' namely, violations of constitutional rights."

Here, the Court distinguished Connick's single-incident *Brady* violation from the *Canton* hypothetical.

> Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability. The obvious need for specific legal training that was present in the *Canton* scenario is absent here…. There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training. In stark contrast, legal "[t]raining is what differentiates attorneys from average public employees." Cf. *United States v. Cronic* (1984).
>
> Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both…. These threshold requirements are designed to ensure that all new attorneys have learned how to find, understand, and apply legal rules….

Furthermore, training does not end upon graduation. Attorneys receive additional training through continuing legal education requirements, on-the-job training, and the profession's ethical guidelines. Thus, "[a] licensed attorney making legal judgments, in his capacity as prosecutor, about *Brady* material simply does not present the same 'highly predictable' constitutional danger as *Canton's* untrained officer."

Justices Scalia and Alito concurred, criticizing the dissent's "lengthy excavation of the trial record" because the question present was a legal question. Further, Scalia wrote that "[t]here was probably no *Brady* violation at all…. For any *Brady* violation…was surely on the very frontier of our *Brady* jurisprudence…." Thus, Connick may not have actually known to instruct the prosecutors on handling untested evidence.

Justice Ginsburg, along with Justices Breyer, Sotomayor, and Kagan, dissented and would have upheld the $14 million jury award:

> The Court holds that the Orleans Parish District Attorney's Office…cannot be held liable, in a civil rights action under 42 U.S.C §1983, for the grave injustice Thompson suffered. That is so, the Court tells us, because Thompson has shown only an aberrant *Brady* violation, not a routine practice of giving short shrift to *Brady's* requirements. The evidence presented to the jury that awarded compensation to Thompson, however, points distinctly away from the Court's assessment….
>
> Over 20 years ago, we observed that a municipality's failure to provide training may be so egregious that, even without notice of prior constitutional violations,

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> the failure "could properly be characterized as 'deliberate indifference to constitutional rights.' " …
>
> Vigilance in superintending prosecutors' attention to *Brady*'s requirement is all the more important for this reason: A *Brady* violation, by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out. Because the absence of the withheld evidence may result in the conviction of an innocent defendant, it is unconscionable not to impose reasonable controls impelling prosecutors to bring the information to light….
>
> The majority's suggestion that lawyers do not need *Brady* training because they "are equipped with the tools to find, interpret, and apply legal principles," "blinks reality" and is belied by the facts of this case….
>
> Connick, who himself had been indicted for suppression of evidence, created a tinderbox in Orleans Parish in which *Brady* violations were nigh inevitable. And when they did occur, Connick insisted there was no need to change anything, and opposed efforts to hold prosecutors accountable on the ground that doing so would make his job more difficult….
>
> I would uphold the jury's verdict awarding damages to Thompson for the gross, deliberately indifferent, and long-continuing violation of his fair trial right.

[District Attorneys and judges are absolutely immune from damages for actions taken within their role as prosecutor of a case or as a judge of a case. In the District Court, Connick moved for summary judgment based on absolute or qualified immunity. The District Court explained that Connick did not qualify for either type of immunity.

First, he did not qualify for absolute immunity. Absolute immunity is only given if the actions complained of were within the quasi-judicial prosecutorial role. Here, the complaint was that "he trained assistants to disregard their constitutional duties [under *Brady*], or that he failed to train and supervise them adequately, despite the obvious need." So the conduct complained about was not "in relation to the prosecution of any particular case for the State, but in running the District Attorney's Office as an administrator or supervisor." Therefore, this claim for summary judgment based on absolute immunity was denied.

Second, he did not meet the test for qualified immunity. Here, the burden is on the plaintiff to show that a defense of qualified immunity is not available. There are two steps: (1) the plaintiff must show that the alleged conduct was a violation of a clearly established federal constitutional right and (2) the plaintiff must show that the defendant's conduct was not objectively reasonable in light of clearly established law at the time of conduct. Here, (1) is met because the plaintiff alleged a 14th Amendment Due Process violation in connection with *Brady* evidence, and "[t]he right to have evidence beneficial to the criminal defendant turned over by the prosecution upon request is clearly established." Additionally (2) was met because *Brady* was 20 year old precedent. So a reasonable District Attorney would have realized that his office needed to comply with *Brady*. Therefore, the conduct alleged—training to disregard *Brady* or

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failing to train and adequately supervise despite obvious need—"is objectively unreasonable in light of clearly established law." As a result, this claim for summary judgment was denied.]

[Insert on page 1096 after *Hamdi* with *** before the next three ***]

***Kerry v. Din* (2015): Note**

Addressing various aspects of procedural and substantive due process, the Court in a five-to-four decision sustained the federal government's denial of a visa to a citizen of Afghanistan, a former civil servant of the Taliban regime, who was married to an American citizen. A plurality opinion written by Justice Scalia and joined by Chief Justice Roberts and Justice Thomas concluded that the American spouse, who had challenged the government's action, lacked any substantive due process right that would provide the predicate for procedural due process. Scalia explained that the federal government had broad discretion to regulate immigration and that Congress had a long history of limiting a citizen's "ability to bring a spouse into the United States." Although the federal government has tended to encourage the preservation of family units, "this has been a matter of legislative grace rather than fundamental right."

A concurring opinion written by Justice Kennedy and joined by Justice Alito contended that the government had satisfied the requirements of procedural due process by explaining that the denial of the visa was based upon a statute that prohibited the issuance of visas to persons who engage in terrorist activities. Kennedy therefore concluded that there was no need to address the issue of whether the American spouse had a protected liberty interest.

Justice Breyer's dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan, argued that "the law, including visa law, surrounds marriage with a host of legal protections to the point that it creates a strong expectation that government will not deprive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure. Breyer concluded that the government deprived the American spouse of procedural due process because its bare citation of the statute failed to provide her with enough information to enable her to assess the correctness of the decision; "determine what kinds of facts she might provide in response"; or "permit her to learn whether, or what kind of, defenses might be available." Although Justice Breyer contended that his position was consistent with well-established principles of procedural due process, Justice Scalia claimed that the dissenters had advanced a new and "dangerous doctrine" that "vastly expands the scope of our implied-rights jurisprudence by setting it free from the requirement that the liberty interest be 'objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty,'" citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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**Chapter 10. Freedom of Speech and Press**

**Part II. Section VI-A-5. Cases on Vagueness and Overbreadth.**
[*Insert on page 1231 after* Grayned v. City of Rockford (1972).]

***FCC v. Fox Television Stations, Inc.* (2012): Note**

Congress has tasked the Federal Communications Commission (FCC) with enforcing 18 U.S.C. §1464, which prohibits broadcasters from airing "obscene, indecent, or profane language." The FCC promulgates regulations to define what type of broadcasts are prohibited under the statute. In *FCC v. Fox Television Stations, Inc.* (2012), the Supreme Court found that the regulations enforced by the FCC were unconstitutionally vague and thus denied broadcasters the due process safeguard of notice.

The case involved violations of the FCC's indecency regulations in three unrelated broadcasts: two on Fox, and one on ABC. Fox's violations stemmed from consecutive broadcasts of the Billboard Music Awards. In 2002, singer Cher used the "F-word" during an unscripted acceptance speech. The following year, reality television personality Nicole Richie colorfully employed both the "F-word" and the "S-word" while presenting an award. ABC's violation occurred during a 2003 episode of *NYPD Blue* in which a woman's naked buttocks were displayed for a period of about seven seconds.

In 2004, while the cases against Fox and ABC were pending, the FCC issued a decision on another allegedly indecent broadcast – this time on NBC. During a live airing of the 2003 Golden Globe Awards, singer Bono described the experience of winning an award as "f***ing brilliant." The FCC found this isolated utterance to be indecent ("the *Golden Globes* Order"). The *Golden Globes* Order marked a significant departure from FCC precedent. Prior to the Order, the FCC distinguished "repeated" broadcasts of indecent material, which were always in violation of §1464, from "isolated" broadcasts, which were not necessarily actionable under the statute. This old view of indecency was expressly recorded in a 2001 policy statement, which noted that "where sexual or excretory references have been … passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency."

The FCC applied its new *Golden Globes* standard to the cases against Fox and ABC and found that all three incidents qualified as indecent. Both Fox and ABC challenged the rulings on several grounds. Among other arguments, the networks contended that they did not have fair notice of the indecency standard articulated in the *Golden Globes* Order since the disputed broadcasts had occurred before that order was issued. On the contrary, at the time the Billboard Music Awards and *NYPD Blue* episode were aired, the networks reasonably believed that fleeting expletives and momentary nudity would not be found indecent under the FCC's regulations. The networks argued that the lack of notice deprived them of due process in violation of the Fifth Amendment. In 2011, after years of litigation and narrowing of issues, the cases were consolidated and found their way to the Supreme Court.

The oral arguments before the Court focused on the FCC's handling of past cases of alleged indecency. At one point, ABC's lawyer mentioned that there had been many complaints about the "opening episode of the last Olympics, which included a statute very much like some of the statues that are here in this courtroom, that had bare breasts and buttocks." The lawyer

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then pointed to the exposed buttocks on statues around the courtroom: "[R]ight over here, Justice Scalia … there's a bare buttock there, and there's a bare buttock here. And there may be more that I hadn't seen. But, frankly, I had never focused on it before."

Ultimately, the Supreme Court decided in favor of the networks on Fifth Amendment grounds. In his opinion for the Court, Justice Kennedy declared that vague regulations are unconstitutional because they deprive the regulated entity of due process:

> A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden.... See *Connally v. General Constr. Co.* (1926)…. This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment…. A … punishment fails to comply with due process if the … regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams* (2008)….
>
> [T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech….

The government responded to due process concerns with two distinct arguments. With regard to Fox, the FCC contended that there was no due process violation because it did not impose any monetary sanctions on Fox and promised not to take the incidents into consideration when renewing the broadcasting licenses of Fox's affiliate stations. The Court was not persuaded, however: "the due process protection against vague regulations 'does not leave the [regulated parties] … at the mercy of *noblesse oblige*' … the Government's assurance it will elect [not to punish Fox] is insufficient to remedy the constitutional violation." With regard to ABC, the FCC argued that the network was on notice that fleeting images of buttocks would be considered indecent because of a decades-old decision in which the FCC declared that "televising of nudes might well raise a serious question of programming contrary to … §1464." *Enbanc Programming Inquiry* (1960). However, the Court found that "an isolated and ambiguous statement … does not suffice for the fair notice required…."

The Court concluded that the FCC's rulings against Fox and ABC were unconstitutionally vague because "the [FCC] policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent." The Court further noted that vagueness was especially troublesome in regulations that have the potential to curtail the freedom of expression: "This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to … regulations that touch upon 'sensitive areas of basic First Amendment freedoms.'"

The Court's decision was also notable for the questions it left unanswered. Because the cases were both resolved purely on the vagueness issue, the Court did not reach the question of whether the indecency policy enforced by FCC at the time of the alleged violations (*i.e.* pre-2004) violated the First Amendment's prohibition on the restriction of free speech. Furthermore,

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since the cases were decided under the old indecency policy, the Court also declined to address the constitutionality of the FCC's current (*i.e.* post-2004) policy.

**Part II. Section VI-C. Content Discrimination**
*[Insert on page 1267 after Brandenburg and Scrutiny]*

***Reed v. Town of Gilbert, Arizona* (2015): Note**

The town of Gilbert, Arizona, enacted a code prohibiting the display of outdoor signs without a permit. The code provided exemptions for 23 different types of signs, each which had its own regulations for the size and amount of time it could be displayed. "Ideological signs," signs communicating messages or ideas, could be up to 20 square feet in size and had no time or placement restrictions. "Political signs," signs "designed to influence the outcome of an election," could be up to 32 square feet and could only be displayed during an election season, but had to be removed thereafter. "Temporary directional signs," signs which directed the public to a church service or other "qualifying event," could only be six square feet and could only be displayed up twelve hours before the event and one hour after. The town also prohibited any more than four temporary directional signs on any single property.

After receiving citations for posting signs with directions to his church, Clyde Reed, pastor of the small Good News Community Church, filed suit against the Town of Gilbert claiming that the sign code abridged the church's freedom of speech. (The church met in different locations each week and church members would put up signs announcing where the service would be held on the day before the service was scheduled). The district court and the Ninth Circuit ruled that the code's restrictions content-neutral and were therefore acceptable under an intermediate scrutiny standard.

While the Supreme Court voted 9-0 to find the code unconstitutional, the justices were split on their reasoning. The lower courts held that the regulations were content-neutral because the Town of Gilbert did not disagree with the messages contained in the signs but rather had motivations unrelated to the content of the signs. So the District Court and the 9th Circuit had applied a lower level of scrutiny. Writing for the six justices in the majority, Justice Thomas explained that the lower courts erred because of their incorrect interpretation of the meaning of content-based regulations:

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

The Court then noted that the sign code was, on its face, content based because the restrictions on each category of sign "depended entirely on the communicative content of the sign."

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Explaining why the Ninth Circuit was wrong in deciding the code was content-neutral, Justice Thomas wrote:

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. …
>
> Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the "abridg[ement] of speech"—rather than merely the motives of those who enacted them.

Turning to the Ninth Circuit's next argument, the Court rejected the idea that if the code did not target any single viewpoint, it was content neutral. Explaining that viewpoint discrimination is more blatant or egregious, the Court reaffirmed that the "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."

The Court stated:

> As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature."

The majority said that towns could still easily enact content-neutral sign restrictions that would not conflict with the First Amendment. Re-enforcing this point, Justice Alito concurred with a list of several examples of types of restrictions that would be content neutral, including regulations of the size and placement of all signs, rules distinguishing between the placement of signs on public and private property, and rules restricting the total number of signs that could be placed on a given mile of road.

Concurring in the judgment only, Justices Breyer and Kagan, joined by Justice Ginsburg, expressed concern about the majority's holding that *all* content-based regulations would automatically trigger strict scrutiny. Justice Breyer argued that content discrimination should be treated "in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger."

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> Consider a few examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place. Consider governmental regulation of securities, e.g., 15 U. S. C. §78l (requirements for content that must be included in a registration statement); of energy conservation labeling-practices, e.g., 42 U. S. C. §6294 (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs, e.g., 21 U. S. C. §353(b)(4)(A) (requiring a prescription drug label to bear the symbol "Rx only"); of doctor-patient confidentiality, e.g., 38 U. S. C. §7332 (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient's spouse or sexual partner). …

Justice Breyer's approach would be to treat content discrimination "as a strong reason weighing against the constitutionality of a rule" where a "traditional public forum or viewpoint discrimination is threatened." In other cases, he would treat content discrimination as a "rule of thumb, finding it a helpful, but not determinative legal tool…to determine the strength of a justification."

> I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives.

Justice Kagan, sharing similar concerns as Justice Breyer, argued that the automatic "trigger" of strict scrutiny will doom many valid laws.

> [A]lthough the majority holds out hope that some sign laws with subject-matter exemptions "might survive" that stringent review, the likelihood is that most will be struck down. After all, it is the rare case in which a speech restriction withstands strict scrutiny. To clear that high bar, the government must show that a content-based distinction is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. So on the majority's view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.

In Justice Kagan's view, the Court's concern with content-based regulations arise "from the fear that the government will skew the public's debate of ideas," but when "that risk is

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inconsequential,…strict scrutiny is unwarranted." Justice Kagan argued that even under a lower level of scrutiny, Gilbert's law would fail stating, "[t]he absence of any sensible basis for [the code] dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to "time, place, or manner" speech regulations."

While the majority currently believes that the presence of content-based regulations automatically triggers strict scrutiny, as the concurring opinions show, that issue is not permanently settled.

**Part II. Section VII-D. Infliction of Emotional Distress**
[*Insert on page 1304 after* Falwell *and before the Note.*]

**Snyder v. Phelps**
562 U. S. ____ (2011)

[Majority: Roberts (C.J.), Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan. Concurring: Breyer. Dissent: Alito]

**Chief Justice Roberts delivered the opinion of the Court.**

A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case.

I-A. Fred Phelps founded the Westboro Baptist Church in Topeka, Kansas in 1955. The church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military. The church frequently communicates its views by picketing, often at military funerals. In the more than 20 years that the members of Westboro Baptist have publicized their message, they have picketed nearly 600 funerals….

Marine Lance Corporal Matthew Snyder was killed in Iraq in the line of duty….

On the day of the memorial service, the Westboro congregation members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral. The Westboro picketers carried signs that were largely the same at all three locations. They stated, for instance: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."

The church had notified the authorities in advance of its intent to picket at the time of

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the funeral, and the picketers complied with police instructions in staging their demonstration. The picketing took place within a 10- by 25-foot plot of public land adjacent to a public street, behind a temporary fence….

That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church…. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing….

The funeral procession passed within 200 to 300 feet of the picket site. Although Snyder testified that he could see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until later that night, while watching a news broadcast covering the event….

I-B. Snyder filed suit against Phelps, Phelps's daughters, and the Westboro Baptist Church…. Snyder alleged five state tort law claims: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. Westboro moved for summary judgment contending, in part, that the church's speech was insulated from liability by the First Amendment….

The District Court awarded Westboro summary judgment on Snyder's claims for defamation and publicity given to private life…. A trial was held on the remaining claims. At trial, Snyder…testified that he is unable to separate the thought of his dead son from his thoughts of Westboro's picketing, and that he often becomes tearful, angry, and physically ill when he thinks about it….

A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for $2.9 million in compensatory damages and $8 million in punitive damages…. The District Court remitted the punitive damages award to $2.1 million, but left the jury verdict otherwise intact….

The Court of Appeals...concluded that Westboro's statements were entitled to First Amendment protection because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric…. We granted certiorari.

II. To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress…. The Free Speech Clause of the First Amendment…can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress….

Whether the First Amendment prohibits holding Westboro liable for its speech in this

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case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. "[S]peech on 'matters of public concern'… is 'at the heart of the First Amendment's protection.' " *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.* (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston* v. *Bellotti* (1978)). The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan* (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana* (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick* v. *Myers* (1983)….

"'[N]ot all speech is of equal First Amendment importance,' " however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous…. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: "[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas"; and the "threat of liability" does not pose the risk of "a reaction of self-censorship" on matters of public import. *Dun & Bradstreet*….

Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," *Connick*, or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," *San Diego v. Roe* (2004). The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin* v. *McPherson* (1987).

Our opinion in *Dun & Bradstreet*, on the other hand, provides an example of speech of only private concern. In that case we held, as a general matter, that information about a particular individual's credit report "concerns no public issue."… The content of the report, we explained, "was speech solely in the individual interest of the speaker and its specific business audience." *Ibid.*…

Deciding whether speech is of public or private concern requires us to examine the " 'content, form, and context' " of that speech, " 'as revealed by the whole record.' " *Dun & Bradstreet* (quoting *Connick*)….

The "content" of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of "purely private concern." *Dun & Bradstreet*…. While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro's position on those issues, in a manner

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designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible. And even if a few of the signs—such as "You're Going to Hell" and "God Hates You"—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues.

Apart from the content of Westboro's signs, Snyder contends that the "context" of the speech—its connection with his son's funeral—makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro's speech. Westboro's signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society. Its speech is "fairly characterized as constituting speech on a matter of public concern," *Connick*, and the funeral setting does not alter that conclusion….

We are not concerned in this case that Westboro's speech on public matters was in any way contrived to insulate speech on a private matter from liability. Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that Westboro's picketing did not represent its "honestly believed" views on public issues. *Garrison*…. There was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter….

Snyder goes on to argue that Westboro's speech should be afforded less than full First Amendment protection "not only because of the words" but also because the church members exploited the funeral "as a platform to bring their message to a broader audience." … There is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral to increase publicity for its views and because of the relation between those sites and its views—in the case of the military funeral, because Westboro believes that God is killing American soldiers as punishment for the Nation's sinful policies…. Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a "special position in terms of First Amendment protection." *United States* v. *Grace* (1983). "[W]e have repeatedly referred to public streets as the archetype of a traditional public forum," noting that " '[t]ime out of mind' public streets and sidewalks have been used for public assembly and debate." *Frisby* v. *Schultz* (1988).

That said, "[e]ven protected speech is not equally permissible in all places and at all times." *Frisby* v. *Schultz* (1988) (quoting *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.* (1985)). Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach—it is "subject to reasonable time, place, or manner restrictions" that are consistent with the standards announced in this Court's precedents. *Clark* v. *Community for Creative Non-Violence* (1984). Maryland now has a law imposing restrictions on funeral

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picketing…as do 43 other States and the Federal Government…. To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.

We have identified a few limited situation where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral. In *Frisby*, for example, we upheld a ban on such picketing "before or about" a particular residence. In *Madsen* v. *Women's Health Center, Inc.* (1994), we approved an injunction requiring a buffer zone between protesters and an abortion clinic entrance. The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities.

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.

Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson* (1989). Indeed, "the point of all speech protection… is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995).

The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro's picketing was "outrageous." "Outrageousness," however, is a highly malleable standard….

III. Snyder argues that even assuming Westboro's speech is entitled to First Amendment protection generally, the church is not immunized from liability for intrusion upon seclusion because Snyder was a member of a captive audience at his son's funeral…. We do not agree. In most circumstances, "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, …the burden normally falls upon the viewer to avoid

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further bombardment of [his] sensibilities simply by averting [his] eyes." *Erznoznik* v. *Jacksonville* (1975)….

Here, Westboro stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral. And there is no indication that the picketing in any way interfered with the funeral service itself. We decline to expand the captive audience doctrine to the circumstances presented here. Because we find that the First Amendment bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion—the alleged unlawful activity Westboro conspired to accomplish—we must likewise hold that Snyder cannot recover for civil conspiracy based on those torts….

IV. Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

The judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.

**Justice Breyer, concurring.**

While I agree with the Court's conclusion that the picketing addressed matters of public concern, I do not believe that our First Amendment analysis can stop at that point. A State can sometimes regulate picketing, even picketing on matters of public concern. See *Frisby* v. *Schultz* (1988). Moreover, suppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A's use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942) ("fighting words")….

**Justice Alito, dissenting.**

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result,

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Albert Snyder suffered severe and lasting emotional injury. The Court now holds that the First Amendment protected respondents' right to brutalize Mr. Snyder. I cannot agree.

I. Respondents and other members of their church have strong opinions on certain moral, religious, and political issues, and the First Amendment ensures that they have almost limitless opportunities to express their views. They may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails….

It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate. To protect against such injury, "most if not all jurisdictions" permit recovery in tort for the intentional infliction of emotional distress (or IIED). *Hustler Magazine, Inc.* v. *Falwell* (1988).

This is a very narrow tort with requirements that "are rigorous, and difficult to satisfy." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* (1984). To recover, a plaintiff must show that the conduct at issue caused harm that was truly severe.

A plaintiff must also establish that the defendant's conduct was "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'"*Harris v. Jones* (Md. 1977).

Although the elements of the IIED tort are difficult to meet, respondents long ago abandoned any effort to show that those tough standards were not satisfied here…. Instead, they maintained that the First Amendment gave them a license to engage in such conduct. They are wrong.

II. It is well established that a claim for the intentional infliction of emotional distress can be satisfied by speech….

III. In this case, respondents brutally attacked Matthew Snyder, and this attack, which was almost certain to inflict injury, was central to respondents' well-practiced strategy for attracting public attention.

On the morning of Matthew Snyder's funeral, respondents could have chosen to stage their protest at countless locations. They could have picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than 5,600 military recruiting stations in this country. They could have returned to the Maryland State House or the

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United States Naval Academy, where they had been the day before. They could have selected any public road where pedestrians are allowed…. They could have staged their protest in a public park…. But of course, a small group picketing at any of these locations would have probably gone unnoticed.

The Westboro Baptist Church, however, has devised a strategy that remedies this problem. As the Court notes, church members have protested at nearly 600 military funerals…. They have also picketed the funerals of police officers, firefighters, and the victims of natural disasters, accidents, and shocking crimes. And in advance of these protests, they issue press releases to ensure that their protests will attract public attention….

The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain. Thus, when the church recently announced its intention to picket the funeral of a 9-year-old girl killed in the shooting spree in Tucson—proclaiming that she was "better off dead"— their announcement was national news, and the church was able to obtain free air time on the radio in exchange for canceling its protest. Similarly, in 2006, the church got air time on a talk radio show in exchange for canceling its threatened protest at the funeral of five Amish girls killed by a crazed gunman.

In this case…[t]heir press release stated that they were going "to picket the funeral of Lance Cpl. Matthew A. Snyder" because "God Almighty killed Lance Cpl. Snyder. He died in shame, not honor—for a fag nation cursed by God…. Now in Hell—sine die." … This announcement guaranteed that Matthew's funeral would be transformed into a raucous media event and began the wounding process. It is well known that anticipation may heighten the effect of a painful event.

On the day of the funeral, respondents, true to their word, displayed placards that conveyed the message promised in their press release. Signs stating "God Hates You" and "Thank God for Dead Soldiers" reiterated the message that God had caused Matthew's death in retribution for his sins….

Since respondents chose to stage their protest at Matthew Snyder's funeral and not at any of the other countless available venues, a reasonable person would have assumed that there was a connection between the messages on the placards and the deceased….

Other signs would most naturally have been understood as suggesting—falsely—that Matthew was gay. Homosexuality was the theme of many of the signs. There were signs reading "God Hates Fags," "Semper Fi Fags," "Fags Doom Nations," and "Fag Troops." … Another placard depicted two men engaging in anal intercourse….

After the funeral, the Westboro picketers reaffirmed the meaning of their protest. They posted an online account entitled "The Burden of Marine Lance Cpl. Matthew A. Snyder. The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots!"

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…

IV. The Court concludes that respondents' speech was protected by the First Amendment for essentially three reasons, but none is sound.

First—and most important—the Court finds that "the overall thrust and dominant theme of [their] demonstration spoke to" broad public issues…. As I have attempted to show, this portrayal is quite inaccurate; respondents' attack on Matthew was of central importance. But in any event, I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected….

Second, the Court suggests that respondents' personal attack on Matthew Snyder is entitled to First Amendment protection because it was not motivated by a private grudge…but I see no basis for the strange distinction that the Court appears to draw….

Third, the Court finds it significant that respondents protest occurred on a public street, but this fact alone should not be enough to preclude IIED liability.

To be sure, statements made on a public street may be less likely to satisfy the elements of the IIED tort than statements made on private property, but there is no reason why a public street in close proximity to the scene of a funeral should be regarded as a free-fire zone in which otherwise actionable verbal attacks are shielded from liability. If the First Amendment permits the States to protect their residents from the harm inflicted by such attacks—and the Court does not hold otherwise—then the location of the tort should not be dispositive. And the same should be true with respect to unprotected speech. Neither classic "fighting words" nor defamatory statements are immunized when they occur in a public place, and there is no good reason to treat a verbal assault based on the conduct or character of a private figure like Matthew Snyder any differently…. Allowing family members to have a few hours of peace without harassment does not undermine public debate. I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern….

**Part II. Section XI-C. Limiting Access to Violent Video Games By Minors**
[*Insert on page 1352 after the end of* United States v. Stevens *and before Indecent Speech*.]

**Brown v. Entertainment Merchants Association**
564 U.S. ___ (2011)

[Majority: Scalia, Kennedy, Ginsburg, Sotomayor, Kagan. Concurring in judgment: Alito, Roberts (C.J). Dissenting: Thomas, Breyer].

**Justice Scalia delivered the opinion of the Court.**

We consider whether a California law imposing restrictions on violent video games

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comports with the First Amendment….

California Assembly Bill 1179 (2005) (Act) prohibits the sale or rental of "violent video games" to minors, and requires their packaging to be labeled "18." The Act covers games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." Violation of the Act is punishable by a civil fine of up to $1,000.

Respondents, representing the video-game and software industries, brought a preenforcement challenge to the Act in [federal court]. [The District Court] concluded that the Act violated the First Amendment and permanently enjoined its enforcement....

California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try…. Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, "esthetic and moral judgments about art and literature…are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States* v. *Playboy Entertainment Group, Inc.* (2000). And whatever the challenges of applying the Constitution to ever-advancing technology, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" when a new and different medium for communication appears. *Joseph Burstyn, Inc.* v. *Wilson* (1952).

The most basic of those principles is this: "[A]s a general matter,…government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *American Civil Liberties Union* (2002). There are of course exceptions…. These limited areas—such as obscenity, *Roth* v. *United States* (1957), incitement, *Brandenburg* v. *Ohio* (1969), and fighting words, *Chaplinsky* v. *New Hampshire* (1942)—represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *id.*

Last Term, in *United States v. Stevens* (2010), we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated. *Stevens* concerned a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty. *See* 18 U. S. C. §48 (amended 2010). The statute covered depictions "in which a living animal is

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intentionally maimed, mutilated, tortured, wounded, or killed" if that harm to the animal was illegal where the "the creation, sale, or possession t[ook] place." … A saving clause largely borrowed from our obscenity jurisprudence, *see Miller* v. *California* (1973), exempted depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." We held that statute to be an impermissible content-based restriction on speech. There was no American tradition of forbidding the *depiction of* animal cruelty—though States have long had laws against *committing* it.

The Government argued in *Stevens* that lack of a historical warrant did not matter; that it could create new categories of unprotected speech by applying a "simple balancing test" that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test…. We emphatically rejected that "startling and dangerous" proposition….

That holding controls this case. As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of "sexual conduct," *Miller*, *supra*….

Because speech about violence is not obscene, it is of no consequence that California's statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg* v. *New York* (1968). That case approved a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child. We held that the legislature could "adjus[t] the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests…' of…minors." *Id.* And because "obscenity is not protected expression," the New York statute could be sustained so long as the legislature's judgment that the proscribed materials were harmful to children "was not irrational." *Id.*

The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. California does not argue that it is empowered to prohibit selling offensively violent works *to adults*—and it is wise not to, since that is but a hair's breadth from the argument rejected in *Stevens*. Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik* v. *Jacksonville* (1975)…. No doubt a State possesses legitimate power to protect children from harm…but that does not include a free-floating power to restrict the ideas to which children may be exposed.

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California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none. Certainly the *books* we give children to read—or read to them when they are younger—contain no shortage of gore. *Grimm's Fairy Tales*, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers "till she fell dead on the floor, a sad example of envy and jealousy." … Cinderella's evil stepsisters have their eyes pecked out by doves…. And Hansel and Gretel (children!) kill their captor by baking her in an oven….

High-school reading lists are full of similar fare. Homer's *Odysseus* blinds Polyphemus the Cyclops by grinding out his eye with a heated stake…. In the *Inferno*, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface…. And Golding's *Lord of the Flies* recounts how a schoolboy called Piggy is savagely murdered *by other children* while marooned on an island….

California claims that video games present special problems because they are "interactive," in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of *The Adventures of You: Sugarcane Island* in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to…. As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. As Judge Posner has observed, all literature is interactive. "[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own." *American Amusement Machine Assn.* v. *Kendrick* (CA7 2001) (striking down a similar restriction on violent video games).

Justice Alito has done considerable independent research to identify…video games in which "the violence is astounding." … "Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces…. Blood gushes, splatters, and pools." … Justice Alito recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of Justice Alito's description…of those video games he has discovered that have a racial or ethnic motive for their violence—"'ethnic cleansing' [of]…African Americans, Latinos, or Jews." To what end does he relate this? Does it somehow increase the "aggressiveness" that California wishes to suppress? Who knows? But it does arouse the reader's ire, and the reader's desire to put an end to this horrible message. Thus, ironically, Justice Alito's argument highlights the precise danger posed by the California Act: that the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.

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Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.... The State must specifically identify an "actual problem" in need of solving, *Playboy, supra*…and the curtailment of free speech must be actually necessary to the solution.... That is a demanding standard. "It is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy, supra*....

California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. Rather, relying upon our decision in *Turner Broadcasting System, Inc. v. FCC* (1994), the State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies. But reliance on *Turner Broadcasting* is misplaced. That decision applied *intermediate scrutiny* to a content-neutral regulation.... California's burden is much higher, and because it bears the risk of uncertainty…ambiguous proof will not suffice.

The State's evidence is not compelling. California relies primarily on the research of…research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games *cause* minors to *act* aggressively....

Even taking for granted…that violent video games produce some effect on children's feelings of aggression, those effects are both small and indistinguishable from effects produced by other media....

Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.... Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.

The Act is also seriously underinclusive in another respect.... The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK.

California claims that the Act is justified in aid of parental authority.... At the outset, we note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority....

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But leaving that aside, California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so. The video game industry has in place a voluntary rating system designed to inform consumers about the content of games…. This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest.

And finally, the Act's purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to "assisting parents" that restriction of First Amendment rights requires….

California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive…. As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.

We affirm the judgment below….

It is so ordered.

**Justice Alito, with whom The Chief Justice joins, concurring in the judgment.**

Although the California statute is well intentioned, its terms are not framed with the precision that the Constitution demands, and I therefore agree with the Court that this particular law cannot be sustained….

I would hold only that the particular law at issue here fails to provide the clear notice that the Constitution requires. I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem. If differently framed statutes are enacted by the States or by the Federal Government, we can consider the constitutionality of those laws when cases challenging them are presented to us.

**Justice Thomas, dissenting.**

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The Court's decision today does not comport with the original public understanding of the First Amendment…. The practices and beliefs of the founding generation establish that "the freedom of speech," as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians. I would hold that the law at issue is not facially unconstitutional under the First Amendment, and reverse and remand for further proceedings….

As originally understood, the First Amendment's protection against laws "abridging the freedom of speech" did not extend to *all* speech. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky* v. *New Hampshire* (1942); *see also United States* v. *Stevens* (2010). Laws regulating such speech do not "abridg[e] the freedom of speech" because such speech is understood to fall outside "the freedom of speech." *See Ashcroft* v. *Free Speech Coalition* (2002).

In my view, the "practices and beliefs held by the Founders" reveal another category of excluded speech: speech to minor children bypassing their parents…. The historical evidence shows that the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children. It would be absurd to suggest that such a society understood "the freedom of speech" to include a right to speak to minors (or a corresponding right of minors to access speech) without going through the minors' parents….

**Justice Breyer, dissenting.**

California's law imposes no more than a modest restriction on expression. The statute prevents no one from playing a video game, it prevents no adult from buying a video game, and it prevents no child or adolescent from obtaining a game provided a parent is willing to help…. All it prevents is a child or adolescent from buying, without a parent's assistance, a gruesomely violent video game of a kind that the industry *itself* tells us it wants to keep out of the hands of those under the age of 17….

Nor is the statute, if upheld, likely to create a precedent that would adversely affect other media, say films, or videos, or books. A typical video game involves a significant amount of physical activity…. And pushing buttons that achieve an interactive, virtual form of target practice (using images of human beings as targets), while containing an expressive component, is not just like watching a typical movie….

The interest that California advances in support of the statute is compelling. As this Court has previously described that interest, it consists of both (1) the "basic" parental claim "to authority in their own household to direct the rearing of their children," which makes it proper to enact "laws designed to aid discharge of [parental] responsibility," and (2) the State's "independent interest in the well-being of its youth." *Ginsberg v. New York* (1968). And where these interests work in tandem, it is not fatally "underinclusive" for a State to advance

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its interests in protecting children against the special harms present in an interactive video game medium through a default rule that still allows parents to provide their children with what their parents wish….

I can find no "less restrictive" alternative to California's law that would be "at least as effective." … The majority points to a voluntary alternative: The industry tries to prevent those under 17 from buying extremely violent games by labeling those games with an "M" (Mature) and encouraging retailers to restrict their sales to those 17 and older…. But this voluntary system has serious enforcement gaps. When California enacted its law, a Federal Trade Commission (FTC) study had found that nearly 70% of unaccompanied 13 to 16-year-olds were able to buy M-rated video games…. Subsequently the voluntary program has become more effective. But as of the FTC's most recent update to Congress, 20% of those under 17 are still able to buy M-rated video games, and, breaking down sales by store, one finds that this number rises to nearly 50% in the case of one large national chain…. And the industry could easily revert back to the substantial noncompliance that existed in 2004, particularly after today's broad ruling reduces the industry's incentive to police itself.

The industry also argues for an alternative technological solution, namely "filtering at the console level." … But it takes only a quick search of the Internet to find guides explaining how to circumvent any such technological controls….

**Part II. Section XI-D. Stolen Valor.**

[*Insert after* Brown v. Entertainment Merchants Association *(2011), above.*]

**United States v. Alvarez**
567 U.S. ___ (2012)

[Plurality: Kennedy, Roberts (C.J.), Ginsburg, Sotomayor; Concurring: Breyer, Kagan; Dissenting: Alito, Scalia, Thomas.]

**Justice Kennedy delivered the plurality opinion.**

Lying was his habit. Xavier Alvarez, the respondent here, lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, respondent ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005. 18 U. S. C. §704.

In 2007, respondent attended his first public meeting as a board member of the Three Valley Water District Board. The board is a governmental entity with headquarters in Claremont, California. He introduced himself as follows: "I'm a…marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor…."

Respondent was indicted under the Stolen Valor Act…. The United States Court of Appeals for the Ninth Circuit, in a decision by a divided panel, found the Act invalid under the First Amendment and reversed the conviction….

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After certiorari was granted, and in an unrelated case, the United States Court of Appeals for the Tenth Circuit, also in a decision by a divided panel, found the Act constitutional. *United States v. Strandlof* (2012)….

This is the second case in two Terms requiring the Court to consider speech that can disparage, or attempt to steal, honor that belongs to those who fought for this Nation in battle. See *Snyder v. Phelps* (2011) (hateful protests directed at the funeral of a serviceman who died in Iraq). Here the statement that the speaker held the Medal was an intended, undoubted lie.

It is right and proper that Congress, over a century ago, established an award so the Nation can hold in its highest respect and esteem those who, in the course of carrying out the "supreme and noble duty of contributing to the defense of the rights and honor of the nation," have acted with extraordinary honor…. [T]his is a…most valued national aspiration and purpose. This does not end the inquiry, however. Fundamental constitutional principles require that laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.

The Government contends the criminal prohibition is a proper means to further its purpose in creating and awarding the Medal. When content-based speech regulation is in question, however, exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment. By this measure, the statutory provisions under which respondent was convicted must be held invalid, and his conviction must be set aside.

I. Respondent's claim to hold the Congressional Medal of Honor was false…. [R]espondent violated §704(b); and, because the lie concerned the Congressional Medal of Honor, he was subject to an enhanced penalty under subsection (c). Those statutory provisions are…:

> (b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States…shall be fined under this title, imprisoned not more than six months, or both.
>
> (c) ENHANCED PENALTY FOR OFFENSES INVOLVING CONGRESSIONAL MEDAL OF HONOR….

Respondent challenges the statute as a content-based suppression of pure speech, speech not falling within any of the few categories of expression where content-based regulation is permissible. The Government defends the statute as necessary to preserve the integrity and purpose of the Medal….

II. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union* (2002). As a result, the Constitution "demands that content-based restrictions on speech be presumed invalid…and that the Government bear the burden of showing their constitutionality." *Ashcroft v. American Civil Liberties Union* (2004).

In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as "startling and dangerous" a "free-floating test for First Amendment coverage…[based on] an ad hoc balancing of relative social costs and benefits." *United States v. Stevens* (2010). Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few "'historic and traditional categories

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[of expression] long familiar to the bar.'" Among these categories are advocacy intended, and likely, to incite imminent lawless action, *see Brandenburg v. Ohio*, (1969); obscenity, *see, e.g., Miller v. California* (1973); defamation, *see, e.g., New York Times Co. v. Sullivan* (1964) (providing substantial protection for speech about public figures); *Gertz v. Robert Welch, Inc.* (1974) (imposing some limits on liability for defaming a private figure); speech integral to criminal conduct, *see, e.g., Giboney v. Empire Storage & Ice Co.* (1949); so-called "fighting words," see *Chaplinsky v. New Hampshire* (1942); child pornography, *see New York v. Ferber* (1982); fraud, *see Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976); true threats, *see Watts v. United States* (1969); and speech presenting some grave and imminent threat the government has the power to prevent, *see Near v. Minnesota ex rel. Olson* (1931), although a restriction under the last category is most difficult to sustain, see *New York Times Co. v. United States* (1971). These categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee. See *Sullivan* ("Th[e] erroneous statement is inevitable in free debate").

The Government disagrees…. It cites language from some of this Court's precedents to support its contention that false statements have no value and hence no First Amendment protection…. For instance, the Court has stated "[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas," *Hustler Magazine, Inc. v. Falwell* (1988)…. See also, *e.g., …Gertz* ("[T]here is no constitutional value in false statements of fact"); *Garrison v. Louisiana* (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection").

These quotations all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation. In those decisions the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.

Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood. See *Sullivan*….

The Government thus seeks to use this principle for a new purpose. It seeks to convert a rule that limits liability even in defamation cases where the law permits recovery for tortious wrongs into a rule that expands liability in a different, far greater realm of discourse and expression. That inverts the rationale for the exception. The requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery in certain defamation cases exists to allow

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more speech, not less. A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it.

The Government then gives three examples of regulations on false speech that courts generally have found permissible: first, the criminal prohibition of a false statement made to a Government official; second, laws punishing perjury; …third, prohibitions on the false representation that one is speaking as a Government official or on behalf of the Government. These restrictions, however, do not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny….

Section 1001's prohibition on false statements made to Government officials, in communications concerning official matters, does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context.

The same point can be made about…the "unquestioned constitutionality of perjury statutes"…. It is not simply because perjured statements are false that they lack First Amendment protection. Perjured testimony "is at war with justice" because it can cause a court to render a "judgment not resting on truth"…. Sworn testimony is quite distinct from lies not spoken under oath and simply intended to puff up oneself.

Statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech….

[T]here are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be. This opinion does not imply that any of these targeted prohibitions are somehow vulnerable. But it also rejects the notion that false speech should be in a general category that is…unprotected.

Although the First Amendment stands against any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," *Stevens*, the Court has acknowledged that perhaps there exist "some categories of speech that have been historically unprotected…but have not yet been specifically identified or discussed…in our case law." Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription," *Brown v. Entertainment Merchants Assn.* (2011). The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis.

III. The probable, and adverse, effect of the Act on freedom of expression illustrates, in a fundamental way, the reasons for the Law's distrust of content-based speech prohibitions.

The Act by its plain terms applies to a false statement made at any time, in any place, to any person. It can be assumed that it would not apply to, say, a theatrical performance. See *Milkovich v. Lorain Journal Co.* (1990) (recognizing that some statements nominally purporting to contain false facts in reality "cannot reasonably be interpreted as stating actual facts about an individual"). Still, the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain. See

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*San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.* (1987) (prohibiting a nonprofit corporation from exploiting the "commercial magnetism" of the word "Olympic")….

That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. See G. Orwell, Nineteen Eighty-Four (1949). Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment…. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

IV. … In assessing content-based restrictions on protected speech, the Court has not adopted a freewheeling approach, see *Stevens* ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits"), but rather has applied the "most exacting scrutiny." Although the objectives the Government seeks to further by the statute are not without significance, the Court must, and now does, find the Act does not satisfy exacting scrutiny….

But to recite the Government's compelling interests is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be "actually necessary" to achieve its interest. *Entertainment Merchants Assn.* There must be a direct causal link between the restriction imposed and the injury to be prevented. The link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown. Although appearing to concede that "an isolated misrepresentation by itself would not tarnish the meaning of military honors," the Government asserts it is "common sense that false representations have the tendency to dilute the value and meaning of military awards." It must be acknowledged that when a pretender claims the Medal to be his own, the lie might harm the Government by demeaning the high purpose of the award, diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true….

The Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez. *Entertainment Merchants Assn.* (analyzing and rejecting the findings of research psychologists demonstrating the causal link between violent video games and harmful effects on children)….

The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie. Respondent lied at a public meeting…. Once the lie was made public, he was ridiculed online, his actions were reported in the press, and a fellow board member called for his resignation…. Indeed, the outrage and contempt expressed for

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respondent's lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose….

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. See *Whitney v. California* (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence")…. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so….

Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.

In addition, when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list Congressional Medal of Honor winners. Were a database accessible through the Internet, it would be easy to verify and expose false claims….

The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace…. The Stolen Valor Act infringes upon speech protected by the First Amendment.

The judgment of the Court of Appeals is affirmed.

**Justice Breyer, with whom Justice Kagan joins, concurring in the judgment.**

… I. In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.

Sometimes the Court has referred to this approach as "intermediate scrutiny," sometimes as "proportionality" review, sometimes as an examination of "fit," and sometimes it has avoided the application of any label at all.

Regardless of the label, some such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as "strict scrutiny" implies) nor near-automatic approval (as is implicit in "rational basis" review)…. [I]n this case, the Court's term "intermediate scrutiny" describes what I think we should do.

As the dissent points out, "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." Laws restricting false statements about philosophy, religion, history, the social sciences,

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the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny. But this case does not involve such a law. The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas….

II-A. … I would read the statute favorably to the Government as criminalizing only false factual statements made with knowledge of their falsity and with the intent that they be taken as true….

I must concede, as the Government points out, that this Court has frequently said or implied that false factual statements enjoy little First Amendment protection.

But these judicial statements cannot be read to mean "no protection at all." False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth. *See, e.g.*, 638 F. 3d 666, 673–675 (9th Cir. 2011) (Kozinski, J., concurring in denial of rehearing en banc) (providing numerous examples); *New York Times Co. v. Sullivan* (1964) ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error'" (quoting J. Mill, On Liberty 15 (Blackwell ed. 1947))).

Moreover, as the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby "chilling" a kind of speech that lies at the First Amendment's heart….

Further, the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively, say by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims.

I also must concede that many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful. Those prohibitions, however, tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm.

Fraud statutes, for example, typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury….

Perjury statutes…[s]tatutes prohibiting false claims of terrorist attacks…[s]tatutes forbidding impersonation of a public official…[and] [s]tatutes prohibiting trademark infringement present, perhaps, the closest analogy to the present statute. Trademarks identify the source of a good; and infringement causes harm by causing confusion among potential customers…. Similarly, a false

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claim of possession of a medal or other honor creates confusion about who is entitled to wear it, thus diluting its value to those who have earned it, to their families, and to their country. But trademark statutes are focused upon commercial and promotional activities that are likely to dilute the value of a mark. Indeed, they typically require a showing of likely confusion, a showing that tends to assure that the feared harm will in fact take place.

While this list is not exhaustive, it is sufficient to show that few statutes, if any, simply prohibit without limitation the telling of a lie, even a lie about one particular matter. Instead, in virtually all these instances limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur. The limitations help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.

The statute before us lacks any such limiting features. It may be construed to prohibit only knowing and intentional acts of deception about readily verifiable facts within the personal knowledge of the speaker, thus reducing the risk that valuable speech is chilled. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm. As written, it applies in family, social, or other private contexts, where lies will often cause little harm. It also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high. Further, given the potential haziness of individual memory along with the large number of military awards covered (ranging from medals for rifle marksmanship to the Congressional Medal of Honor), there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable. And so the prohibition may be applied where it should not be applied, for example, to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like. These considerations lead me to believe that the statute as written risks significant First Amendment harm.

II-B. Like both the plurality and the dissent, I believe the statute nonetheless has substantial justification. It seeks to protect the interests of those who have sacrificed their health and life for their country. The statute serves this interest by seeking to preserve intact the country's recognition of that sacrifice in the form of military honors. To permit those who have not earned those honors to claim otherwise dilutes the value of the awards. Indeed, the Nation cannot fully honor those who have sacrificed so much for their country's honor unless those who claim to have received its military awards tell the truth. Thus, the statute risks harming protected interests but only in order to achieve a substantial countervailing objective.

II-C. We must therefore ask whether it is possible substantially to achieve the Government's objective in less burdensome ways. In my view, the answer to this question is "yes." Some potential First Amendment threats can be alleviated by interpreting the statute to require knowledge of falsity, etc. But other First Amendment risks, primarily risks flowing from breadth of coverage, remain. As is indicated by the limitations on the scope of the many other kinds of statutes regulating false factual speech, it should be possible significantly to diminish or eliminate these remaining risks by enacting a similar but more finely tailored statute. For example, not all military awards are alike. Congress might determine that some warrant greater protection than others. And a more finely tailored statute might, as other kinds of statutes prohibiting false factual statements have done, insist upon a showing that the false statement

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caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm.

I recognize that in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve. In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas. Thus, the statute may have to be significantly narrowed in its applications. Some lower courts have upheld the constitutionality of roughly comparable but narrowly tailored statutes in political contexts. *See, e.g., United We Stand America, Inc. v. United We Stand, America New York, Inc.*, (2d Cir. 1997) (upholding against First Amendment challenge application of Lanham Act to a political organization); *Treasurer of the Committee to Elect Gerald D. Lostracco v. Fox* (Mich. App. Ct. 1986) (upholding under First Amendment statute prohibiting campaign material falsely claiming that one is an incumbent). Without expressing any view on the validity of those cases, I would also note, like the plurality, that in this area more accurate information will normally counteract the lie. And an accurate, publicly available register of military awards, easily obtainable by political opponents, may well adequately protect the integrity of an award against those who would falsely claim to have earned it. And so it is likely that a more narrowly tailored statute combined with such information-disseminating devices will effectively serve Congress' end.

The Government has provided no convincing explanation as to why a more finely tailored statute would not work….

**Justice Alito, with whom Justice Scalia and Justice Thomas join, dissenting.**

Only the bravest of the brave are awarded the Congressional Medal of Honor, but the Court today holds that every American has a constitutional right to claim to have received this singular award. The Court strikes down the Stolen Valor Act of 2005, which was enacted to stem an epidemic of false claims about military decorations….

By holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest. I would adhere to that principle and would thus uphold the constitutionality of this valuable law.

I. … The Stolen Valor Act follows a long tradition of efforts to protect our country's system of military honors. When George Washington, as the commander of the Continental Army, created the very first "honorary badges of distinction" for service in our country's military, he established a rigorous system to ensure that these awards would be received and worn by only the truly deserving….

As Congress recognized, the lies proscribed by the Stolen Valor Act inflict substantial harm. In many instances, the harm is tangible in nature: Individuals often falsely represent themselves as award recipients in order to obtain financial or other material rewards, such as lucrative contracts and government benefits….

It is well recognized in trademark law that the proliferation of cheap imitations of luxury goods blurs the "'signal' given out by the purchasers of the originals." In much the same way, the proliferation of false claims about military awards blurs the signal given out by the actual

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awards by making them seem more common than they really are, and this diluting effect harms the military by hampering its efforts to foster morale and esprit de corps….

Both the plurality and Justice Breyer argue that Congress could have preserved the integrity of military honors by means other than a criminal prohibition, but Congress had ample reason to believe that alternative approaches would not be adequate. The chief alternative that is recommended is the compilation and release of a comprehensive list or database of actual medal recipients. If the public could readily access such a resource, it is argued, imposters would be quickly and easily exposed, and the proliferation of lies about military honors would come to an end….

The Department of Defense has explained that the most that it can do is to create a database of recipients of certain top military honors awarded since 2001….

The plurality and the concurrence also suggest that Congress could protect the system of military honors by enacting a narrower statute. The plurality recommends a law that would apply only to lies that are intended to "secure moneys or other valuable considerations." In a similar vein, the concurrence comments that "a more finely tailored statute might…insist upon a showing that the false statement caused specific harm." But much damage is caused, both to real award recipients and to the system of military honors, by false statements that are not linked to any financial or other tangible reward….

II-A. Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value.

Consistent with this recognition, many kinds of false factual statements have long been proscribed without "'rais[ing] any Constitutional problem.'" *United States v. Stevens* (2010) (quoting *Chaplinsky v. New Hampshire* (1942)). Laws prohibiting fraud, perjury, and defamation, for example, were in existence when the First Amendment was adopted, and their constitutionality is now beyond question.

We have also described as falling outside the First Amendment's protective shield certain false factual statements that were neither illegal nor tortious at the time of the Amendment's adoption. The right to freedom of speech has been held to permit recovery for the intentional infliction of emotional distress by means of a false statement, see *Falwell*, even though that tort did not enter our law until the late 19th century. And in *Time, Inc. v. Hill* (1967), the Court concluded that the free speech right allows recovery for the even more modern tort of false-light invasion of privacy.

In line with these…it has long been assumed that the First Amendment is not offended by prominent criminal statutes with no close common-law analog…. 18 U. S. C. §1001…makes it a crime to "knowingly and willfully" make any "materially false, fictitious, or fraudulent statement or representation" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." Unlike perjury, §1001 is not limited to statements made under oath or before an official government tribunal. Nor does it require any showing of "pecuniary or property loss to the government."…

Still other statutes make it a crime to falsely represent that one is speaking on behalf of, or with the approval of, the Federal Government….

These examples amply demonstrate that false statements of fact merit no First Amendment protection in their own right. It is true, as Justice Breyer notes, that many in our society either

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approve or condone certain discrete categories of false statements, including false statements made to prevent harm to innocent victims and so-called "white lies." But respondent's false claim to have received the Medal of Honor did not fall into any of these categories. His lie did not "prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence."…

The lies covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection unless their prohibition would chill other expression that falls within the Amendment's scope….

II-B. While we have repeatedly endorsed the principle that false statements of fact do not merit First Amendment protection for their own sake, we have recognized that it is sometimes necessary to "exten[d] a measure of strategic protection" to these statements in order to ensure sufficient "'breathing space'" for protected speech. Thus, in order to prevent the chilling of truthful speech on matters of public concern, we have held that liability for the defamation of a public official or figure requires proof that defamatory statements were made with knowledge or reckless disregard of their falsity. *New York Times Co. v. Sullivan* (1964)…. [W]e have imposed "[e]xacting proof requirements" in other contexts as well when necessary to ensure that truthful speech is not chilled. *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.* (2003) (complainant in a fraud action must show that the defendant made a knowingly false statement of material fact with the intent to mislead the listener and that he succeeded in doing so). All of these proof requirements inevitably have the effect of bringing some false factual statements within the protection of the First Amendment, but this is justified in order to prevent the chilling of other, valuable speech.

These examples by no means exhaust the circumstances in which false factual statements enjoy a degree of instrumental constitutional protection…. [T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat….

Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal. Today's accepted wisdom sometimes turns out to be mistaken….

Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. Statements about history illustrate this point. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation?...

In stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters, the Stolen Valor Act presents no risk at all that valuable speech will be suppressed. The speech punished by the Act is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect….

II-C. Neither of the two opinions endorsed by Justices in the majority claims that the false statements covered by the Stolen Valor Act possess either intrinsic or instrumental value. Instead, those opinions appear to be based on the distinct concern that the Act suffers from

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overbreadth. But to strike down a statute on the basis that it is overbroad, it is necessary to show that the statute's "overbreadth [is] *substantial*, not only in an absolute sense, but also relative to [its] plainly legitimate sweep"….

The plurality additionally worries that a decision sustaining the Stolen Valor Act might prompt Congress and the state legislatures to enact laws criminalizing lies…. The plurality apparently fears that we will see laws making it a crime to lie about civilian awards such as college degrees or certificates of achievement in the arts and sports….

The problem that the plurality foresees — that legislative bodies will enact unnecessary and overly intrusive criminal laws — applies regardless of whether the laws in question involve speech or nonexpressive conduct. If there is a problem with, let us say, a law making it a criminal offense to falsely claim to have been a high school valedictorian, the problem is not the suppression of speech but the misuse of the criminal law, which should be reserved for conduct that inflicts or threatens truly serious societal harm. The objection to this hypothetical law would be the same as the objection to a law making it a crime to eat potato chips during the graduation ceremony at which the high school valedictorian is recognized. The safeguard against such laws is democracy, not the First Amendment. Not every foolish law is unconstitutional….

The Stolen Valor Act is a narrow law enacted to address an important problem, and it presents no threat to freedom of expression. I would sustain the constitutionality of the Act, and I therefore respectfully dissent.

**After *United States v. Alvarez*: Note**

Before *United States v. Alvarez* was decided, the Department of Defense declared that an online database listing valor award recipients would be useless because federal law prohibits posting identifying information like dates of birth and social security numbers. See "Database of Veterans' Medals Cited as Alternative to 'Stolen Valor,'" *N.Y. Times*, June 28, 2012. One month after the decision, however, Secretary of Defense Leon Panetta announced the launch of a valor award database, which is intended to "raise public awareness about our nation's heroes and help deter those who might falsely claim military honors." Spoken Statement on DOD-VA Collaboration before the House Armed Services and Veterans Affairs Committees, Washington, D.C., July 25, 2012. The database will eventually contain the names of all those who have been awarded the Congressional Medal of Honor, Silver Star, and Service Crosses since September 11, 2001. It can be accessed at http://valor.defense.gov.

## Part II. Section XV. The *R.A.V.* Exceptions for Unprotected Speech (Hate Speech and True Threats)

[*Insert on page 1306 after Virginia v. Black and before "Understanding R.A.V.: Three Hypotheticals]*

***Elonis v. United States* (2015): Note**

In *Elonis v. United States* (2015), the first case dealing with speech on social media to reach the Supreme Court, the Court voted 8 to 1 to overturn Anthony Douglas Elonis' conviction for making threats on the website Facebook. Elonis, posting under the pseudonym "Tone Dougie," began posting threatening "rap lyrics" on his Facebook page after his wife of seven

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years left him. The lyrics contained "graphically violent language and imagery," and although Elonis intermittently posted disclaimers that his lyrics were "fictitious," his wife eventually took out a protective order against him. While Elonis directed many of the lyrics towards his wife, he also posted comments about other people and locations, including an elementary school:

> That's it, I've had enough
>
> I'm checking out and making a name for myself
>
> Enough elementary schools in a ten mile radius
>
> To initiate the most heinous school shooting ever imagined
>
> And hell hath no fury like a crazy man in a Kindergarten class
>
> The only question is…which one?

Elonis was indicted for making threats to injure his wife, patrons and employees of a park, the police, a kindergarten class, and a federal agent. The statute he was charged under, 18 U.S.C. § 875(c), did not specify the mental state required to be found guilty. At trial, Elonis argued that he was emulating well-known rappers and asserted that he could not be convicted if he never intended the lyrics to be threatening. Prosecutors argued that it was enough to determine how a reasonable person would view his posts. Elonis was convicted, and his conviction was upheld by the Third Circuit, which held that the prosecution needed only to show that Elonis intended to make the communication and that a reasonable person would find the comments threatening, not that he intended the communication to be a threat.

Elonis appealed to the Supreme Court, arguing that the jury should have been required to find that he intended the posted lyrics to be threatening. Writing for the majority, Chief Justice Roberts explained that when criminal statutes are silent on a required mental state, a court must "read into the statute, only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." The fact that Elonis' conviction "was premised solely on how his posts would be understood by a reasonable person," Roberts wrote, "is inconsistent with the conventional requirement for criminal conduct—*awareness* of some wrongdoing." Concluding its argument, the majority stated:

> Having liability turn on whether a reasonable person regards the communication as a threat—regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to negligence, and we have long been reluctant to infer that a negligence standard was intended in criminal statutes.

Having resolved the case on statutory grounds, the Court declined to delve into any First Amendment arguments on the case.

Justice Alito, concurring in part and dissenting in part, argued that the Court failed to provide clarity as to what mental state was sufficient for conviction, instead saying only that

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negligence was insufficient. In his opinion, Alito argued that recklessness should be enough, and that the case should be remanded for the Third Circuit to consider if Elonis' conviction could be upheld under a recklessness standard. Arguing that "context matters," Justice Alito stated he believed Elonis' postings would not be protected by the First Amendment:

> Taken in context, lyrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person. Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously. To hold otherwise would grant a license to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody, or something similar.

Justice Thomas, in his dissent, argued that Elonis' conviction should be upheld:

> To know the facts that make his conduct illegal under § 875(c) a defendant must know that he transmitted a communication in interstate or foreign commerce that contained a threat. Knowing that the communication contains a "threat"– a serious expression of an intention to engage in unlawful physical violence–does not, however, require knowing that a jury will conclude that the communication contains a threat as a matter of law.

Thomas also noted that he did not believe that Elonis' comments would be protected under the First Amendment; he saw "no reason why we should give threats pride of place among unprotected speech." Further, he argued, abandoning the general intent standard for threats created an "arbitrary distinction between threats and other forms of unprotected speech":

> Had Elonis mailed obscene materials to his wife and a kindergarten class, he could have been prosecuted irrespective of whether he intended to offend those recipients or recklessly disregarded that possibility. Yet when he threatened to kill his wife and a kindergarten class, his intent to terrify those recipients (or reckless disregard of that risk) suddenly becomes highly relevant. That need not—and should not—be the case.

**Part II. Section XVIII. Commercial Speech**

[*Insert on page 1473 after the* Liquormart *Note.*]

***Sorrell v. IMS Health, Inc.* (2011): Note**

The Court's most recent commercial speech case is *Sorrell v. IMS Health, Inc.* (2011). Justice Kennedy delivered the opinion for the majority, joined by Justices Roberts (C.J.), Scalia, Thomas, Alito, and Sotomayor. In *Sorrell*, the Court nullified a Vermont statute that prevented (without the physician's consent) pharmacies from providing drug manufacturers and data mining companies with pharmacy records that revealed the drug prescribing practices of physicians. The sale and disclosure of such records to these businesses helped drug companies make more effective sales pitches to physicians.

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The Court held that the statute violated the First Amendment because it imposed content and viewpoint restrictions on the sale, disclosure, and use of prescriber-identifying information. In his opinion for the Court, Justice Kennedy wrote that Vermont "burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views."

The Court found that the statute was more than merely a commercial regulation because its imposition on speech was more than incidental.

Vermont contended that the statute lowered medical costs, promoted public health, and protected medical privacy. But the Court found that Vermont had failed even to carry its burden under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n* (1980) of demonstrating that the statute directly advanced a substantial governmental interest and that the measure was drawn to achieve that interest. The Court explained that the Vermont statute permitted pharmacies to share prescriber-identifying information with anyone for any reason except marketing. Vermont contended that other statutes limited such sharing. The Court nevertheless held that both the wording of the statute and its legislative history indicate the statute's "purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs."

Since the prescription records were not false and misleading, the majority held that Vermont could not impose restrictions on the dissemination of information to a limited class of persons (drug manufacturers) whose speech the state sought to suppress. The majority said that the state could have found other ways, including its own public information campaign, to discourage doctors from prescribing brand-name drugs rather than lower-cost alternatives. So, the Court explained, Vermont "may not burden the speech of others in order to tilt public debate in a preferred direction."

In reviewing the statute, the Court applied what it described as a "heightened judicial scrutiny." This type of heightened scrutiny was used because the statute "burdens disfavored speech by disfavored speakers." Although the Court did not explain the extent to which this standard might exceed the intermediate scrutiny with which the Court has reviewed restrictions on commercial speech, it suggested that commercial speech may under some circumstances warrant the same protection as political speech. Quoting its first attorney advertising decision, *Bates v. State Bar of Arizona* (1976), the Court declared that a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." The Court observed that this "reality has great relevance in the fields of medicine and public health, where information can save lives."

The decision is consistent with the high level of protection that the Court accorded to corporate speech in *Citizens United v. Federal Elections Commission* (2010).

In a dissent joined by Justices Ginsburg and Kagan, Justice Breyer said that the statute was constitutional under an intermediate standard of review because it threatened "only modest

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harm to commercial speech." Unimpressed with the Court's emphasis that the statute applied only to marketing of information, Breyer pointed out that the record contained "no evidence that prescriber-identifying information is widely disseminated." Breyer also found that the statute served "substantial" state interests satisfying the *Central Hudson* test. That was so because it helped to protect health and privacy and reduce consumer costs.

In particular, Breyer found that drug sales personnel did not need information about the prescribing practices of individual physicians in order to focus sales discussions on safety, effectiveness, and cost. "Shaping a detailing message based on an individual doctor's prior prescription habits" might help a drug company sell more of its drugs. "But it does so by diverting attention from scientific research about a drug's safety and effectiveness, as well as its cost." The dissent emphasized the substantial legislative record of testimony by experts in support of the regulation: "Use of data mining helps drug companies 'to cover up information that is not in the best light of their drug….' " A former drug detailer testified that prescriber identified data is the " 'greatest tool in planning our approach to manipulating doctors.' " Another witness described data mining practices as "secret [since the doctor is not informed and does not consent] and manipulative activities by the marketers." Another witness cited studies that physician-specific detailing "will lead to more prescriptions of [much more expensive and often no more effective] brand-name agents" driving up health care costs.

Pointing out that the Court's "heightened scrutiny" lacked support in other commercial speech cases, Breyer declared that "until today, this Court has *never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate."

Breyer warned against applying "a strict First Amendment standard virtually as a matter of course when a court reviews ordinary economic regulatory programs" that have a "modest" impact on speech. "Since ordinary regulatory programs can affect [commercial speech] in myriad ways, to apply a 'heightened' First Amendment standard of review whenever such a program burdens speech would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives." "If the Court means to create constitutional barriers to regulatory rules that might affect the *content* of a commercial message, it has embarked upon an unprecedented task—a task that threatens significant judicial interference with widely accepted regulatory activity" and which could open "a Pandora's Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message." Breyer concluded that the "Court reaches its conclusion through the use of important First Amendment categories—'content-based,' 'speaker-based,' and 'neutral,'—but without taking full account of the regulatory context, the nature of the speech effects, the values these First Amendment categories seek to promote, and prior precedent." Breyer expressed concern that the Court's decision could re-awaken "*Lochner*'s pre-New Deal threat of substituting judicial for democratic decision-making where ordinary economic regulation is at issue."

**Part II. Section II. Regulating Streets, Parks and Sidewalks**

[*Insert on page 1497 after* U.S. v. Kokinda.]

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### *McCullen v. Coakley* (2014): Note

In *McCullen v. Coakley* (2014), the Supreme Court invalidated a Massachusetts statute that prohibited members of the public from entering or remaining on public property within 35 feet of facilities in which abortions were offered or performed. The statute, which was enacted in response to conflicts arising out of protests at abortion clinics, exempted clients and employees of the clinic, law enforcement officers, and persons who used the public spaces solely for the purpose of reaching a destination other than the facility.

Even though the statute established buffer zones only at abortion clinics, the Court found that the statute was not content-based because violations of the statute were based on the location of speech rather than on its content, and because the statute was designed to protect public safety and patient access to the facilities rather than to regulate the content of speech. The Court also found no viewpoint discrimination. Accordingly, the Court held that it did not need to evaluate the statute under strict scrutiny.

The Court found that the statute was unconstitutional even as a "time, place or manner" regulation because it was not "narrowly tailored to serve a significant governmental interest." Although the Court found that the statute served the state's interest of protecting public safety and access to the clinics, the Court determined that the statute imposed serious burdens on speech by depriving opponents of the statute of opportunities to personally converse with clients of the clinic and to distribute literature to them. While the statute did not prevent shouting or display of signs from outside the buffer zone, the Court explained that the petitioners in the case sought not to protest abortion but rather "to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations…It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm." The Court regarded this a significant interference with free speech because "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse," *citing Meyer v. Grant* (1988).

The Court also determined that the buffer zones burdened substantially more speech than was necessary to achieve the state's interests insofar as the state had not seriously explored less intrusive alternatives. The Court pointed out that the statute itself prohibited deliberate obstruction of clinic entrances and that the state's interests likewise could be served at least in part through enforcement of local ordinances regarding traffic, trespass, and breaches of the peace. Moreover, the Court found that the state could have enacted a law authorizing police to disperse persons who blocked clinic entrances and could have initiated injunctions and individual prosecutions for disorderly conduct.

The Court observed that "[i]t is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can

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always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks."

An opinion by Justice Scalia, concurring in the judgment only and joined by Justices Kennedy and Thomas, contended that the statute was unconstitutional because it was content-based and that the state had failed to use the least restrictive means to further a compelling state interest under the strict scrutiny test. The concurring opinion complained that the Court's opinion "carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion." A separate opinion by Justice Alito, concurring in the judgment only, contended that the statute discriminated on the basis of viewpoint as well as content.

**Part III. Section VI. Speech in Limited Environments.**
[*Insert on page 1546 after* Morse.]

**More on Limited Environments: Note**

The Supreme Court relaxes constitutional safeguards in certain limited environments, and often does so dramatically. We have seen this process at work, for example, in the case of speech in schools, where student speech that would be fully protected in the public domain (e.g., "Bong Hits 4 Jesus") may be sanctioned at school. Similar results occur in other doctrinal areas—such as Fourth Amendment guarantees and in other places such as prisons, jails, and in the military.

Prisons and jails are a very restricted limited environment. In *Florence v. Board of Chosen Freeholders of County of Burlington* (2012), for example, the Court narrowly affirmed the theory that county jails may perform routine strip searches on all inmates, regardless of whether they are suspected of possessing contraband, without violating the Fourth Amendment.

In 1998, petitioner Albert Florence pled guilty to various criminal charges and was sentenced to pay a fine in monthly installments. Five years later, a warrant was issued for his arrest after he fell behind in his payments and failed to appear at a hearing. However, he quickly paid the outstanding balance and was not arrested. In 2005, Florence was pulled over by a state trooper as he was driving through Burlington County, New Jersey. Due to an unexplained error, the old arrest warrant popped up in a statewide computer database when the trooper ran Florence's information. The trooper arrested Florence on the strength of the outstanding warrant.

Florence was taken to a county detention center where he was ordered to "strip down, open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals." Six days later, he was transferred to larger county jail. He was then subjected to another strip-search, during which he was allegedly "required to lift his genitals, turn around, and cough in a squatting position." Albert Florence was finally released the following day, when the charges against him were dismissed.

Florence sued the county government and other defendants under 42 U.S.C. § 1983. He argued that routine strip searches of inmates arrested for minor offenses violate the Fourth Amendment prohibition on unreasonable search and seizure. In response, the governmental defendants maintained that the searches were reasonably necessary to maintain institutional security by checking arrestees for scars, marks, gang tattoos, and contraband. The Supreme

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Court granted certiorari to resolve a split in the Courts of Appeals as to whether jails may conduct strip searches of all arrestees entering the general jail population.

The five-justice majority upheld, against the constitutional challenge, the jails' policy of strip searching all incoming arrestees, regardless of level of offense, behavior, or criminal record. After noting that "a regulation impinging on an inmate's constitutional rights must be upheld if it is reasonably related to legitimate penological interests," the Court found that correctional officials had a significant interest in checking incoming inmates for medical conditions and gang affiliation, and in keeping drugs, weapons, and other contraband out of their facilities. The Court rejected the argument that people jailed for minor offenses should be exempt from search because "the seriousness of the offense is a poor predictor of who has contraband." Even if this were not the case, the Court found that "[i]t may be difficult, as a practical matter, to classify inmates by their current and prior offenses." The Court concluded that the Fourth Amendment was satisfied because "the search procedures … struck a reasonable balance between inmate privacy and the needs of the institutions."

Justice Breyer, writing for the four-justice dissent, said

> Such a search of an individual arrested for a minor offense that does not involve drugs or violence … is an "unreasonable search" forbidden by the Fourth Amendment, unless prison authorities have reasonable suspicion to believe that the individual possesses drugs or other contraband….
>
> I have found no convincing reason indicating that, in the absence of reasonable suspicion, involuntary strip searches of those arrested for minor offenses are necessary in order to further the penal interests mentioned….

In support of his conclusion, Justice Breyer cited a study showing that full-body strip searches rarely turn up contraband that would not have been otherwise discovered through less invasive measures. He also noted that laws in at least 10 states forbid "suspicionless" strip searches in any setting, and that many correctional facilities around the country do require reasonable suspicion before searching inmates as a matter of general policy. Finally, Justice Breyer noted how one might be moved into a limited environment and shorn of Fourth Amendment rights. Breyer cited *Atwater v. City of Lago Vista* (2001), the case of a mother (with her children) who was stopped for not wearing a seat belt and arrested and jailed. By a five to four vote the Court upheld her incarceration on these facts. The majority found that Atwater's arrest and booking were "merely gratuitous humiliations imposed by a police officer … exercising extremely poor judgment" but were nevertheless "not so extraordinary as to violate the Fourth Amendment."

The *Florence* majority identifies county jails as "limited environments" where Fourth Amendment rights may be restricted when reasonably necessary to advance legitimate interests, such as institutional security. Other Supreme Court decisions involving the constitutional rights of inmates have applied similar reasoning. For example, in *Bell v. Wolfish* (1979), the Court held that a federal prison could conduct routine body cavity searches of pretrial detainees without violating the Fourth Amendment. In doing so, the Court rejected the argument that prison officials must make a showing of "compelling necessity" before restricting the constitutional rights of the inmates in their charge. Instead, the Fourth Amendment requires only "a balancing of the need for this particular search against the invasion of personal rights that the search entails." Under this standard, the Court found that the legitimate security interests of the prison

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justified invading the privacy of the inmates through body cavity searches. The Court considered the low rate of contraband actually discovered during these searches as "a testament to the effectiveness of this search technique as a deterrent," rather than as evidence that inmates were uninterested in smuggling drugs and weapons if given the chance.

Despite constitutional concerns, the limited environment theory has also been extended to cover searches in public schools. In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002), the Supreme Court upheld a high school's policy of requiring all students to submit to a drug test before participating in extracurricular activities, regardless of whether the student was actually suspected of using drugs. The Court recognized that drug tests by school officials implicate the Fourth Amendment, but found that the suspicionless testing policy in question was a "reasonable means of furthering the School District's important interest in preventing and deterring drug use among its school children."

*Safford Unified School District #1 v. Redding* (2009) involved the strip search of a 13-year-old female middle school student who was accused of distributing prescription-strength pain medication to other students. Two female school employees searched the student's clothing for pills, during which her breasts and pelvic area were exposed. The child's mother brought a §1983 action against the school district and the school officials involved alleging that the strip search violated her Fourth Amendment rights. The Court held that school officials may search students provided that the search was "reasonably related in scope to the circumstances which justified the interference in the first place." Using this test, the Court found that the school employees had a reasonable suspicion that the student was distributing contraband drugs, but that "the content of the suspicion failed to match the degree of intrusion." The search was therefore held to be unreasonable and a violation of the Fourth Amendment.

The Court has reached similar results in due process and liberty claims under the 5th or 14th Amendments. In *Washington v. Harper* (1990), the Court approved Washington's state policy of administering antipsychotic medication to a non-compliant inmate on the recommendation of a psychiatrist, which was affirmed at an administrative (but not a judicial) hearing. Walter Harper, who been alternately incarcerated and hospitalized for over a decade, argued that forcing him to take medication without a judicial finding of mental incompetency violated the due process guarantee of the Fourteenth Amendment. The Court recognized his liberty interest in staying drug-free, but nevertheless upheld the state's policy as a "reasonably related to legitimate penological interests." The Court held that "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interests." After weighing three factors – the importance of the state's interest in medicating psychotic prisoners, the consequences that non-medication would have for guards and other inmates, and the absence of reasonable alternatives – the Court determined that the disputed policy satisfied this standard and that no judicial hearing was required "as a prerequisite for the involuntary treatment of prisoners."

The limited environment theory has also found judicial approval outside of the correctional realm. In *United States v. Stanley* (1987), a master sergeant in the Army volunteered for a "chemical warfare testing program"; in reality, the purpose of the program was to test the effects of lysergic acid diethylamide (LSD) on humans by secretly administering it to servicemen. After learning the true nature of the experiment (no less than seventeen years after it

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had been conducted), James B. Stanley filed a *Bivens* action – which allows citizens to sue federal government officials for constitutional violations. He sued certain unknown federal officers involved. He alleged that the hallucinations, incoherence, and violent behavior he suffered as a result of his unconsented LSD use had led to his discharge from the army and the dissolution of his marriage. However, the Supreme Court denied relief, holding that "no *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to [military] service." Thus, a citizen's ability to protect his basic constitutional rights through a civil action is curtailed in the limited environment of the armed forces.

Like the prison cases, however, the limited environment theory in *Stanley* met with strong resistance from a minority of the Court. In an opinion concurring in part and dissenting in part, Justice Brennan noted that the Nuremberg Trials of 1947 – during which Nazi physicians were prosecuted for experimenting on human subjects – "deeply impressed upon the world that experimentation with unknowing human subjects is morally and legally unacceptable." He then argued that "absent a showing that military discipline is concretely (not abstractly) implicated … its talismanic invocation does not counsel hesitation in the face of an intentional constitutional tort…."

**Part III. Section VII. Government Speech**

[*Insert on page 1549 after* Pleasant Grove City, Utah v. Summum]

***Walker, Chairman, Texas Department of Motor Vehicles Board v. Texas Division, Sons of Confederate Veterans* (2015): Note**

For a fee and subject to state approval, the State of Texas allows motorists to request and receive a specialty license plate issued by the state. The design and the plate remain the state's property. The Texas Sons of Confederate Veterans requested a specialty plate that included an image of the Confederate flag. The Texas Motor Vehicles Board rejected the design, and specifically the Confederate Flag portion, because public comments showed that many members of the public found the design offensive and because the board found the comments reasonable. Presumably, Texas did not want its license plates associated with *that* flag.

The government often speaks, and government speech is not subject to limitations that are applied when the government regulates private speech. In its own speech, government can decide what subjects to address and what viewpoints to express.

In public forums (largely limited to streets, sidewalks, and parks) private persons have a right to free speech, and, in general, the government may not punish the speaker because of the subject chosen or viewpoints expressed. In the public forum, subject to limited exceptions, government may not declare subjects or viewpoints out of bounds. Even on government property that is not a public forum, but where private speech is allowed to some degree, the government may not (outside of certain limited environments) generally ban speech or symbolic expression because of viewpoint.

When, during the Civil Rights era of the 1960s, the State of South Carolina decided to fly the Confederate Battle Flag from the state capitol and later on the capital grounds, flying the flag

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was government speech. Likewise, when the state decided to remove the flag from the state capitol, that too was symbolic government expression.

If a private person decided to fly the Confederate flag at his home or to carry it in a parade on a public street or sidewalk, she or he could not be prohibited or punished because of the viewpoint expressed. But complex question arise regarding private speech on government property that is not a traditional public forum, and whether speech on government property is "government speech" or "private speech.".

Faced with how to characterize the specialty license plates, the Court divided five to four. Justice Breyer, writing for the majority, found the specialty plate was government speech. First, the Court noted that when license plates went beyond identifying numbers and letters and state names, they had long communicated state messages. Second, the Court wrote that license plate designs are often closely identified in the public mind with the State. The Court felt that the person displaying the message likely intends to convey to the public that the state has endorsed the message. Third, Texas maintains control over the message by requiring prior approval of messages on specialty license plates. For these reasons, the Court concluded that the specialty license plates are sufficiently similar to the monuments in *Summun* to call for the same result. (In *Summun*, the Court upheld a town's right to reject a donated monument for a state park while accepting other donated monuments.)

The majority held that the license plate was not a traditional public forum, because unlike streets and parks, it had no historic lineage of being open to the public for expression. The Court rejected the claim that the license plate was a designated or limited forum—a space that would not be any sort of public forum unless the government intended to designate it as one, either for general or limited purposes. The majority further noted that a limited or designated forum is not created by inaction or because the government permits limited discourse. To decide if the forum is designated or limited, the Court said it looks to the policy and practice of the government, the nature of the property, and its compatibility with expressive activity. Texas required citizens to get permission to create the desired plate; it owned the plate and the design for which it required state approval, and license plates had been traditionally used for government speech.

Nor did the Court find the license plate a nonpublic forum—where the government is acting as a proprietor and managing the property for its internal operations. Texas was not simply managing property, it was engaging in expressive conduct. So the speech was government speech and rules limiting the way government can regulate private speech did not apply. The majority noted:

> [J]ust as Texas cannot require SCV [the Sons of Confederate Veterans] to convey "the State's ideological message," [citing *Wooley*, a no-compelled-speech case holding a motorist could cover up New Hampshire's "Live free or Die" slogan on his license plate] SVC cannot force Texas to include a Confederate battle flag on its specialty license plates.

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Justices Alito, Roberts, Scalia, and Kennedy dissented. According to the dissenters, when Texas "began to allow private entities to secure plates conveying their own messages, Texas crossed the line and opened a limited public forum." The state could require specialty license plates to be used according to rules the state sets and could require that the plates not be incompatible with the purposes of the forum, but the state could not discriminate based on viewpoint. According to the dissent:

> Texas has space available on millions of little mobile billboards. And Texas, in effect, sells that space to those who wish to use it to express a personal message—provided only that the message does not express a viewpoint the State finds unacceptable. That is not government speech; it is regulation of private speech.

Since, for the dissenters, the speech on the license plate was private speech, not government speech, when Texas rejected the SCV plate because members of the public found it offensive, Texas was engaging in unconstitutional viewpoint discrimination.

**Part IV. Section III. Independent Expenditures: Use of Union and For-Profit Corporate Treasury Funds to Support or Oppose Candidates**

[*Insert on page 1603 after* Citizens United v. Federal Election Commission *(2010).*]

***Nevada Comm'n on Ethics v. Carrigan* (2011): Note**

Nevada's Ethics in Government Law required public officials to recuse themselves from " 'vot[ing] upon or advocat[ing] the passage or failure of…a matter with respect to which' " their judgment may be " 'materially affected by…[their] commitment' " to private interests. The Nevada Commission on Ethics censured Carrigan, an elected local official, for failure to recuse himself from a vote to approve a hotel/casino project proposed by a company which paid Carrigan's long-time friend and campaign manager as a consultant. Carrigan argued that this violated his First Amendment right to vote. The Nevada Supreme Court held that voting was protected speech and that the Nevada ethics law was unconstitutionally overbroad. In *Nevada Commission on Ethics v. Carrigan* (2011), the Court granted certiorari to "consider whether legislators have a personal, First Amendment right to vote on any given matter."

Justice Scalia wrote for the majority, joined by Justices Roberts (C.J.), Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan. The Court held that the Nevada ethics law was not unconstitutionally overbroad.

The Court first looked at historical evidence that recusal rules have not been "thought to violate 'the freedom of speech' to which the First Amendment refers." Legislative recusal rules "have been commonplace for over 200 years," since before the enactment of the First Amendment. The Court noted that "[m]embers of the [U.S.] House [of Representatives] would have been subject to [the first House's recusal rule] when they voted to submit the First Amendment for ratification; their failure to note any inconsistency between the two suggests that there was none."

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Additionally, " 'a universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional…' *Republican Party of Minn. v. White* (2002)." The Court found "the Nevada Supreme Court's belief that recusal rules violate legislators' First Amendment rights is also inconsistent with long-standing traditions in the States…. [A] number of States, by common-law rule, have long required recusal of public officials with a conflict."

Furthermore the Court distinguished a legislator's vote on a proposal from a citizen's protected First Amendment right to vote. Unlike a citizen's vote, the Court held that:

> a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it…. [T]he legislator casts his vote "as trustee for his constituents, not as a prerogative of personal power." (*Raines v. Byrd* (1997)). While "a voter's franchise is a personal right," "[t]he procedures for voting in legislative assemblies… pertain to legislators not as individuals but as political representatives executing the legislative process." *Coleman v. Miller* (1939).

Recognizing that "action conveys a symbolic meaning" at times (as was the case in *Texas v. Johnson* (1989)), the Court nevertheless held that a legislator's "act of voting symbolizes nothing. It discloses…that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, …[b]ut [it is not] an act of communication." "[T]he fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to convey his deeply held personal belief—does not transform action into First Amendment speech."

The Court also noted that "[i]f Carrigan was constitutionally excluded from voting, his 'exclusion from 'advocat[ing]' at the legislative session was a reasonable time, place and manner limitation. *See Clark v. Community for Creative Non-Violence* (1984)."

Justice Kennedy joined in the opinion, but also concurred. He discussed the concern that the Nevada statute "may well impose substantial burdens on what undoubtedly is speech…apart from an asserted right to engage in the act of casting [an official] vote." He wrote:

> speech takes place both in the election process and during the routine course of communications between and among legislators, candidates, citizens, groups active in the political process, the press, and the public at large. This speech and expression often finds powerful form in groups and associations with whom a legislator or candidate has long and close ties, ties made all the stronger by shared outlook and civic purpose.… The constitutionality of a law prohibiting a legislative or executive official from voting on matters advanced by or associated with a political supporter is therefore a most serious matter from the standpoint of the logical and inevitable burden on speech and association that preceded the vote.…

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Justice Alito concurred in part and concurred in the judgment. He disagreed with the Court's assessment that "restrictions upon legislators' voting are not restrictions upon legislators' speech." Justice Alito said "[v]oting has an expressive component in and of itself." He disagreed with the Court's assessment that a legislator's vote can be restricted because it is not speech. He concurred, however, with the Court's judgment because "legislative recusal rules were not regarded during the founding era as *impermissible* restrictions on freedom of speech."

### *American Tradition Partnership, Inc. v. Bullock* (2012): Note

In *American Tradition Partnership, Inc. v. Bullock*, a *per curium* decision, the U.S. Supreme Court held that the First Amendment, as interpreted in *Citizens United*, required the invalidation of a Montana statute providing that "a corporation may not make … an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party." In overturning a decision of the Montana Supreme Court upholding the statute, the Court stated that "Montana's arguments … were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."

Justice Breyer, in a dissent joined by Justices Ginsburg, Sotomayor, and Kagan, expressed disagreement with the Court's decision for the reasons expressed by Justice Stevens's dissent in *Citizen United* and argued that the Court should uphold the Montana law even under *Citizens United* because the Montana Supreme Court found "that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana."

Breyer explained that "given the history and political landscape in Montana, that court concluded that the State had a compelling interest in limiting independent expenditures by corporations." Breyer observed that "Montana's experience, like considerable experience elsewhere since *Citizens United*, casts grave doubts on the Court's supposition that independent expenditures do not corrupt or appear to do so."

Some commentators have contended that Montana should have argued that the lawsuit by a corporation challenging the Montana law was barred by the Eleventh Amendment. Do you think that this would have been a viable argument?

### *American Tradition Partnership*: Background

In *Western Tradition Partnership, Inc. v. Attorney General of State* (Mont. 2011), the Montana Supreme Court had upheld the anti-corruption statute at issue in *American Tradition Partnership*. The court found that the statute "cannot be understood outside the context of the time and place it was enacted, during the early twentieth century." The court used the Anaconda Mining Company and its parent company, Standard Oil, as an example of how mining corporations had historically corrupted state politics:

> [I]n 1903 Anaconda/Standard…closed down all its industrial and mining operations (but not the many newspapers it controlled), throwing 4/5 of the labor force of Montana out of work. Its price for sending its employees back to work was that the Governor call a special session of the Legislature to enact a measure that would allow Anaconda to avoid having to litigate in front of [judges who routinely decided cases in a competitor's favor]. The Governor and legislature capitulated….

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> After the Anaconda Company cleared itself of opposition…it controlled 90% of the press in the state and a majority of the legislature. By 1915 the company…clearly dominated the Montana economy and political order….

While *American Tradition Partnership* was pending, the U.S. Supreme Court issued a stay on enforcement of the century-old statute. Montana Governor Brian Schweitzer responded with op-ed in the New York Times in which he lamented the effects of this action:

> The ink wasn't even dry when corporate front groups started funneling lots of corporate cash into our legislative races….
>
> I've started receiving bills on my desk ghostwritten by…gold mining companies that want to overturn a state ban on the use of cyanide to mine gold, and developers who want to build condos right on the edge of our legendary trout streams.

In the absence of strict rules governing campaign money, these big players will eventually get what they seek…. [S]adly, the Washington model of corruption – where corporations legally bribe members of Congress by bankrolling their campaigns with so-called independent expenditures – will have infected Montana….

**Part IV. Section IV. Restriction on the Speech of Judicial Candidates.**
*[Insert on page 1604 after* Republican Party of Minnesota v. White *and before "V. Equalizing Speech without Restricting Speech"]*

***Williams-Yulee v. Florida Bar* (2015): Note**

Lanell Williams-Yulee had practiced law since 1991. In September 2009, she decided to run for a seat on the county court for Hillsborough County, Florida. She drafted a letter to local voters and put it on her web site. In addition to describing her qualifications and reasons for running, the letter also asked for an early contribution of $25, $50, $200, $250 or $500. In its canon of judicial conduct, the Florida bar banned candidates for judicial office from personally soliciting campaign contributions. The candidate's committee could solicit funds and the candidate could write a thank you note.

The bar cited Ms. Williams-Yulee for violating the ban. She defended, claiming that her speech related to the election was protected by the First Amendment. She argued that the rule banning personal solicitation (but allowing solicitation by a candidate committee) was a content-based limit on free speech and both over- and under-inclusive.

The Court divided 5-4 upholding the Florida bar rule and the decision against Ms. Williams-Yulee. Chief Justice Roberts wrote for the majority. He held that the rule was a content-based limit on speech in the context of a judicial election and that it required exacting scrutiny. But elected "judges are not politicians." The state decision to elect its judges did not mean it had to treat judicial elections like other elections. The content based rule had to be

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measured by strict scrutiny, but the rule passed strict scrutiny (something the Court noted was rare for a State to successfully demonstrate).

The state's interest in preserving the public belief in the impartiality of judges justified a rule preventing judges from asking anyone for money. "[A] state's interest in preserving public confidence in the integrity of its judiciary extends beyond the interest in preventing the appearance of corruption in legislative and executive elections." Politicians are "expected to be appropriately responsive to the preferences of their supporters. Indeed, such 'responsiveness is key to the very concept of self-governance though elected officials.'" Unlike politicians, a judge is not to "'provide any special consideration to his'" supporters or campaign donors.

Williams-Yulee acknowledged the state's compelling interest in judicial integrity, but argued that the Canon by which she was punished was under-inclusive. The judge's campaign committee could solicit money and the candidate could write a thank-you note to donors. Furthermore the rule was over-inclusive. It included a ban on soliciting donations from people never likely to appear before the judge, including relatives and friends.

Chief Justice Roberts held that the First Amendment has no freestanding under-inclusiveness limitation. The ban on in-person solicitation was sufficiently narrowly tailored; it was aimed squarely at conduct most likely to undermine public confidence. As to solicitations allowed by the candidate's campaign committee, the Court held that Florida had "reasonably concluded that solicitation by the candidate personally creates categorically different and more severe risk of undermining public confidence."

Williams-Yulee had argued that permitting thank you notes would ensure that the candidate would know who contributed. But, according to Chief Justice Roberts, these accommodations reflected Florida's respect for the First Amendment interests of candidates and their contributors—and were used to resolve the tension between "the ideal character of the judicial office and the real world of electoral politics." The Court would not "punish Florida for leaving open more, rather than fewer, avenues of expression…."

Williams-Yulee argued that the rule was not narrowly tailored because it suppressed too much speech, including solicitations of people in situations where the public confidence in impartiality would not be involved. The Court disagreed, responding that "Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary." Further, drawing lines between permitted and forbidden solicitations would be unworkable.

Justice Ginsburg concurred. She would not apply exacting scrutiny to state efforts to differentiate between judicial and political elections. States should have substantial latitude to enact different campaign finance rules for judicial elections. "When the political campaign-finance apparatus is applied to judicial elections, the distinction of judges from politicians dims." She noted that "[i]n recent years…issue-oriented organizations and political action committees

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have spent millions of dollars opposing reelection of judges whose decision do not toe a party line or are alleged to be out of step with public opinion. She cited the voter removal of three Iowa judges who had found the state's ban on same-sex marriage violated the Iowa constitution. "[I]n West Virginia, as described in *Caperton v. A.T. Massey Coal Co*. (2009) coal executive Don Blakenship lavishly funded a political action committee called "And For the Sake of the Kids" accusing Justice Warren McGraw of freeing a "'child rapist.'" Justice Ginsburg cited a number of similar examples, including one from North Carolina. Justice Ginsburg concluded that "States should not be put to the polar choices of either equating judicial elections to political elections, or else abandoning public participation in the selection of judges altogether." Instead, States should be free to balance the interest in judicial integrity and that in free expression.

Justice Scalia dissented, finding that the Court's decision to allow Florida to prohibit personal solicitations by judicial candidates as a means of preserving public confidence in the integrity of the judiciary only purported to apply strict scrutiny. But "it would be more accurate to say that it does so by applying the appearance of strict scrutiny." Justice Scalia wrote that Florida "must do more than point to a vital public objective brooding overhead. The State must also meet a difficult burden of demonstrating that the speech restriction substantially advances the claimed objective." He pointed out ways the rule would, he said, have failed conventional application of strict scrutiny—among other ways by being over and under-inclusive and so not narrowly tailored. It was over-inclusive because it included those who, under recusal rules could not appear before the judge. It was under-inclusive because candidate committees could solicit and the candidate could send a thank you note to donors.

**Part IV. Section V. Equalizing Speech Without Restricting Speech.** (Note that the Court rejects this characterization.)
[*Insert on page 1611 after* Davis *and before concluding notes*.]

**Arizona Free Enterprise Club's Freedom Club PAC v. Bennett**
564 U.S. ___ (2011)

[Majority: Roberts (C.J.), Scalia, Kennedy, Thomas, and Alito. Dissenting: Kagan, Ginsburg, Breyer, and Sotomayor.]

**Chief Justice Roberts delivered the opinion of the Court.**

Under Arizona law, candidates for state office who accept public financing can receive additional money from the State in direct response to the campaign activities of privately financed candidates and independent expenditure groups. Once a set spending limit is exceeded, a publicly financed candidate receives roughly one dollar for every dollar spent by an opposing privately financed candidate. The publicly financed candidate also receives roughly one dollar for every dollar spent by independent expenditure groups to support the privately financed candidate, or to oppose the publicly financed candidate. We hold that Arizona's matching funds

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scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.

The Arizona Citizens Clean Elections Act, passed by initiative in 1998, created a voluntary public financing system to fund the primary and general election campaigns of candidates for state office. *See* ARIZ. REV. STAT. ANN. §16–940 et seq. All eligible candidates for Governor, secretary of state, attorney general, treasurer, superintendent of public instruction, the corporation commission, mine inspector, and the state legislature (both the House and Senate) may opt to receive public funding. Eligibility is contingent on the collection of a specified number of five-dollar contributions from Arizona voters, and the acceptance of certain campaign restrictions and obligations. Publicly funded candidates must agree, among other things, to limit their expenditure of personal funds to $500; adhere to an overall expenditure cap; and return all unspent public moneys to the State.

In exchange for accepting these conditions, participating candidates are granted public funds to conduct their campaigns. In many cases, this initial allotment may be the whole of the State's financial backing of a publicly funded candidate. But when certain conditions are met, publicly funded candidates are granted additional "equalizing" or matching funds. §§16–952(A), (B), and (C)(4)–(5) (providing for "[e]qual funding of candidates").

Matching funds are available in both primary and general elections. In a primary, matching funds are triggered when a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the primary election allotment of state funds to the publicly financed candidate. During the general election, matching funds are triggered when the amount of money a privately financed candidate receives in contributions, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the general election allotment of state funds to the publicly financed candidate. A privately financed candidate's expenditures of his personal funds are counted as contributions for purposes of calculating matching funds during a general election.

Once matching funds are triggered, each additional dollar that a privately financed candidate spends during the primary results in one dollar in additional state funding to his publicly financed opponent (less a 6% reduction meant to account for fundraising expenses). During a general election, every dollar that a candidate receives in contributions—which includes any money of his own that a candidate spends on his campaign—results in roughly one dollar in additional state funding to his publicly financed opponent. In an election where a privately funded candidate faces multiple publicly financed candidates, one dollar raised or spent by the privately financed candidate results in an almost one dollar increase in public funding to each of the publicly financed candidates.

Once the public financing cap is exceeded, additional expenditures by independent groups can result in dollar-for-dollar matching funds as well. Spending by independent groups on

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behalf of a privately funded candidate, or in opposition to a publicly funded candidate, results in matching funds. Independent expenditures made in support of a publicly financed candidate can result in matching funds for other publicly financed candidates in a race. The matching funds provision is not activated, however, when independent expenditures are made in opposition to a privately financed candidate. Matching funds top out at two times the initial authorized grant of public funding to the publicly financed candidate.

Under Arizona law, a privately financed candidate may raise and spend unlimited funds, subject to state-imposed contribution limits and disclosure requirements. Contributions to candidates for statewide office are limited to $840 per contributor per election cycle and contributions to legislative candidates are limited to $410 per contributor per election cycle.

An example may help clarify how the Arizona matching funds provision operates. Arizona is divided into 30 districts for purposes of electing members to the State's House of Representatives. Each district elects two representatives to the House biannually. In the last general election, the number of candidates competing for the two available seats in each district ranged from two to seven. Arizona's Fourth District had three candidates for its two available House seats. Two of those candidates opted to accept public funding; one candidate chose to operate his campaign with private funds.

In that election, if the total funds contributed to the privately funded candidate, added to that candidate's expenditure of personal funds and the expenditures of supportive independent groups, exceeded $21,479—the allocation of public funds for the general election in a contested State House race—the matching funds provision would be triggered. At that point, a number of different political activities could result in the distribution of matching funds. For example:

- If an independent expenditure group spent $1,000 on a brochure supporting one of the publicly financed candidates, the other publicly financed candidate would receive $940 directly, but the privately financed candidate would receive nothing.
- If an independent expenditure group spent $1,000 on a brochure opposing the privately financed candidate, no matching funds would be issued.…

The District Court agreed that this provision "constitute[d] a substantial burden" on the speech of privately financed candidates because it "award[s] funds to a [privately financed] candidate's opponent" based on the privately financed candidate's speech. That court further held that "no compelling interest [was] served by the" provision that might justify the burden imposed.…

II. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation" of our system of government. *Buckley v. Valeo* (1976) (per curiam). As a result, the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.* (1989). "Laws that burden political speech are" accordingly "subject to strict scrutiny, which requires the

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Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. Federal Election Comm'n* (2010); *see Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.* (1986).…

Although the speech of the candidates and independent expenditure groups that brought this suit is not directly capped by Arizona's matching funds provision, those parties contend that their political speech is substantially burdened by the state law in the same way that speech was burdened by the law we recently found invalid in *Davis v. Federal Election Comm'n* (2008). In *Davis*, we considered a First Amendment challenge to the so-called "Millionaire's Amendment" of the Bipartisan Campaign Reform Act of 2002. Under that Amendment, if a candidate for the United States House of Representatives spent more than $350,000 of his personal funds, "a new, asymmetrical regulatory scheme [came] into play." The opponent of the candidate who exceeded that limit was permitted to collect individual contributions up to $6,900 per contributor—three times the normal contribution limit of $2,300. The candidate who spent more than the personal funds limit [was] "burden[ed] [in] his exercise of his First Amendment right to make unlimited expenditures of his personal funds because" doing so had "the effect of enabling his opponent to raise more money and to use that money to finance speech that counteract[ed] and thus diminishe[d] the effectiveness of Davis' own speech."

In [the]…Millionaire's Amendment case, we acknowledged that the provision did not impose an outright cap on a candidate's personal expenditures. We nonetheless [held] the Amendment was unconstitutional because it forced a candidate "to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." … We determined that this constituted an "unprecedented penalty" and "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech," and concluded that the Government had failed to advance any compelling interest that would justify such a burden.…

The penalty imposed by Arizona's matching funds provision is different in some respects from the penalty imposed by the law we struck down in *Davis*. But those differences make the Arizona law more constitutionally problematic, not less. First, the penalty in *Davis* consisted of raising the contribution limits for one of the candidates.… Here the benefit to the publicly financed candidate is the direct and automatic release of public money. That is a far heavier burden than in *Davis*.…

[U]nlike the law at issue in *Davis*, all of this is to some extent out of the privately financed candidate's hands. Even if that candidate opted to spend less than the initial public financing cap, any spending by independent expenditure groups to promote the privately financed candidate's election—regardless whether such support was welcome or helpful—could trigger matching funds. What is more, that state money would go directly to the publicly funded candidate to use as he saw fit. That disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate. That

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candidate can allocate the money according to his own campaign strategy, which the privately financed candidate could not do with the independent group expenditures that triggered the matching funds. *Cf. Citizens United* (" 'The absence of prearrangement and coordination of an expenditure with the candidate or his agent…undermines the value of the expenditure to the candidate' " (quoting *Buckley*))….

In some ways, the burden the Arizona law imposes on independent expenditure groups is worse than the burden it imposes on privately financed candidates…. If a candidate contemplating an electoral run in Arizona surveys the campaign landscape and decides that the burdens imposed by the matching funds regime make a privately funded campaign unattractive, he at least has the option of taking public financing. Independent expenditure groups, of course, do not.

Once the spending cap is reached, an independent expenditure group that wants to support a particular candidate—because of that candidate's stand on an issue of concern to the group—can only avoid triggering matching funds in one of two ways. The group can either opt to change its message from one addressing the merits of the candidates to one addressing the merits of an issue, or refrain from speaking altogether. Presenting independent expenditure groups with such a choice makes the matching funds provision particularly burdensome to those groups. And forcing that choice—trigger matching funds, change your message, or do not speak—certainly contravenes "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995); *cf. Citizens United*.…

Arizona contends that the matching funds provision is distinguishable from the law we invalidated in *Davis*.… [T]here can be no doubt that the burden on speech is significantly greater in this case than in *Davis*: That means that the law here—like the one in *Davis*—must be justified by a compelling state interest.

The State argues that the matching funds provision actually results in more speech by "increas[ing] debate about issues of public concern" in Arizona elections and "promot[ing] the free and open debate that the First Amendment was intended to foster." In the State's view, this promotion of First Amendment ideals offsets any burden the law might impose on some speakers.

Not so. Any increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates. The burden imposed on privately financed candidates and independent expenditure groups reduces their speech; "restriction[s] on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." *Buckley*. Thus, even if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups. This sort of "beggar thy

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neighbor" approach to free speech— "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others"—is "wholly foreign to the First Amendment." *Id*.

We have rejected government efforts to increase the speech of some at the expense of others outside the campaign finance context. In *Miami Herald Publishing Co. v. Tornillo* (1974), we held unconstitutional a Florida law that required any newspaper assailing a political candidate's character to allow that candidate to print a reply. We have explained that while the statute in that case "purported to advance free discussion, …its effect was to deter newspapers from speaking out in the first instance" because it "penalized the newspaper's own expression." … The Arizona law imposes a similar penalty: The State grants funds to publicly financed candidates as a direct result of the speech of privately financed candidates and independent expenditure groups. The argument that this sort of burden promotes free and robust discussion is no more persuasive here than it was in *Tornillo*.

[The] matching funds provision…burden[s] speech.… That cash subsidy, conferred in response to political speech, penalizes speech to a greater extent and more directly than the Millionaire's Amendment in *Davis*. The fact that this may result in more speech by the other candidates is no more adequate a justification here than it was in *Davis*.

In disagreeing with our conclusion, the dissent relies on cases in which we have upheld government subsidies against First Amendment challenge, and asserts that "[w]e have never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another." But none of those cases—not one—involved a subsidy given in direct response to the political speech of another, to allow the recipient to counter that speech.…

The State and the Clean Elections Institute assert that the candidates and independent expenditure groups have failed to "cite specific instances in which they decided not to raise or spend funds," and have "failed to present any reliable evidence that Arizona's triggered matching funds deter their speech." The record in this case, which we must review in its entirety, does not support those assertions. *See Bose Corp. v. Consumers Union of United States, Inc.* (1984).

That record contains examples of specific candidates curtailing fundraising efforts, and actively discouraging supportive independent expenditures, to avoid triggering matching funds. The record also includes examples of independent expenditure groups deciding not to speak in opposition to a candidate to avoid triggering matching funds.… As in *Davis*, we do not need empirical evidence to determine that the law at issue is burdensome. ([*Davis* required] no evidence of a burden whatsoever.)

It is clear not only to us but to every other court to have considered the question after *Davis* that a candidate or independent group might not spend money if the direct result of that spending is additional funding to political adversaries.… The dissent's disagreement is little more than disagreement with *Davis*.…

[I]t is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case. It is the manner in which that funding is

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provided—in direct response to the political speech of privately financed candidates and independent expenditure groups. And the fact that the State's matching mechanism may be more efficient than other alternatives—that it may help the State in "finding the sweet-spot" or "fine-tuning" its financing system to avoid a drain on public resources, *post* (Kagan, J., dissenting)—is of no moment; "the First Amendment does not permit the State to sacrifice speech for efficiency."

The United States as amicus contends that "[p]roviding additional funds to petitioners' opponents does not make petitioners' own speech any less effective" and thus does not substantially burden speech.… [That is not so.] All else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted.…

II-B. Because the Arizona matching funds provision imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups, "that provision cannot stand unless it is 'justified by a compelling state interest.' " *Massachusetts Citizens for Life*.…

II-B-1. [The Court says "leveling the playing field" has not been found an interest justifying limiting speech, suggesting that this is not a legitimate governmental interest.] There is ample support for the argument that the matching funds provision seeks to "level the playing field" in terms of candidate resources.… The Act refers to the funds doled out after the Act's matching mechanism is triggered as "equalizing funds." And the regulations implementing the matching funds provision refer to those funds as "equalizing funds" as well.…

Other features of the Arizona law reinforce this understanding of the matching funds provision.… If the Citizens Clean Election Commission cannot provide publicly financed candidates with the moneys that the matching funds provision envisions because of a shortage of funds, the statute allows a publicly financed candidate to "accept private contributions to bring the total monies received by the candidate" up to the matching funds amount. Limiting contributions, of course, is the primary means we have upheld to combat corruption. *Buckley*. [T]he State argues that one of the principal ways that the matching funds provision combats corruption is by eliminating the possibility of any quid pro quo between private interests and publicly funded candidates by eliminating contributions to those candidates altogether. But when confronted with a choice between fighting corruption and equalizing speech, the drafters of the matching funds provision chose the latter. That significantly undermines any notion that the "Equal funding of candidates" provision is meant to serve some interest other than an interest in equalizing funds.

We have repeatedly rejected the argument that the government has a compelling state interest in "leveling the playing field" that can justify undue burdens on political speech. *See, e.g., Citizens United*. In *Davis*, we stated that discriminatory contribution limits meant to "level electoral opportunities for candidates of different personal wealth" did not serve "a legitimate government objective," let alone a compelling one. And in *Buckley*, we held that limits on

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overall campaign expenditures could not be justified by a purported government "interest in equalizing the financial resources of candidates." [E]qualizing campaign resources "might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign."

"Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election,"—a dangerous enterprise and one that cannot justify burdening protected speech. [W]e have, as noted, held that it is not legitimate for the government to attempt to equalize electoral opportunities in this manner. And such basic intrusion by the government into the debate over who should govern goes to the heart of First Amendment values.

"Leveling the playing field" can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the "unfettered interchange of ideas"—not whatever the State may view as fair.

II-B-2. As already noted, the State and the Clean Elections Institute disavow any interest in "leveling the playing field." They instead assert that the "Equal funding of candidates" provision serves the State's compelling interest in combating corruption and the appearance of corruption. But even if the ultimate objective of the matching funds provision is to combat corruption—and not "level the playing field"—the burdens that the matching funds provision imposes on protected political speech are not justified.

Burdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticorruption interest. Indeed, we have said that "reliance on personal funds reduces the threat of corruption" and that "discouraging [the] use of personal funds[ ] disserves the anticorruption interest." That is because "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse" of money in politics. The matching funds provision counts a candidate's expenditures of his own money on his own campaign as contributions, and to that extent cannot be supported by any anticorruption interest.

We have also held that "independent expenditures…do not give rise to corruption or the appearance of corruption." *Citizens United*. "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." The candidate-funding circuit is broken. The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of quid pro quo corruption with which our case law is concerned.…

We have observed in the past that "[t]he interest in alleviating the corrupting influence of large contributions is served by…contribution limitations." Arizona already has some of the most austere contribution limits in the United States. *See Randall v. Sorrell* (2006) (plurality

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opinion). Contributions to statewide candidates are limited to $840 per contributor per election cycle and contributions to legislative candidates are limited to $410 per contributor per election cycle. Arizona also has stringent fundraising disclosure requirements. In the face of such ascetic contribution limits, strict disclosure requirements, and the general availability of public funding, it is hard to imagine what marginal corruption deterrence could be generated by the matching funds provision.

Perhaps recognizing that the burdens the matching funds provision places on speech cannot be justified in and of themselves, either as a means of leveling the playing field or directly fighting corruption, the State and the Clean Elections Institute offer another argument: They contend that the provision indirectly serves the anticorruption interest, by ensuring that enough candidates participate in the State's public funding system, which in turn helps combat corruption. We have said that a voluntary system of "public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Buckley*. But the fact that burdening constitutionally protected speech might indirectly serve the State's anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision.

We have explained that the matching funds provision substantially burdens the speech of privately financed candidates and independent groups. It does so to an even greater extent than the law we invalidated in *Davis*. We have explained that those burdens cannot be justified by a desire to "level the playing field." We have also explained that much of the speech burdened by the matching funds provision does not, under our precedents, pose a danger of corruption. In light of the foregoing analysis, the fact that the State may feel that the matching funds provision is necessary to allow it to "find[ ] the sweet-spot" and "fine-tun[e]" its public funding system, (Kagan, J., dissenting), to achieve its desired level of participation without an undue drain on public resources, is not a sufficient justification for the burden.

The flaw in the State's argument is apparent in what its reasoning would allow. By the State's logic it could grant a publicly funded candidate five dollars in matching funds for every dollar his privately financed opponent spent, or force candidates who wish to run on private funds to pay a $10,000 fine in order to encourage participation in the public funding regime. Such measures might well promote participation in public financing, but would clearly suppress or unacceptably alter political speech. How the State chooses to encourage participation in its public funding system matters, and we have never held that a State may burden political speech—to the extent the matching funds provision does—to ensure adequate participation in a public funding system. Here the State's chosen method is unduly burdensome and not sufficiently justified to survive First Amendment scrutiny.

III. We do not today call into question the wisdom of public financing as a means of funding political candidacy. That is not our business. But determining whether laws governing campaign finance violate the First Amendment is very much our business. In carrying out that

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responsibility over the past 35 years, we have upheld some restrictions on speech and struck down others.…

The professed purpose of the state law is to cause a sufficient number of candidates to sign up for public financing, which subjects them to the various restrictions on speech that go along with that program. This goes too far; Arizona's matching funds provision substantially burdens the speech of privately financed candidates and independent expenditure groups without serving a compelling state interest.

"[T]here is practically universal agreement that a major purpose of" the First Amendment "was to protect the free discussion of governmental affairs," "includ[ing] discussions of candidates." *Buckley*. That agreement "reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " (quoting *New York Times Co. v. Sullivan* (1964)). True when we said it and true today. Laws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand.

The judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

**Justice Kagan, with whom Justice Ginsburg, Justice Breyer, and Justice Sotomayor join, dissenting.**

Imagine two States, each plagued by a corrupt political system. In both States, candidates for public office accept large campaign contributions in exchange for the promise that, after assuming office, they will rank the donors' interests ahead of all others. As a result of these bargains, politicians ignore the public interest, sound public policy languishes, and the citizens lose confidence in their government.

Recognizing the cancerous effect of this corruption, voters of the first State, acting through referendum, enact several campaign finance measures previously approved by this Court. They cap campaign contributions; require disclosure of substantial donations; and create an optional public financing program that gives candidates a fixed public subsidy if they refrain from private fundraising. But these measures do not work. Individuals who "bundle" campaign contributions become indispensable to candidates in need of money. Simple disclosure fails to prevent shady dealing. And candidates choose not to participate in the public financing system because the sums provided do not make them competitive with their privately financed opponents. So the State remains afflicted with corruption.

Voters of the second State, having witnessed this failure, take an ever-so-slightly different tack to cleaning up their political system. They too enact contribution limits and disclosure requirements. But they believe that the greatest hope of eliminating corruption lies in creating an effective public financing program, which will break candidates' dependence on large donors and bundlers. These voters realize, based on the first State's experience, that such a

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program will not work unless candidates agree to participate in it. And candidates will participate only if they know that they will receive sufficient funding to run competitive races. So the voters enact a program that carefully adjusts the money given to would-be officeholders, through the use of a matching funds mechanism, in order to provide this assurance. The program does not discriminate against any candidate or point of view, and it does not restrict any person's ability to speak. In fact, by providing resources to many candidates, the program creates more speech and thereby broadens public debate. And just as the voters had hoped, the program accomplishes its mission of restoring integrity to the political system. The second State rids itself of corruption.

A person familiar with our country's core values—our devotion to democratic self-governance, as well as to "uninhibited, robust, and wide-open" debate, *New York Times Co. v. Sullivan* (1964)—might expect this Court to celebrate, or at least not to interfere with, the second State's success. But today, the majority holds that the second State's system—the system that produces honest government, working on behalf of all the people— clashes with our Constitution. The First Amendment, the majority insists, requires us all to rely on the measures employed in the first State, even when they have failed to break the stranglehold of special interests on elected officials.

I disagree. The First Amendment's core purpose is to foster a healthy, vibrant political system full of robust discussion and debate. Nothing in Arizona's anticorruption statute, the Arizona Citizens Clean Elections Act, violates this constitutional protection. To the contrary, the Act promotes the values underlying both the First Amendment and our entire Constitution by enhancing the "opportunity for free political discussion to the end that government may be responsive to the will of the people." I therefore respectfully dissent.

I-A. Campaign finance reform over the last century has focused on one key question: how to prevent massive pools of private money from corrupting our political system. If an officeholder owes his election to wealthy contributors, he may act for their benefit alone, rather than on behalf of all the people. As we recognized in *Buckley v. Valeo* (1976) (per curiam), our seminal campaign finance case, large private contributions may result in "political quid pro quo[s]," which undermine the integrity of our democracy. And even if these contributions are not converted into corrupt bargains, they still may weaken confidence in our political system because the public perceives "the opportunities for abuse[s]." To prevent both corruption and the appearance of corruption—and so to protect our democratic system of governance—citizens have implemented reforms designed to curb the power of special interests.

Among these measures, public financing of elections has emerged as a potentially potent mechanism to preserve elected officials' independence. President Theodore Roosevelt proposed the reform as early as 1907 in his State of the Union address. "The need for collecting large campaign funds would vanish," he said, if the government "provided an appropriation for the proper and legitimate expenses" of running a campaign, on the condition that a "party receiving campaign funds from the Treasury" would forgo private fundraising. 42 CONG. REC. 78 (1907). The idea was—and remains—straightforward. Candidates who rely on public, rather than

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private, moneys are "beholden [to] no person and, if elected, should feel no post-election obligation toward any contributor." *Republican Nat. Comm. v. FEC* (SDNY 1980), aff'd (U.S. 1980). By supplanting private cash in elections, public financing eliminates the source of political corruption.

For this reason, public financing systems today dot the national landscape. Almost one-third of the States have adopted some form of public financing, and so too has the Federal Government for presidential elections. The federal program—which offers presidential candidates a fixed public subsidy if they abstain from private fundraising—originated in the campaign finance law that Congress enacted in 1974 on the heels of the Watergate scandal. Congress explained at the time that the "potentia[l] for abuse" inherent in privately funded elections was "all too clear." In Congress's view, public financing represented the "only way…[to] eliminate reliance on large private contributions" and its attendant danger of corruption, while still ensuring that a wide range of candidates had access to the ballot.

We declared the presidential public financing system constitutional in *Buckley v. Valeo*. Congress, we stated, had created the program "for the 'general welfare'—to reduce the deleterious influence of large contributions on our political process," as well as to "facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." We reiterated "that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." And finally, in rejecting a challenge based on the First Amendment, we held that the program did not "restrict[] or censor speech, but rather…use[d] public money to facilitate and enlarge public discussion and participation in the electoral process." We declared this result "vital to a self-governing people," and so concluded that the program "further[ed], not abridge[d], pertinent First Amendment values." We thus gave state and municipal governments the green light to adopt public financing systems along the presidential model.

But this model, which distributes a lump-sum grant at the beginning of an election cycle, has a significant weakness: It lacks a mechanism for setting the subsidy at a level that will give candidates sufficient incentive to participate, while also conserving public resources. Public financing can achieve its goals only if a meaningful number of candidates receive the state subsidy, rather than raise private funds. *See McCommish v. Bennett* (CA9 2010) ("A public financing system with no participants does nothing to reduce the existence or appearance of quid pro quo corruption"). But a public funding program must be voluntary to pass constitutional muster, because of its restrictions on contributions and expenditures. *See Buckley*. And candidates will choose to sign up only if the subsidy provided enables them to run competitive races. If the grant is pegged too low, it puts the participating candidate at a disadvantage. Because he has agreed to spend no more than the amount of the subsidy, he will lack the means to respond if his privately funded opponent spends over that threshold. So when lump-sum grants do not keep up with campaign expenditures, more and more candidates will choose not to participate. But if the subsidy is set too high, it may impose an unsustainable burden on the

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public fisc. *See McCommish* (noting that large subsidies would make public funding "prohibitively expensive and spell its doom"). At the least, hefty grants will waste public resources in the many state races where lack of competition makes such funding unnecessary.…

I-B. The people of Arizona had every reason to try to develop effective anticorruption measures. Before turning to public financing, Arizonans voted by referendum to establish campaign contribution limits. But that effort to abate corruption, standing alone, proved unsuccessful. Five years after the enactment of these limits, the State suffered "the worst public corruption scandal in its history." In that scandal, known as "AzScam," nearly 10% of the State's legislators were caught accepting campaign contributions or bribes in exchange for supporting a piece of legislation. Following that incident, the voters of Arizona decided that further reform was necessary. Acting once again by referendum, they adopted the public funding system at issue here.

The hallmark of Arizona's program is its inventive approach to the challenge that bedevils all public financing schemes: fixing the amount of the subsidy. For each electoral contest, the system calibrates the size of the grant automatically to provide sufficient—but no more than sufficient—funds to induce voluntary participation. In effect, the program's designers found the Goldilocks solution, which produces the "just right" grant to ensure that a participant in the system has the funds needed to run a competitive race.…

This arrangement, like the lump-sum model, makes use of a pre-set amount to provide financial support to participants. For example, all publicly funded legislative candidates collect an initial grant of $21,479 for a general election race. And they can in no circumstances receive more than three times that amount ($64,437); after that, their privately funded competitors hold a marked advantage. But the Arizona system improves on the lump-sum model in a crucial respect. By tying public funding to private spending, the State can afford to set a more generous upper limit—because it knows that in each campaign it will only have to disburse what is necessary to keep a participating candidate reasonably competitive. Arizona can therefore assure candidates that, if they accept public funds, they will have the resources to run a viable race against those who rely on private money. And at the same time, Arizona avoids wasting taxpayers' dollars. In this way, the Clean Elections Act creates an effective and sustainable public financing system.

The question here is whether this modest adjustment to the public financing program that we approved in *Buckley* makes the Arizona law unconstitutional. The majority contends that the matching funds provision "substantially burdens protected political speech" and does not "serv[e] a compelling state interest." *Ante*. But the Court is wrong on both counts.

II. Arizona's statute does not impose a "restriction," or "substantia[l] burde[n]," on expression. The law has quite the opposite effect: It subsidizes and so produces more political speech. We recognized in *Buckley* that, for this reason, public financing of elections "facilitate[s] and enlarge[s] public discussion," in support of First Amendment values. And what we said then is just as true today. Except in a world gone topsy-turvy, additional campaign speech and electoral competition is not a First Amendment injury.

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II-A. At every turn, the majority tries to convey the impression that Arizona's matching fund statute is of a piece with laws prohibiting electoral speech. The majority invokes the language of "limits," "bar[s]," and "restraints." It equates the law to a "restrictio[n] on the amount of money a person or group can spend on political communication during a campaign." It insists that the statute "restrict[s] the speech of some elements of our society" to enhance the speech of others. And it concludes by reminding us that the point of the First Amendment is to protect "against unjustified government restrictions on speech."

There is just one problem. Arizona's matching funds provision does not restrict, but instead subsidizes, speech. The law "impose[s] no ceiling on [speech] and do[es] not prevent anyone from speaking." *Citizens United v. Federal Election Comm'n* (2010); *see Buckley* (holding that a public financing law does not "abridge, restrict, or censor" expression). The statute does not tell candidates or their supporters how much money they can spend to convey their message, when they can spend it, or what they can spend it on. Rather, the Arizona law, like the public financing statute in *Buckley*, provides funding for political speech, thus "facilitat[ing] communication by candidates with the electorate." By enabling participating candidates to respond to their opponents' expression, the statute expands public debate, in adherence to "our tradition that more speech, not less, is the governing rule." *Citizens United*. What the law does—all the law does—is fund more speech.

And under the First Amendment, that makes all the difference. In case after case, year upon year, we have distinguished between speech restrictions and speech subsidies. " 'There is a basic difference,' " we have held, " 'between direct state interference with [First Amendment] protected activity and state encouragement' " of other expression. *Rust v. Sullivan* (1991)…. Government subsidies of speech, designed "to stimulate… expression[,]…[are] consistent with the First Amendment," so long as they do not discriminate on the basis of viewpoint. *Board of Regents of Univ. of Wis. System v. Southworth* (2000); *see, e.g., Rosenberger v. Rector and Visitors of Univ. of Va.* (1995). That is because subsidies, by definition and contra the majority, do not restrict any speech.

No one can claim that Arizona's law discriminates against particular ideas, and so violates the First Amendment's sole limitation on speech subsidies. The State throws open the doors of its public financing program to all candidates who meet minimal eligibility requirements and agree not to raise private funds. Republicans and Democrats, conservatives and liberals may participate; so too, the law applies equally to independent expenditure groups across the political spectrum. Arizona disburses funds based not on a candidate's (or supporter's) ideas, but on the candidate's decision to sign up for public funding. So under our precedent, Arizona's subsidy statute should easily survive First Amendment scrutiny.[1] …

[1] The majority claims that none of our subsidy cases involved the funding of "respons[ive]" expression. But the majority does not explain why this distinction, created to fit the facts of this case, should matter so long as the government is not discriminating on the basis of viewpoint. Indeed, the difference the majority highlights should cut in the opposite direction, because facilitating responsive speech fosters "uninhibited, robust, and wide-open" public

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[T]he candidates bringing this challenge…were never denied a subsidy. Arizona, remember, offers to support any person running for state office. Petitioners here refused that assistance. So they are making a novel argument: that Arizona violated their First Amendment rights by disbursing funds to other speakers even though they could have received (but chose to spurn) the same financial assistance. Some people might call that *chutzpah*.

Indeed, what petitioners demand is essentially a right to quash others' speech through the prohibition of a (universally available) subsidy program. Petitioners are able to convey their ideas without public financing—and they would prefer the field to themselves, so that they can speak free from response. To attain that goal, they ask this Court to prevent Arizona from funding electoral speech—even though that assistance is offered to every state candidate, on the same (entirely unobjectionable) basis. And this Court gladly obliges.

If an ordinary citizen, without the hindrance of a law degree, thought this result an upending of First Amendment values, he would be correct. That Amendment protects no person's, nor any candidate's, "right to be free from vigorous debate." Indeed, the Amendment exists so that this debate can occur—robust, forceful, and contested. It is the theory of the Free Speech Clause that "falsehood and fallacies" are exposed through "discussion," "education," and "more speech." *Whitney v. California* (1927) (Brandeis, J., concurring). Or once again from *Citizens United*: "[M]ore speech, not less, is the governing rule." And this is no place more true than in elections, where voters' ability to choose the best representatives depends on debate—on charge and countercharge, call and response. So to invalidate a statute that restricts no one's speech and discriminates against no idea—that only provides more voices, wider discussion, and greater competition in elections—is to undermine, rather than to enforce, the First Amendment.[2]

We said all this in *Buckley*, when we upheld the presidential public financing system—a ruling this Court has never since questioned.… "[T]he central purpose of the Speech and Press Clauses," we explained, "was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish."(quoting *New York Times*). And we continued: "[L]aws providing financial assistance to the exercise of free speech"—including the campaign finance statute at issue—"enhance these First Amendment values." We should be saying the same today.

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debate. *New York Times Co. v. Sullivan* (1964). In any event, the majority is wrong to say that we have never approved funding to "allow the recipient to counter" someone else's political speech. *Ante*. That is exactly what we approved in *Buckley v. Valeo* (1976).…

[2] The majority argues that more speech will quickly become "less speech," as candidates switch to public funding. But that claim misunderstands how a voluntary public financing system works. Candidates with significant financial resources will likely decline public funds, so that they can spend in excess of the system's expenditure caps. Other candidates accept public financing because they believe it will enhance their communication with voters. So the system continually pushes toward more speech. That is exactly what has happened in Arizona and the majority offers no counter-examples.

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II-B. The majority has one, and only one, way of separating this case from *Buckley* and our other, many precedents involving speech subsidies. According to the Court, the special problem here lies in Arizona's matching funds mechanism, which the majority claims imposes a "substantia[l] burde[n]" on a privately funded candidate's speech. Sometimes, the majority suggests that this "burden" lies in the way the mechanism " 'diminish[es] the effectiveness' " of the privately funded candidate's expression by enabling his opponent to respond. (quoting *Davis v. Federal Election Comm'n* (2008)). At other times, the majority indicates that the "burden" resides in the deterrent effect of the mechanism: The privately funded candidate "might not spend money" because doing so will trigger matching funds. Either way, the majority is wrong to see a substantial burden on expression.[3]

Most important, and as just suggested, the very notion that additional speech constitutes a "burden" is odd and unsettling. Here is a simple fact: Arizona imposes nothing remotely resembling a coercive penalty on privately funded candidates. The State does not jail them, fine them, or subject them to any kind of lesser disability. (So the majority's analogies to a fine on speech are inapposite.) The only "burden" in this case comes from the grant of a subsidy to another person, and the opportunity that subsidy allows for responsive speech. But that means the majority cannot get out from under our subsidy precedents. Once again: We have never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another. (And that is so even when the subsidy is not open to all, as it is here.) Yet in this case, the majority says that the prospect of more speech—responsive speech, competitive speech, the kind of speech that drives public debate—counts as a constitutional injury. That concept, for all the reasons previously given, is "wholly foreign to the First Amendment." *Buckley*.

But put to one side this most fundamental objection to the majority's argument; even then, has the majority shown that the burden resulting from the Arizona statute is "substantial"? *See Clingman v. Beaver* (2005) (holding that stringent judicial review is "appropriate only if the burden is severe"). I will not quarrel with the majority's assertion that responsive speech by one candidate may make another candidate's speech less effective; that, after all, is the whole idea of the First Amendment, and a benefit of having more responsive speech. *See Abrams v. United States* (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market"). And I will assume that the operation of this statute may on occasion deter a privately funded candidate from spending money, and conveying ideas by that means. My guess is that this does not happen often: Most political candidates, I

[3] The majority's error on this score extends both to candidates and to independent expenditure groups. Contrary to the majority's suggestion nearly all of my arguments showing that the Clean Elections Act does not impose a substantial burden apply to both sets of speakers (and apply regardless of whether independent or candidate expenditures trigger the matching funds). That is also true of every one of my arguments demonstrating the State's compelling interest in this legislation. But perhaps the best response to the majority's view that the Act inhibits independent expenditure groups lies in an empirical fact already noted: Expenditures by these groups have risen by 253% since Arizona's law was enacted.

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suspect, have enough faith in the power of their ideas to prefer speech on both sides of an issue to speech on neither. But I will take on faith that the matching funds provision may lead one or another privately funded candidate to stop spending at one or another moment in an election. Still, does that effect count as a severe burden on expression? By the measure of our prior decisions—which have upheld campaign reforms with an equal or greater impact on speech—the answer is no.

Number one: Any system of public financing, including the lump-sum model upheld in *Buckley*, imposes a similar burden on privately funded candidates. Suppose Arizona were to do what all parties agree it could under *Buckley*— provide a single upfront payment (say, $150,000) to a participating candidate, rather than an initial payment (of $50,000) plus 94% of whatever his privately funded opponent spent, up to a ceiling (the same $150,000). That system would "diminis[h] the effectiveness" of a privately funded candidate's speech at least as much, and in the same way: It would give his opponent, who presumably would not be able to raise that sum on his own, more money to spend. And so too, a lump-sum system may deter speech. A person relying on private resources might well choose not to enter a race at all, because he knows he will face an adequately funded opponent. And even if he decides to run, he likely will choose to speak in different ways—for example, by eschewing dubious, easy-to-answer charges—because his opponent has the ability to respond. Indeed, privately funded candidates may well find the lump-sum system more burdensome than Arizona's (assuming the lump is big enough). Pretend you are financing your campaign through private donations. Would you prefer that your opponent receive a guaranteed, upfront payment of $150,000, or that he receive only $50,000, with the possibility—a possibility that you mostly get to control—of collecting another $100,000 somewhere down the road? That's the first reason the burden on speech cannot command a different result in this case than in *Buckley*.

Number two: Our decisions about disclosure and disclaimer requirements show the Court is wrong. Starting in *Buckley* and continuing through last Term, the Court has repeatedly declined to view these requirements as a substantial First Amendment burden, even though they discourage some campaign speech.… " 'Disclosure requirements may burden the ability to speak," we reasoned [in *Citizens United]*, but they "do not prevent anyone from speaking.' " …

The majority breezily dismisses this comparison…because disclosure requirements result in no payment of money to a speaker's opponent. That is indeed the factual distinction: A matching fund provision, we can all agree, is not a disclosure rule. But the majority does not tell us why this difference matters. Nor could it. The majority strikes down the matching funds provision because of its ostensible effect—most notably, that it may deter a person from spending money in an election. But this Court has acknowledged time and again that disclosure obligations have the selfsame effect. If that consequence does not trigger the most stringent judicial review in the one case, it should not do so in the other.

Number three: Any burden that the Arizona law imposes does not exceed the burden associated with contribution limits, which we have also repeatedly upheld.… Rather than

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potentially deterring or " 'diminish[ing] the effectiveness' " of expressive activity, these limits stop it cold. Yet we have never subjected these restrictions to the most stringent review.…

In this way, our campaign finance cases join our speech subsidy cases in supporting the constitutionality of Arizona's law. Both sets of precedents are in accord that a statute funding electoral speech in the way Arizona's does imposes no First Amendment injury.…

As the majority recounts, *Davis* addressed the constitutionality of federal legislation known as the Millionaire's Amendment. Under that provision (which applied in elections not involving public financing), a candidate's expenditure of more than $350,000 of his own money activated a change in applicable contribution limits.…

[In both *Davis* and the present cases], one candidate's campaign expenditure triggered…something. Now here are the differences: In *Davis*, the candidate's expenditure triggered a discriminatory speech restriction, which Congress could not otherwise have imposed consistent with the First Amendment; by contrast, in this case, the candidate's expenditure triggers a non-discriminatory speech subsidy, which all parties agree Arizona could have provided in the first instance.… As I have indicated before, two great fault lines run through our First Amendment doctrine: one, between speech restrictions and speech subsidies, and the other, between discriminatory and neutral government action. The Millionaire's Amendment fell on the disfavored side of both divides: To reiterate, it imposed a discriminatory speech restriction. The Arizona Clean Elections Act lands on the opposite side of both: It grants a non-discriminatory speech subsidy. So to say that *Davis* "largely controls" this case is to decline to take our First Amendment doctrine seriously.

[The *Davis*] decision began, continued, and ended by focusing on the Millionaire Amendment's "discriminatory contribution limits." … The constitutional problem with the Millionaire's Amendment lay in its use of discriminatory speech restrictions.… [N]othing in the logic of *Davis* controls this decision.

III. For all these reasons, the Court errs in holding that the government action in this case substantially burdens speech and so requires the State to offer a compelling interest. But in any event, Arizona has come forward with just such an interest, explaining that the Clean Elections Act attacks corruption and the appearance of corruption in the State's political system. The majority's denigration of this interest—the suggestion that it either is not real or does not matter—wrongly prevents Arizona from protecting the strength and integrity of its democracy.

III-A. Our campaign finance precedents leave no doubt: Preventing corruption or the appearance of corruption is a compelling government interest…. And so too, these precedents are clear: Public financing of elections serves this interest. [P]ublic financing "reduce[s] the deleterious influence of large contributions on our political process." When private contributions fuel the political system, candidates may make corrupt bargains to gain the money needed to win election. *See Federal Election Comm'n v. Nat'l Conservative PAC* (1985). And voters, seeing the dependence of candidates on large contributors (or on bundlers of smaller contributions),

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may lose faith that their representatives will serve the public's interest. *See Nixon v. Shrink Missouri Gov't PAC* (2000) (the "assumption that large donors call the tune [may] jeopardize the willingness of voters to take part in democratic governance"). Public financing addresses these dangers by minimizing the importance of private donors in elections. Even the majority appears to agree with this premise. ("We have said that…'public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest' ").

This compelling interest appears on the very face of Arizona's public financing statute. Start with the title: The Citizens Clean Elections Act. Then proceed to the statute's formal findings. The public financing program, the findings state, was "inten[ded] to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money." That measure was needed because the prior system of private fundraising had "[u]ndermine[d] public confidence in the integrity of public officials;" allowed those officials "to accept large campaign contributions from private interests over which they [had] governmental jurisdiction;" favored "a small number of wealthy special interests" over "the vast majority of Arizona citizens;" and "[c]os[t] average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors." … And so Arizona, like many state and local governments, has implemented public financing on the theory (which this Court has previously approved), that the way to reduce political corruption is to diminish the role of private donors in campaigns.

And that interest justifies the matching funds provision at issue because it is a critical facet of Arizona's public financing program. The provision is no more than a disbursement mechanism; but it is also the thing that makes the whole Clean Elections Act work [by dispersing a basic amount of funds and increasing the funding somewhat if needed to respond, so that candidates feel safe in accepting public financing.] If public financing furthers a compelling interest—and according to this Court, it does—then so too does the disbursement formula that Arizona uses to make public financing effective. The one conclusion follows directly from the other.

Except in this Court, where the inescapable logic of the State's position is…virtually ignored. The Court, to be sure, repeatedly asserts that the State's interest in preventing corruption does not "sufficiently justif[y]" the mechanism it has chosen to disburse public moneys. Only one thing is missing from the Court's response: any reasoning to support this conclusion…. Assuming (against reason and precedent) that the matching funds provision substantially burdens speech, the question becomes whether the State has offered a sufficient justification for imposing that burden. Arizona has made a forceful argument on this score, based on the need to establish an effective public financing system. The majority does not even engage that reasoning.…

III-B-1. For starters, the Court has no basis to question the sincerity of the State's interest in rooting out political corruption. As I have just explained, that is the interest the State has asserted in this Court; it is the interest predominantly expressed in the "findings and declarations" section of the statute; and it is the interest universally understood (stretching back

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to Teddy Roosevelt's time) to support public financing of elections. As against all this, the majority claims to have found three smoking guns that reveal the State's true (and nefarious) intention to level the playing field.

[But] the majority has no evidence—zero, none—that the objective of the Act is anything other than the interest that the State asserts, the Act proclaims, and the history of public financing supports: fighting corruption.

III-B-2. But suppose the majority had come up with some evidence showing that Arizona had sought to "equalize electoral opportunities." Would that discovery matter? Our precedent says no, so long as Arizona had a compelling interest in eliminating political corruption (which it clearly did). In these circumstances, any interest of the State in "leveling" should be irrelevant. That interest could not support Arizona's law (assuming the law burdened speech), but neither would the interest invalidate the legislation.

To see the point, consider how the matter might arise. Assume a State has two reasons to pass a statute affecting speech. It wants to reduce corruption. But in addition, it wishes to "level the playing field." Under our First Amendment law, the interest in preventing corruption is compelling and may justify restraints on speech. But the interest in "leveling the playing field," according to well-established precedent, cannot support such legislation. So would this statute (assuming it met all other constitutional standards) violate the First Amendment?

The answer must be no. This Court, after all, has never said that a law restricting speech (or any other constitutional right) demands two compelling interests. One is enough. And this statute has one: preventing corruption. So it does not matter that equalizing campaign speech is an insufficient interest. The statute could violate the First Amendment only if "equalizing" qualified as a forbidden motive—a motive that itself could annul an otherwise constitutional law. But we have never held that to be so. And that should not be surprising: It is a "fundamental principle of constitutional adjudication," from which we have deviated only in exceptional cases, "that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien* (1968) (declining to invalidate a statute when "Congress had the undoubted power to enact" it without the suspect motive). When a law is otherwise constitutional—when it either does not restrict speech or rests on an interest sufficient to justify any such restriction—that is the end of the story.

That proposition disposes of this case, even if Arizona had an adjunct interest here in equalizing electoral opportunities. No special rule of automatic invalidation applies to statutes having some connection to equality; like any other laws, they pass muster when supported by an important enough government interest. Here, Arizona has demonstrated in detail how the matching funds provision is necessary to serve a compelling interest in combating corruption. So the hunt for evidence of "leveling" is a waste of time; Arizona's law survives constitutional scrutiny no matter what that search would uncover.

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IV. This case arose because Arizonans wanted their government to work on behalf of all the State's people. On the heels of a political scandal involving the near-routine purchase of legislators' votes, Arizonans passed a law designed to sever political candidates' dependence on large contributors. They wished, as many of their fellow Americans wish, to stop corrupt dealing—to ensure that their representatives serve the public, and not just the wealthy donors who helped put them in office. The legislation that Arizona's voters enacted was the product of deep thought and care. It put into effect a public financing system that attracted large numbers of candidates at a sustainable cost to the State's taxpayers. The system discriminated against no ideas and prevented no speech. Indeed, by increasing electoral competition and enabling a wide range of candidates to express their views, the system "further[ed]…First Amendment values." *Buckley* (citing *New York Times*). Less corruption, more speech. Robust campaigns leading to the election of representatives not beholden to the few, but accountable to the many. The people of Arizona might have expected a decent respect for those objectives.

Today, they do not get it. The Court invalidates Arizonans' efforts to ensure that in their State, " '[t]he people…possess the absolute sovereignty.' " (quoting James Madison in *Elliot's Debates on the Federal Constitution* (1876)). No precedent compels the Court to take this step; to the contrary, today's decision is in tension with broad swaths of our First Amendment doctrine. No fundamental principle of our Constitution backs the Court's ruling; to the contrary, it is the law struck down today that fostered both the vigorous competition of ideas and its ultimate object—a government responsive to the will of the people.

Arizonans deserve better. Like citizens across this country, Arizonans deserve a government that represents and serves them all. And no less, Arizonans deserve the chance to reform their electoral system so as to attain that most American of goals.…

I respectfully dissent.

### *McCutcheon v. Federal Election Commission* (2014): Note

In *McCutcheon v. Federal Election Commission* (2014), Sean McCutcheon, C.E.O. of Coalmont Electrical Development and treasurer of the Super PAC Conservative Action Fund, challenged the Bipartisan Campaign Reform Act's (BCRA) aggregate limits on donations to candidates and parties as violating the First Amendment right to freedom of speech and association. The BCRA was a 2002 amendment to the Federal Election Campaign Act (FECA) of 1971. The 1971 Act put two types of limits on campaign contributions, base limits of $2,500 and aggregate limits of $117,000 for the 2011-2012 election cycle.

"Base limits restrict how much money a donor may contribute to a particular candidate or committee while aggregate limits restrict how much money a donor may contribute in total to all candidates or committees." The FECA's base and aggregate contribution limits were upheld in *Buckley* [*v. Valeo* (1976)], along with disclosure requirements; the Court said contribution limits, including the aggregate limits, were one of the "primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large

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campaign contributions." Despite the restrictions on speech the limits imposed, the *Buckley* Court said they "serve[d] the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion."

During the 2011-2012 election cycle, McCutcheon made donations within the base limits, which were $2,500 per federal congressional candidate, to sixteen candidates, totaling $33,088, plus $27,328 in donations to noncandidate political committees. McCutcheon wanted to make twelve more donations of $1,776 each to a dozen additional congressional candidates, but doing so would violate the aggregate limits. Those twelve candidates McCutcheon wished to support were not running in McCutcheon's state of Alabama. He also wanted to donate "$25,000 to each of the three Republican national party committees." For the 2013-2014 cycle, McCutcheon wanted to donate "at least $60,000 to various candidates and $75,000 to non-candidate political committees." The base limits for the 2013-2014 cycle was "$2,600 per election to a candidate ($5,200 total for the primary and general elections); $32,400 per year to a national party committee; $10,000 per year to a state or local party committee; and $5,000 per year to a political action committee, or 'PAC.'" The aggregate limits that an individual could contribute for the 2013-2014 cycle were "a total of $48,600 to federal candidates and a total of $74,600 to other political committees. Of that $74,600, only $48,600 may be contributed to state or local party committees and PACs, [in contrast] to national party committees." The 2013-2014 total an individual could give "to candidate and noncandidate committees during each two-year election cycle" was $123,200. The Republican National Committee wanted to receive larger donations from people like McCutcheon, and joined as a plaintiff in the suit.

In line with *Buckley*, the U.S. District Court for the District of Columbia found that McCutcheon's claim was about rights of association more that speech, because the speech is not performed by the contributor, so contribution limits should not receive strict scrutiny. The District Court held these limits were constitutional because they prevent quid pro quo corruption or its appearance, and the aggregate contribution limits serve to prevent donors from evading the base contribution limits.

The Supreme Court reversed the District Court 5-4, with Justice Thomas concurring only in the judgment and arguing that all contribution limits are unconstitutional. Quoting *Citizens United* [*v. FEC* (2010)], Chief Justice Roberts, writing for the Court, said, "When *Buckley* identified a sufficiently important governmental interest in preventing corruption, that interest was limited to *quid pro quo* corruption" where money is exchanged directly for favors, or the appearance of *quid pro quo* corruption. "Government may not seek to limit the appearance of mere influence or access. … The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." The Court said that the aggregate contribution limits "do not serve [the function of preventing quid pro quo corruption or its appearance] in any meaningful way." Roberts responded to Justice Breyer's claims that aggregate limits prevent circumventing the

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base limits by saying the examples Breyer used in his dissent are "illegal under current campaign finance laws or divorced from reality."

The Court said *quid pro quo* corruption is less likely to occur, "when money flows through independent actors to a candidate" as opposed to when donors make contributions directly to a candidate. According to the Court, the more hands a donation passes through, the lower the risk of *quid pro quo* corruption. Aggregate limits were put in place to prevent circumvention of base limits. But, Chief Justice Roberts said, there are other safeguards in place to prevent the risk of circumvention, such as "earmarking and anti-proliferation rules." For example, a donor cannot give a candidate the base limit, and then donate to a PAC that will substantially contribute to that candidate. The only way to circumvent the base limit for that candidate would be to give to a multicandidate PAC, up to the base limit for the PAC, but then "his contribution will be significantly diluted by all the contributions from others to the same PACs." Thus, "the aggregate limits violate the First Amendment because they are not 'closely drawn to avoid unnecessary abridgement of associational freedoms.' … [and] because the statute is poorly tailored to the Government's interest in preventing circumvention of the base limits, it impermissibly restricts participation in the political process." Thus, aggregate contribution limits are unconstitutional.

Justice Breyer's dissent first argued that the limited definition of corruption, which the majority took from *Citizens United*, was dicta and "flatly inconsistent with the broader definition of corruption upon which *McConnell* [*v. FEC* (2003)]*'s* holding depends."

> "[T]he anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions. … Speech does not exist in a vacuum. Rather, political communication seeks to secure government action. A politically oriented 'marketplace of ideas' seeks to form a public opinion that can and will influence elected representatives.
>
> This is not a new idea. Eighty-seven years ago, Justice Brandeis wrote that the First Amendment's protection of speech was "essential to effective democracy." *Whitney v. California* (1927) (concurring opinion). Chief Justice Hughes reiterated the same idea shortly thereafter: "A fundamental principle of our constitutional system" is the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people." *Stromberg v. California* (1931). In *Citizens United*, the Court stated that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."
>
> [In *An Inquiry Into the Nature of the Social Contract*, Jean Jacque Rousseau had argued that] people lose control of their representatives between elections, during which interim periods they were 'in chains.' … The Framers responded to this criticism by requiring frequent elections to federal office, and by enacting a First Amendment that would facilitate a 'chain of communication between the people, and those, to whom

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> they have committed the exercise of the powers of the government…. This 'chain' would establish the necessary 'communion of interests' … between the people and their representatives, so that public opinion could be channeled into effective governmental action…. Accordingly, the First Amendment advances not only the individual's right to engage in free speech, but also the public's interest in preserving a democratic order in which collective speech *matters*. … Corruption breaks the constitutionally necessary 'chain of communication' between the people and their representatives. It derails the essential speech-to-government action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. That is one reason why the Court has stressed the constitutional importance of Congress' concern that a few large donations not drown out the voices of the many. … The 'appearance of corruption' can make matters worse. It can lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in political participation altogether. … Democracy, the Court has often said, cannot work unless 'the people have faith in those who govern.'"

Lawrence Lessig, in his amicus brief to the Court, argued that the Framers understood corruption to mean improper dependence on gifts, and that representatives should be dependent on the people, not the wealthy few. Lessig argued that the aggregate limits prevent various kinds of corruption, not solely bribery. As Justice Breyer wrote in his dissent, "In *Beaumont* [*v. FEC* (2003)]… the Court found a constitutional a ban on direct contributions by corporations because of the need to prevent corruption, properly 'understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment.'"

The dissent argued that the safeguards in place that Chief Justice Roberts claimed preclude the need for aggregate limits are not effective. The dissent showed that the aggregate limits serve a purpose not covered by the existing laws and gave examples of how to evade the base limits if the aggregate limits were not in place. First, "[t]he two major political parties each have three national committees." $64,800 can legally be given to each national committee. Then, a donor can give $20,000 to each of the 50 state party committees. Combined, a donor can give $1.2 million to his party of choice every two years. Second, a donor can give the $5,200 base limit to each of the "435 party candidates for House seats and 33 party candidates for Senate seats [for] an additional $2.4 million in allowable contributions" bringing the total donations to $3.6 million every two-year cycle. A donor can give $5,200 to each of the 435 House candidates and 33 Senate candidates, and those individual candidates can all give that money to a single candidate. This single candidate can then find out the true source of the money. Third, a donor can give up to the $10,000 base limit to as many PACs as he desires over a two-year cycle. The PACs then funnel the money to one candidate. The majority said that this third option is illegal, but Justice Breyer responded that "the regulation requires a showing that donors have knowledge that a substantial portion of their contributions will be used by a PAC to support a candidate to whom

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they have already contributed." Justice Breyer said this knowledge is typically not capable of being proven. In eight of nine Federal Election Commission cases challenging evasion, knowledge could not be proven. In the ninth case, knowledge was proven because the donor was related to the candidate. So, the dissent said, "[t]here is no 'substantial mismatch' between Congress' legitimate object and the 'means selected to achieve it." Concluding, Justice Breyer said that the majority had approved an opinion that "fails to recognize the difference between influence resting upon public opinion and influence bought by money alone; that overturns key precedent; that creates huge loopholes in the law; and that undermines, perhaps devastates, what remains of campaign finance reform."

## Chapter 11. Freedom of Religion.

### Section III-B-1. Government Sponsorship of Religious Speech

[*Insert on page 1651 of text, following note on The 2005 Ten Commandments Case.*]

#### Legislative Prayers and *Town of Greece v. Galloway* (2014): Note

History and theory collide when confronting the subject of legislative prayers and the Establishment Clause. Since before the 1st Amendment was ratified, Congress has hired chaplains to offer invocations at the start of each legislative session, and the practice had long gone largely unchallenged. Whether or not such practices can continue, and in what forms, became a subject of litigation in recent decades. The Supreme Court has decided two major cases on this subject: *Marsh v. Chambers* (1983) and the more recent *Town of Greece v. Galloway* (2014). These cases, especially *Town of Greece*, pose significant questions for the future application of the Establishment Clause to legislative prayers.

In 1983 in *Marsh*, a member of the Nebraska Legislature sued to enjoin the legislature's longstanding practice of hiring a Presbyterian minister to open each legislative session with a prayer. The Eight Circuit Court of Appeals ruled that the practice violated all three parts of the *Lemon* test: in its view, the chaplaincy practice had no secular purpose, it had both a primary purpose and primary effect of advancing religion, and paying the chaplain involved significant religious entanglement. However, the Supreme Court reversed. The Court found that no aspect of the practice constituted an Establishment violation in itself, and upheld the legislative prayers on the grounds that they were justified as a historic tradition:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.

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Justice Brennan, in his dissent, argued that the court was "carving out an exception" to the Establishment Clause to accommodate legislative prayers rather than providing any sort of sound analysis. For Brennan (and Marshall who joined his dissent), legislative prayer could survive neither the *Lemon* test nor the broader purpose of the Establishment Clause, which he viewed as upholding "an adherence to separation and neutrality" on religious matters.

The proper understanding of *Marsh* became a core question in *Town of Greece* three decades later: both the majority and the dissent claimed to embrace the prior ruling, but differed greatly on how it should be applied. Though *Town of Greece* does reinforce the permissibility of legislative prayer—even explicitly sectarian prayer—it also offers other mixed standards that dilute its meaning and clarity.

In *Town of Greece*, two women who lived in Greece, New York, (a suburb of Rochester) sued the city to enjoin it from continuing what they believed to be an unconstitutional practice of legislative prayers. In the late 1990's, the town council decided to begin inviting local religious leaders to volunteer to open town council meetings with an invocation. However, the list of volunteers was initially drawn from a city register of local religious groups, and the town had only one non-Christian sect with a place of worship within its borders. Neighboring communities (particularly Rochester) that had more diverse faiths; these were not extended the same invitation as those within Greece's borders. As a result, the prayers were offered almost exclusively by Christian ministers despite the fact that people of many faiths (Christian and non-Christian) lived in Greece.

The Court ruled 5-4 in favor of the practice. Justice Kennedy, writing for the majority, argued that Greece had undertaken a good faith effort to enact legislative prayers of the same kind as those offered before the U.S. Congress or the legislature in *Marsh*. Although a couple of prayers had been demeaning to other belief systems, those errors did not condemn the overall tradition. Furthermore, the fact that most prayers were sectarian did not somehow diminish the common cultural values contained therein:

> From the earliest days of the nation, these invocations have been addressed to assemblies comprising many different creeds. These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith…. The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized.

Justice Kagan, writing the chief dissent, argued that the glaring lack of diversity was unacceptable. While she agreed with the reasoning in *Marsh*, she argued that there were significant differences between the situation with the Nebraska legislature and the Greece town council. First, in *Marsh* only legislators were in the audience. In *Town of Greece*, citizens who

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had come to conduct business before the council were also in attendance. Second, the prayers offered by the volunteer Christian ministers used overtly sectarian language, and on at least two occasions included content that demeaned non-Christian community members. This, Kagan argued, was nothing like the kind of neutral and reflective legislative prayer endorsed by *Marsh*. Kagan maintained that the town of Greece should have either encouraged volunteer ministers to use non-sectarian language or invited a larger number of diverse groups to participate in the invocations. Because the town failed to do either one, however, Kagan viewed the prayers as implicitly endorsing Christianity as the local government's preferred religion. If non-Christian citizens wished to go before the town council with their issues, Kagan argued, they might feel compelled to either publicly accept the Christianized prayers or risk facing prejudice from their local leaders for not holding the majority's religious view.

Justice Kennedy's majority opinion also alluded to a possible standard for what kinds of legislative prayers may not be permissible. "If the course and practice [of legislative prayer] over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion…that circumstance would present a different case than the one presently before the Court." Because of its vagueness, however, it is unclear whether or how this *dicta* might be applied in future cases.

Despite the fact that the majority was unified on the subject of history, and was therefore able to rule in the Town of Greece's favor, it was not unified on the question of whether or not the prayers coerced participation by religious minorities. Justices Thomas and Scalia elected not to join Section II-B of the majority opinion (which dealt specifically with the issue of coercion), and Justice Thomas instead authored his own two-part concurring opinion.

Justice Kennedy's answer to the question of coercion in Section II-B of his opinion begins with his assertion that the primary purpose of legislative prayers is to meet the spiritual needs of lawmakers, not community members. Kennedy also points out that the town of Greece's prayers were held during the first half of the meeting, which was more ceremonial in nature, and that the second half was reserved for matters of individual concern and adjudication. Because of these distinct and separate sections within the meeting, Kennedy argued that prayers during the first part of the meeting were meant more to "acknowledge religious leaders and the institutions they represent rather than to coerce nonbelievers." (This argument, not surprisingly, is one which Kagan disagrees with aggressively in her dissent.) Kennedy also reiterates a view, similar to one expressed by Justice Scalia in his dissent in *Lee v. Wiseman*: that merely being offended or upset by the content of a prayer does not amount to a form of religious coercion.

Justice Thomas, in his concurring opinion, restated his belief that an accurate historic understanding of the Establishment Clause suggests that it was never meant to be incorporated via the 14th Amendment. Thus, as Thomas asserts, there shouldn't even be a question as to state-sponsored coercion because there should not be a prohibition against the Town of Greece having a city-sanctioned faith. Justice Thomas goes on, however, to argue (now with Scalia joining him) that if the Establishment Clause has been properly incorporated against the States, there is still no

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coercive establishment here similar to one as it would have been understood by the Framers. At that time, governments used their power to collect revenues for religions, manipulate doctrine, and punish dissenters. "Thus, to the extent coercion is relevant… it is actual legal coercion that counts—not the 'subtle coercive pressures' allegedly felt by respondents in this case." Here Thomas and Scalia look at practices at the time of the ratification of the 1st, not the 14th, Amendment.

Both Thomas's concurrence and Kennedy's plurality identify a difference between legally meaningful coercion and weaker forms that are more similar to peer pressure experienced by adults. It appears Justices Thomas and Scalia will virtually never find public prayer to be coercive. Justices Kennedy and Alito and Chief Justice Roberts recognize that public prayer *could* be coercive. While Justice Kagan and the other dissenters will likely find coercion in a broad variety of settings, it is unclear how the Kennedy/Roberts/Alito group will apply *Town of Greece* in the future with regards to religious coercion.

**Section IV. Free Exercise of Religion**

[Insert on page. 1686 after *Gonzalez,* it will come before the *Hobby Lobby* note]

***Holt, AKA Muhammad v.***
***Hobbs, Director, Arkansas Department of Corrections* (2015): Note**

The Court in this case unanimously held that a state deprived a prison inmate of religious liberty by denying his request to grow a beard that would be a half-inch in length. The Court concluded that the state violated the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which prohibits federal, state, and local governments from imposing "a substantial burden on the religious exercise" of an institutionalized person unless the government can demonstrate that the burden is the least restrictive means of furthering a compelling governmental interest.

The Court found that the inmate, a Muslim, easily satisfied his burdens of showing that his religious belief was sincere and that the state had substantially burdened his exercise of religion. This shifted the burden to the government, which failed to demonstrate that its refusal to permit the beard was the least restrictive means of promoting its compelling interests in detecting contraband and preventing prisoners from disguising their identities in order to escape or evading detection after an escape. The Court explained that contraband would be difficult to hide in such a short beard and that the state could "satisfy its security concerns by simply searching" the inmate's beard for contraband. The Court found that the state could take photographs of inmates before they grew beards in order to prevent inmates from using beards to facilitate escapes and evade apprehension after escaping.

In a concurring opinion, Justice Ginsburg, joined by Justice Sotomayor, explained that the Court's decision was not inconsistent with their dissent in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014) because accommodating the inmate's religious belief "would not detrimentally affect others who do not share" his belief.

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The RLUIPA remains constitutional as applied to states even though the Supreme Court invalidated its companion statute, the Religious Freedom Restoration Act of 1993 (RFRA), as applied to the states in *City of Bourne v. Flores*, 521 U.S. 507 (1997). This is because the former was enacted pursuant to the spending and commerce clauses rather than section 5 of the Fourteenth Amendment.

**Section IV-A. The Development of the Required Accommodation Doctrine.**
[Insert on page 1686 of text following note on *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*.]

**The Free Exercise Rights of Closely Held Corporations and *Burwell v. Hobby Lobby* (2014): Note**

In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA). As part of the ACA, the Department of Health and Human Services (HHS) mandated that employer-based health insurance plans must cover certain preventive care services for women, including twenty kinds of FDA-approved contraceptives. For religious and non-profit institutions that objected to contraception and met a number of strict requirements, HHS offered exemptions to the mandate. However, HHS did not offer exemptions to for-profit corporations. In *Burwell v. Hobby Lobby* (2014), the Court ruled 5-4 that the contraceptive mandate under the ACA violated rights that closely held corporations held pursuant to the Religious Freedom Restoration Act (RFRA).

When the contraceptive mandates went into effect, a number of for-profit companies across the United States filed lawsuits seeking preliminary injunctions. Three companies in particular saw their cases advance to the Supreme Court: Hobby Lobby, a national chain of arts and crafts supply stores; Mardel, a chain of Christian book stores; and Conestoga Wood Specialties Corp., a Mennonite cabinet manufacturer. The three companies were closely held by the families who operated them: the Greens owned Hobby Lobby and Mardel, and the Hahns owned Conestoga Wood. The families operated the companies in ways that they believed embodied their religious beliefs, and both families offered generous wages and relatively high-quality insurance plans out of a religious duty to care for their employees.

However, both families also firmly believed that life begins at conception, specifically the point at which a sperm fertilized an egg. The families objected to covering certain contraceptives that were reported to work by interfering with the implantation of a fertilized egg into the uterine lining, believing that this function had an abortifacent effect. Four of the twenty FDA-approved contraceptives were reported to operate in this way, and the families directed their corporations to refuse to cover those particular contraceptives. As a result of this conflict, the corporations contended that they were faced with the Hobson's choice of either violating their beliefs or paying fines for failing to provide required coverage under the ACA. For Hobby Lobby, with 21,000 employees and annual revenues of 3.3 billion dollars (in 2012), the fines could have potentially totaled 475 million dollars a year.

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The Greens and the Hahns sued in the Tenth and Third Circuits, respectively, seeking protection for both themselves and their businesses under both RFRA and the First Amendment. Under *Employment Division v. Smith* (1990), the Court previously had made clear that Free Exercise challenges to statutes of general application receive only rational basis review. Congress responded to *Smith* by passing RFRA, attempting to give challengers like Smith a statutory right to strict scrutiny. While the Court struck down RFRA insofar as it applied to *states* in *City of Boerne v. Flores* (1997), it remains constitutional in its application to *federal* law. *See, Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* (2006). The ACA cases hinged on two major issues: (1) whether or not corporate entities could be considered "persons" for the purposes of RFRA or the Free Exercise Clause, and (2) regardless of whether or not the corporations counted as people, whether the beliefs of the Greens and Hahns were themselves substantially burdened by the ACA. Following *Citizens United v. Federal Election Commission* (2010), which extended First Amendment protections to corporate speech, many Free Exercise proponents argued that Free Exercise rights should be extended to corporate entities as well.

The Third Circuit Court of Appeals denied the Hahns' claims, siding with the government and asserting that for-profit corporations were outside the scope of who could be considered "people" under RFRA. The Third Circuit also ruled that the burdens placed on the Hahns' beliefs were not substantial, because a corporation is a distinct legal entity separate from any of its owners: "The Hahn family chose to incorporate and conduct business through Conestoga, thereby obtaining both the advantages and disadvantages of the corporate form. We simply cannot ignore the distinction between Conestoga and the Hahns. …The Mandate does not impose any requirements on the Hahns. Rather, compliance is placed squarely on Conestoga." *Conestoga Wood Specialties Corp. v. U.S. Dept. of HHS* (3d Cir. 2013).

The Tenth Circuit Court of Appeals disagreed with the Third. The Tenth Circuit deemed the government's argument that for-profit corporations were not persons under RFRA was logically inconsistent with other aspects of corporate law. "In short, individuals may incorporate for religious purposes and keep their Free Exercise rights, and unincorporated individuals may pursue profit while keeping their Free Exercise rights. With these propositions, the government does not seem to disagree. The problem for the government, it appears, is when individuals incorporate and fail to satisfy Internal Revenue Code § 501(c)(3). At that point, Free Exercise rights somehow disappear." *Hobby Lobby Stores, Inc. v. Sebelius* (10th Cir. 2014).

The Tenth Circuit's reasoning was ultimately upheld by the Supreme Court. The majority, per Justice Alito, decided the case solely on the RFRA challenge of the corporations. In its ruling, the majority determined that "If for-profit corporations may pursue [humanistic and altruistic] objectives, there is no apparent reason why they may not further religious objectives as well." Following this reasoning, the Court determined that "closely held for-profit corporations"—those similar in kind to Hobby Lobby, Mardel, and Conestoga Wood, where five or fewer people control more than half of the shares of the corporation—were "persons" that were protected under RFRA.

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Applying RFRA's standard, the Court ruled that the government's actions did not satisfy the least restrictive means test: the government had the option of either subsidizing the contraception directly or extending to companies like Hobby Lobby the same exemptions it already had authorized for religious groups and non-profit organizations.

In a passionate dissent, Justice Ginsburg argued that the majority wrongfully expanded the realm of persons protected under RFRA. Including corporate entities in the realm of religious persons, in her view, created a slippery slope that could destabilize government policies:

> Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a 'less restrictive alternative.' … there always will be [a less-restrictive alternative] whenever… the government, *i.e.*, the general public, can pick up the tab.

Ginsburg also argued that, by upholding the employers' religious claims, the Court created an undue burden for female employees the government sought to protect by forcing them to take on extra time or expense to acquire birth control coverage.

Justice Kennedy, in a concurring opinion, disagreed with Justice Ginsburg's conclusion that extending corporations religious rights was improper. He also disagreed with Ginsburg's conclusion that the majority had created an undue burden on the rights of female employees, as the government had already created at least one kind of accommodation that would address the employers' concerns: requiring insurers to pay for the contraception coverage directly, without cost sharing: "That accommodation equally furthers the Government's interest… [and] the Government has not met its burden of showing that it cannot accommodate the plaintiffs' similar religious objections under this established framework."

Ultimately, the majority sought to narrow its decision to the contraception issue alone: "This decision concerns only the contraceptive mandate and should not be understood to hold that all insurance coverage mandates, e.g., for vaccinations or blood transfusions, must necessarily fall if they conflict with an employer's religious beliefs. Nor does it provide a shield for employers who might cloak illegal discrimination as a religious practice." However, the decision raised a number of still unanswered questions. How will the Supreme Court respond if it grants certiorari in a case that involves one of the issues it excluded in the passage above? Will future jurisprudence extend Free Exercise protections to corporations under the First Amendment itself, and not merely to RFRA? How will courts approach the question of corporations and other business entities that are not "closely held," including partnerships and publicly-traded corporations? How will this ruling be applied in situations that do not involve health care, such as labor or antidiscrimination laws?

Though it may be years before the Supreme Court addresses these issues, it is unmistakable that *Burwell v. Hobby Lobby* represents a sea change in the way that the federal

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government must approach Free Exercise issues that impact corporations and other non-individuals.

[*Insert on page 1686 after After* Employment Division v. Smith: Note.]

### *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (2012): Note

The Establishment and Free Exercise clauses preclude employment discrimination suits by clergy against religious organizations, according to the Court's unanimous decision in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission (2012). The Court unanimously held that the religion clauses create a "ministerial exception" to the Americans with Disabilities Act (ADA) and other employment discrimination statutes, a position espoused earlier by seven Courts of Appeals. The Court therefore concluded that a parochial school teacher who had ministerial status within her denomination because she had theological training and taught religious subjects could not maintain an action against her church for firing her when she threatened to sue for violation of the ADA. The Court relied heavily upon its decisions in church property disputes in which the Court deferred to the internal decisions of churches in determining who could exercise ecclesiastical authority.

In his opinion for the Court, Chief Justice Roberts declared that:

> The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.

Roberts explained that allowing "the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."

Although Roberts acknowledged that "the interest of society in the enforcement of employment discrimination statutes is undoubtedly important," he explained that religious groups also have a significant interest "in choosing who will preach their beliefs, teach their faith, and carry out their mission." Roberts held that the ministerial exception applied even though the minister was seeking only monetary relief rather than reinstatement because even monetary relief would violate the First Amendment by penalizing the church for terminating the minister.

The Court explained that its recognition of a ministerial exception was not inconsistent with Employment Division v. Smith (1990), which held that the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)," 494 U.S. at 879. Although the Court determined that "the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of

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general applicability," the Court found that "a church's selection of its ministers is unlike an individual's ingestion of peyote. Smith involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself."

The Court limited its decision to employment discrimination lawsuits, explaining that "we express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."

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## Chapter 12. Equal Protection

### Section V. Equal Protection Analysis of Social and Economic Regulatory Legislation

[*Insert on page 1762 after* Village of Willowbrook v. Olech *(2000).*]

#### *Armour v. City of Indianapolis* (2012): Note

The Court re-affirmed *Carolene Products* and once again applied the rational basis standard of review to an equal protection claim involving economic regulation in *Armour v. City of Indianapolis* (2012). In this case, a city that had levied assessments upon property owners for sewer assessments relieved persons who were making installment payments from making additional payments after the city switched to an alternative system of financing sewers. The city, however, refused to provide any refund to persons who had already paid in full by making lump sum payments. In a six to three decision, the Court held that the city did not violate the equal protection clause in its disparate treatment of the two classes of property owners. Since the classification involved "ordinary commercial transactions" rather than any "fundamental right" or "suspect" classification, the Court concluded that "rational basis review requires deference to reasonable underlying legislative judgments." The Court found that administrative convenience provided the city with a rational basis for the classification because the costs of processing refunds would have been substantial. The Court observed that "ordinarily, administrative considerations can justify a tax-related distinction."

In a dissent joined by Justices Scalia and Alito, Chief Justice Roberts contended that refunds would not impose a substantial burden on the city and that "the equal protection violation is plain" because the city charged "some homeowners *30 times* what it charged their neighbors for the same hook-ups" (emphasis in original). The dissent contended that the Court's decision was inconsistent with *Allegheny Pittsburgh Coal Co. v. Commission of Webster City* (1989), in which the Court held that a county violated the equal protection clause by assessing property taxes primarily on the basis of purchase prices, without subsequent adjustments to reflect increases in market value. This practice had created substantial disparities in the valuation of property that had similar market value. The Court's majority opinion distinguished *Allegheny* on the ground that the disparate assessments were not rational because they "clearly and dramatically violated" state laws requiring equal valuation.

### Section IV-B. Race: The Modern Approach

[*Insert on page 1739 after* Bolling v. Sharpe]

#### *Brown v. Board of Education* and Stare Decisis: Note

The central issue in *Brown* was whether or not the Court was justified in overruling *Plessy v. Ferguson* (1896) and in refusing to follow a presumption in favor of stare decisis. "Stare decisis" derives from Latin, meaning "to stand by things decided," and has been described, with a good bit of exaggeration, as "[t]he doctrine of precedent under which a court must follow earlier judicial decisions when the same points arise again in litigation." Black's Law Dictionary 1537 (9th ed. 2009). Stare decisis dictates that a legal decision should ordinarily

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be followed in similar subsequent cases because stability and predictability are major institutional goals of the rule of law and of judicial review. If appellate courts change legal rules *solely* due to changes in personnel and for no other good reason, the claim that the rule of law differs from simple politics is more difficult to sustain. Thus, judges take pains to explain reasons for departing from stare decisis. Legislators, not judges, are free to vote according to their personal policy preferences.

Courts are generally reluctant to overturn prior decisions, preferring instead to cultivate stability, consistency, and predictability. Stare decisis allows judges and attorneys to rely on previously decided issues to determine legal rights in future matters. In a dissenting opinion in *Burnet v. Coronado Oil & Gas Co.* (1932), Justice Brandeis famously said, "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."

The question of when a court should defer to principles of stare decisis and affirm prior case law is contentious and much debated. Some legal scholars argue that stare decisis is constitutionally required.[1] At the same time, others argue that stare decisis is itself unconstitutional because "it requires courts to follow precedent even if it conflicts with the Constitution," thus disregarding the Constitution's position as "the supreme law of the land [that] trumps all conflicting law."[2]

A court is not the only institution that can correct an earlier judicial "mistake." Controversial or mistaken decisions interpreting statutes can be nullified by the legislature revising the statute. Though much, much more difficult to accomplish, controversial decisions interpreting a constitutional provision can be overturned by constitutional amendment and, rarely and occasionally, they have been.

However, while stare decisis serves important interests, it is not an inflexible rule. In some instances, significant changes in facts related to the precedent or to the law in associated cases requires reconsideration of the old rule. Justice Brandeis, in the same *Burnet* dissent, argued that the Court has frequently overruled its prior decisions in cases involving Constitutional questions. This is so because prior Supreme Court decisions cannot readily be corrected through legislation, so "[t]he court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."

In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Supreme Court listed several factors that are germane to stare decisis analysis:

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[1] Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 Notre Dame L. Rev. 1173, 1178 (May, 2008).

[2] *Id*. at 1183-84. (Citing Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol'y 23, 27-28 (1994).

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> [W]hether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

In overruling *Plessy v. Ferguson* (1896), Chief Justice Warren found the history of the 14th Amendment and the intent of its drafters and ratifiers to be "[a]t best…inconclusive" in deciding whether racially segregated schools were constitutionally permissible. He noted that the field of education and its importance in society had undergone tremendous changes since the time when the 14th Amendment was passed and when *Plessy* was decided. He additionally concluded that society's understanding of the psychological impact of the "separate but equal" doctrine on African-Americans had so changed that premises relied on in *Plessy* were no longer tenable in the context of school segregation. Warren noted that under the modern understanding, racial segregation was understood to "generate[] a feeling of inferiority…that may affect [students'] hearts and minds in a way unlikely ever to be undone." This and the importance of public education by the 1950s justified overturning *Plessy*'s long-standing precedent.

While the Supreme Court generally adheres to principles of stare decisis, there are numerous examples of constitutional cases where the Court overrules its own prior decisions. These cases are almost always fraught with controversy.[3] For example, In *Lochner v. New York* (1905), the Court had voted 5-4 to strike down a state statute limiting the number of hours per week that a baker could work, holding that it unconstitutionally interfered with the fundamental right to contract freely. The Court at that time was guided by principles of laissez faire economics and was reluctant to uphold Progressive laws that attempted to regulate industry. The Progressive Movement, around the beginning of the 20th Century, sought to enact health, safety, and wage and hour legislation that protected workers. The idea embraced by the Lochner majority, however, was that workers were free to negotiate with their employers for themselves and to accept work on terms that they found suitable. After the Great Depression, however, as some Justices in *Planned Parenthood v. Casey* noted, it became "apparent" to the Court and others that wageworkers were often not in a position to negotiate meaningfully with their employers to improve conditions or wages. Because the prior assumption of *Lochner*—that an unregulated market could properly ensure the welfare of workers—proved false, the Court (5-4) in *West Coast Hotel Co. v. Parrish* upheld a state's minimum wage law, overruling *Lochner*.

Another instance where the Court later changed course and reversed its prior holding occurred in *Garcia v. San Antonio Metropolitan Transit Authority* (1985). There the Court voted 5-4 to overrule *National League of Cities v. Usery* (1976). In *Usery*, the Court had voted 5-4 to

[3] The final 9-0 vote in *Brown* is misleading, masking serious controversy amongst the justices regarding the proper resolution of the case. See *Brown* conference notes: http://law2.umkc.edu/faculty/projects/ftrials/brownvboard/brownconferences.html.

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hold that application of the Fair Labor Standards Act to state governments violated the 10th Amendment. The Act required states to pay a minimum wage to its government employees, which the Supreme Court held was an impermissible interference with "traditional governmental functions" of the state. However, just nine years later in *Garcia*, the Court again considered the Fair Labor Standards Act as it applied to state and local governments and overruled *Usery*. The majority wrote that *Usery* was a rule that was "unsound in principle and unworkable in practice" and was an issue that should be resolved through the political process. The Court argued that the rule was unworkable because the determination of what qualified as a "traditional government function" allowed the judiciary too much latitude to "make decisions about which state policies it favors and which ones it dislikes."

More recently, in *Lawrence v. Texas* (2003) the Supreme Court overruled *Bowers v. Hardwick* (1986), which upheld Georgia's criminal sodomy statute when challenged by a gay man arrested for engaging in oral sex with another adult man in his home. In *Bowers*, in a 5-4 opinion the Court argued that the issue was whether or not there was a fundamental right to sodomy contained in the right to privacy. Based on a long history of criminal statutes outlawing sodomy, the Court found that it was within a state's police power to ban such conduct; there was no right to engage in private consensual sodomy. However, in *Lawrence v. Texas* (2003), amid a rising wave of recognition of the rights of gays, in a 5-1-3 opinion the Court expressly overruled *Bowers*. Justice Kennedy, writing for the majority, argued that such laws demean homosexuals and "seek to control a personal relationship that…is within the liberty of persons to choose without being punished as criminals." Justice Kennedy focused on the historical scholarship, legislation, and judicial decisions in the United States and under the European Court of Human Rights that undermined *Bowers*' assertions. The Court held that stare decisis did not control because "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."

Not all cases that present the opportunity to overrule a hotly contested decision end in such a clear result. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Supreme Court voted to reaffirm "the central holding" of *Roe v. Wade* (1973) (holding that a woman's right to an abortion in the earlier stages of pregnancy is a right that the law, with qualifications, protects.). Although the Court chose not to overrule its prior decision, it engaged in a lengthy discussion of stare decisis that described the proper analysis as "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." (Joint opinion of Justices O'Connor, Kennedy, and Souter). As mentioned above, the Court then listed several factors relevant to stare decisis analysis.

These factors described in *Casey* can be seen piecemeal in the cases discussed above, but *Casey* discussed each of these factors in turn. First, the Court found that *Roe*'s holding had not become unworkable by creating problems for courts in how to apply the rule, but was merely a limit on restrictions that states may lawfully enact in the abortion context. Second, the court

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observed that for the past two decades people had come to rely on the holding of *Roe* in their intimate relationships and personal choices. Third, the Court reasoned that "subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to…decisions about whether or not to beget or bear a child." Finally, the court considered whether there had been any change in facts since 1973 that affected the validity of *Roe*. Although advances in medical technology allowed viability of the fetus (the critical point in pregnancy where a fetus can survive outside of the womb thus justifying state regulation or even a ban on abortions) to occur earlier in a pregnancy, this did not change the underlying analysis that viability is the critical point where the state's interest becomes more compelling than the woman's interest in her right to choose.

The *Casey* court distinguished its decision not to overrule *Roe* from *Brown v. Board of Education* and *West Coast Hotel Co. v. Parrish*. The plurality wrote that in both *Brown* and *West Coast Hotel*, because society's understanding of the issues and the factual underpinnings of both *Plessy* and *Lochner* had changed drastically, a "terrible price [] would have been paid if the Court had not overruled as it did." However, with *Roe,* it said no such upheaval of societal understanding or factual bases had occurred so as to justify overruling precedent. The Court argued that to overrule "in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy."

The dissenters contested the *Casey* plurality on almost every point. They pointed out that many of the rules set out in *Roe* had been overruled and suggested that *Casey* was a "Potemkin village" purporting to show that *Roe* had not been undermined when the facts were otherwise. They insisted that *Plessy* was wrong when decided, so changes in public opinion or understanding were not what justified its overruling in *Brown*.

**Section VI. The Movement Toward "Rational Basis with Bite."**

[*Insert on page 1776. Delete paragraph immediately before* Kentucky v. Wasson*, and replace* Kentucky v. Wasson *and* Romer v. Evans *with the following note.*]

**Homosexuals as a Suspect Class? Equal Protection Analysis of Gay Rights Issues: Note**

As legislation aimed at homosexuals was challenged with increasing frequency in the last few decades of the 20th century, the question emerged as to what type of treatment gays and lesbians should be granted under equal protection analysis. Under the rationale of *Carolene Products* Footnote 4, suggesting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry," should sexual orientation be recognized as a quasi-suspect class deserving a formal category of heightened scrutiny? In *City of Cleburne v. Cleburne Living Center, Inc.* (1985), the Court had refused to formally grant quasi-suspect status to the mentally

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challenged, or even to acknowledge that it was using a different form of rational basis review ("rational basis with bite") when it struck down a discriminatory zoning ordinance.

In 1996, the Supreme Court for the first time addressed classifications based on sexual orientation in a meaningful way in *Romer v. Evans*, striking down a Colorado constitutional amendment as being violative of the Equal Protection Clause. After several Colorado cities passed general ordinances that protected their citizens from discrimination in employment, public accommodation, housing, etc., because of sexual orientation, Colorado amended its constitution by referendum vote to repeal these ordinances. "Amendment 2," as it was referred to, not only repealed the current ordinances, but also prohibited any state or local entity from granting special protected status to homosexuals or bisexuals:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

By a 6-3 vote, the Supreme Court of the United States struck down "Amendment 2" because it bore no rational relationship to a legitimate state interest and was enacted for an improper discriminatory purpose.

Justice Kennedy, writing for the majority noted that, "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and…invalid form of legislation." He found that an enactment designed to make it more difficult for a single class of people to seek the protection of their government is discordant with the guarantee of equal protection contained in the 14th Amendment.

Additionally, Justice Kennedy, quoting *United States Dept. of Agriculture v. Moreno* (1973), concluded that "'a bare…desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest,'" and that this amendment was "born out of animosity toward the class of persons affected." He dismissed the state's rationale that the amendment served to protect the freedom of association and liberties of other citizens' who object to homosexuality, observing that "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." As it had done with the mentally challenged in *City of Cleburne*, the Court did not formally grant quasi-suspect status to gays and lesbians, or even acknowledge that it was using a different form of rational basis review. However, the Court unquestionably applied greater scrutiny than traditional low-level rational basis review. This approach created much uncertainty as to what treatment classifications based on sexual orientation would receive in future cases.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, would have used low level rational basis review and upheld the amendment. He argued that since the Court had

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upheld a criminal sodomy statute in *Bowers v. Hardwick*, Colorado was free to express its disapproval of non-traditional sexual practices in other ways as well.

*Romer* was in obvious tension with *Bowers*, and in 2003 the Court re-visited the issue of criminal sodomy statutes. A Texas statute criminalized only homosexual sodomy, presenting an obvious equal protection question. In *Lawrence v. Texas* (2003) the Court chose to strike the statute on substantive due process grounds, but Justice O'Connor, in her concurring opinion, argued that the statute was based on a "bare…desire to harm" homosexuals as a class. She would have voted to strike the statute based on the Equal Protection Clause under the same reasoning as *Romer v. Evans*.

Although the Supreme Court expressed willingness to grant heightened protection to gays and lesbians without expressly saying so, various state supreme courts squarely addressed the question of how classifications based on sexual orientation should be treated under equal protection principles under their own state constitutions.

The Hawaii Supreme Court was the first state court to declare that denial of marriage licenses to same-sex couples violated Hawaii's Equal Protection Clause. *Baehr v. Lewin* (Haw. 1993). The court found a violation of equal protection because it found the classification in the marriage laws to be based on sex, a suspect class under Hawaii's jurisprudence. This victory for gay rights was immediately met by strong resistance and in 1998 Hawaii amended its constitution to define marriage as an opposite-sex entity. The case still demonstrates, however, that on the state level, some courts were beginning to grant more heightened review to legislation making distinctions based on sexual orientation.

Connecticut's Supreme Court declared that sexual orientation itself was a quasi-suspect class that deserved greater scrutiny under the Connecticut Constitution in *Kerrigan v. Commissioner of Public Health* (Conn. 2003). There the court declared that the exclusion of gays and lesbians from marriage violated the state's equal protection provision. It found that the distinction between civil unions and marriages, even though civil unions enjoyed equal rights and responsibilities with marriage, was discrimination based on sexual orientation designed to express moral disapproval.

Next the court engaged in a thorough analysis of how to classify homosexuals under the traditional rubric of equal protection analysis, considering the "four I's" that denote a suspect class (the trait is immutable, the group with the trait has suffered from a history of invidious discrimination, the group with the trait is insular and, due to their size, is impotent in the political process). The court traced a long history of invidious discrimination, noting that, "[f]or centuries, the prevailing attitude toward gay persons has been 'one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment.'" (Quoting R. Posner, *Sex and Reason* (Harvard University Press 1992) c. 11, p. 291). The court noted that they have been excluded from military service and certain professions, victims of violence, subject to criminal prosecution and, until relatively recently, were considered mentally ill.

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The Connecticut court also found sexual orientation to be a trait that, rather than being defined merely by behavior, was a central part of their personhood that was not subject to change. The court next discussed whether homosexuals are a politically impotent and insular minority. The court noted that "gay persons are not entirely without political power," because there has been legislation enacted that is protective of homosexuals and because some public officials are openly gay. However, the court also noted that political impotence is not a literal phrase, but for equal protection purposes it exists wherever there is such a history of discrimination that it seems likely that such discrimination will "not be rectified…merely by resort to the democratic process."

Concluding that the distinction between civil unions and traditional marriages is discriminatory and that state has not offed an "exceedingly persuasive justification" for the different treatment, the Connecticut Supreme Court struck the statute as violative of the state's Equal Protection Clause.

Several other states also engaged in thorough equal protection analysis of their own laws classifying based on sexual orientation and granted heightened scrutiny to gays and lesbians. See *Goodridge v. Department of Public Health* (Mass. 2003); *Varnum v. Brien* (Iowa 2009); *In re Marriage Cases* (Cal. 2008); *see also*, Chapter 8 on Substantive Due Process in this text.

The Supreme Court revisited the issue of equal protection for homosexuals in considering the Defense of Marriage Act (DOMA), a federal law enacted in 1996 defining marriage as being between one man and one woman for purposes of federal law. This definition denied to same-sex partners, legally married in their respective states, all of the burdens and benefits attendant to marriage in over 1,000 federal statutes. Edith Windsor, a lesbian woman who was legally registered as a domestic-partner with her wife Thea Spyer under New York law, brought a refund suit challenging the constitutionality of DOMA after she was denied a spousal tax exemption on her inheritance of Spyer's estate after Spyer died. *United States v. Windsor* (2013).

In a 5-4 decision Justice Kennedy, writing for the majority, held that DOMA's definition of marriage violated the 5th Amendment's guarantees of due process and equal protection. Justice Kennedy found that:

> DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

This again echoed the reasoning of *Romer* that "'a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." [Quoting *Dept. of Agriculture v. Moreno* (1973)]. The majority argued that the purpose of the definition was to express moral

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disapproval of homosexuals and in so doing, it wrote "inequality into the entire United States Code."

However, again, the Supreme Court failed to explicitly engage in traditional equal protection analysis and to declare sexual orientation as a quasi-suspect class. Following the logic of *Windsor*, lower federal courts began to routinely strike state statutes that denied same-sex couples the right to marry. While the Supreme Court eventually ruled 5-4 that such statutes were in fact unconstitutional in *Obergefell v. Hodges* (2015), the majority opinion of Justice Kennedy relied primarily on substantive due process analysis. *See, supra* at Chapter 8.

**Section IX. "De jure" versus "De facto" Discrimination: Obvious and Indirect Discrimination (Discriminatory intent versus disproportional impact.)**

[*Insert on page 1835 after* McCleskey.]

***Felkner v. Jackson* (2011): Note**

In *Swain v. Alabama* (1965), the Supreme Court held that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." The Court reasoned,

> [a]lthough a prosecutor is ordinarily entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, *United States v. Robinson* (1976), the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

To prove a prima facie case of peremptory challenge racial discrimination, a black defendant could show that the prosecutor "in case after case… is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries."

Subsequently, in *Batson v. Kentucky* (1986), the Supreme Court rejected readings of *Swain* that said "proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause." The Court described this interpretation as placing "on defendants a crippling burden of proof" which essentially immunized prosecutor's peremptory challenges.

Instead, the Court articulated a new formulation that did not require a pattern of racially motivated peremptory challenges.

> The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since *Swain.* These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida* (1977), and that the prosecutor

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> has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia* (1953). Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In *Felkner v. Jackson* (2011), Steven Jackson was convicted of sexual offenses stemming from his attack upon an elderly woman. Jackson raised *Batson* claims regarding the prosecution's exercise of peremptory challenges on two prospective black jurors. The prosecutor offered race-neutral explanations for both peremptory strikes. One juror was struck because he believed he had been stopped by the police multiple times because of his race. The second juror was struck because she was a social worker. "After listening to each side's arguments, the trial court denied Jackson's motion." The California Court of Appeal affirmed Jackson's conviction and upheld the denial of the *Batson* claim.

Jackson then sought federal habeas relief, a review governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The standard of review is that "federal habeas relief may not be granted unless the state court adjudication 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.' " At the district court level, Jackson's petition was denied. The district court found that the California Court of Appeal's findings were not unreasonable.

However, the Ninth Circuit Court reversed this decision in a three-paragraph, unpublished opinion. It did so although it "did not discuss any specific facts or mention the reasoning of the three other courts that had rejected Jackson's claim." The Ninth Circuit only offered one explanatory sentence: "The prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors."

The Supreme Court granted certiorari and in a per curium opinion decided that

> On federal habeas review, AEDPA "imposes a highly deferential standard for evaluating state-court rulings" and "demands that state-court decisions be given the benefit of the doubt." *Renico* v. *Lett* (2010). Here the trial court credited the prosecutor's race-neutral explanations, and the California Court of Appeal carefully reviewed the record at some length in upholding the trial court's findings. The state appellate court's decision was plainly not unreasonable. There

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> was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner.

Thus, the Court reversed the California Court of Appeals decision and remanded the case for further proceedings.

**Section X. Affirmative Action**

[*Insert on page 1863 after* Gratz v. Bollinger (2003): Note.]

***Adarand Constructors, Inc. v. Pena* (1995): Note**

May racial classifications be used for "benign" purposes—those that benefit rather than harm racial minorities? That question has proven to be enormously controversial. From a constitutional perspective, the central question about affirmative action is whether strict scrutiny of racial classifications should be relaxed when the classifications in question have been adopted by a racial majority for the purpose of aiding minorities. If so, which "benign" purposes justify this relaxation of strict scrutiny? To remedy past de jure racial discrimination by the state? To remedy de facto (societal) racial discrimination (either public or private)? To provide greater racial diversity in a particular setting? Should the level of scrutiny differ when assessing gender classifications (as opposed to racial classifications) motivated by "benign" purposes?

A controversial setting in which these issues arise is affirmative action in higher education. In *Regents of the University of California v. Bakke* (1978), the Court considered the constitutionality of a program at the UC-Davis medical school that set aside a quota of sixteen of the school's 100 seats in each entering class for racial minorities who were found to have suffered from economic or educational deprivation.

Four Justices (Blackmun, Brennan, Marshall, and White) voted to uphold the program, using "intermediate" tier scrutiny. Justice Brennan explained that under this level of scrutiny, the racial classification must have an "important" purpose; for these Justices, the medical school's goal of remedying de facto discrimination was sufficiently important. Four other justices (Burger, Rehnquist, Stevens, and Stewart) found that the program violated Title VI of the Civil Rights Act of 1964 and therefore that it was not necessary to reach the constitutional question.

Justice Powell wrote the opinion for the Court striking down the medical school's program. Powell's reasoning, however, was joined by no other justice in its entirety. Powell concluded that all racial classifications, including "benign" classifications, must be subjected to strict scrutiny. Powell further concluded that the state's proffered interest in remedying de facto racial discrimination (the low number of racial minorities in medical school) could not justify the quota program. Alternatively, since the school had not engaged in prior de jure discrimination, the court had no basis to assert its remedial power. However, Powell asserted that the medical school's interest in creating a diverse student body did constitute a *compelling* state interest, but that the quota was not a *necessary* means of accomplishing this goal. Powell joined Burger, Rehnquist, Stevens, and Stewart to hold that Bakke had been illegally denied admission to the

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medical school, but he also joined Blackmun, Brennan, Marshall, and White in leaving the door open to the use of affirmative action under a different kind of program. In dicta, Powell spoke approvingly of an affirmative action plan at Harvard in which the race of applicants was viewed as one of many "plus" factors considered for the purpose of securing a diverse class of students.

Subsequent cases continued to produce splintered opinions. The first issue was always whether or not the party adopting the program was doing so to remedy its own de jure unlawful prior conduct or attempting to address de facto discrimination. Cases which invalidated affirmative action programs during the *Bakke* era appeared to do so on the "means" reasoning. Quotas were not "necessary" to address de facto discrimination, and firing a current employee was not "necessary" even to address suspected discrimination by the party itself. See *Wygant v. Jackson Board of Education* (1986).

The Court finally adopted strict scrutiny as the standard to be used in 14th Amendment cases involving state or local affirmative action programs. See *Richmond v. J.A. Croson Co.* (1989). However, *Croson* was arguably distinguishable from cases that were brought to challenge *federal* affirmative action programs. Congress had powers under § 5 of the 14th Amendment that states did not have.

In *Adarand Constructors, Inc. v. Pena* (1995), the Court conclusively held that *Croson's* strict scrutiny standard would apply to federal programs as well. Two earlier cases had approved *federal* affirmative action programs. In *Fullilove v. Klutznick* (1980), the Court approved a federal set-aside program, even under ostensible strict scrutiny analysis; and in *Metro Broadcasting, Inc. v. FCC* (1990), the Court explicitly adopted intermediate scrutiny as the appropriate level of analysis for *federal* affirmative action programs. However, *Adarand* explicitly overruled *Metro Broadcasting* (and implicitly overruled *Fullilove*). In *Adarand,* petitioner contested the Federal Government's practice of giving contractors financial incentives to hire subcontractors owned by "socially and economically disadvantaged individuals." Petitioner contended the practice violated the implied equal protection guarantees of the "liberty" found in the Fifth Amendment Due Process Clause. *See, Bolling v. Sharpe* (1954). Under the Small Business Act, socially disadvantaged individuals were defined as, "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," § 8(a)(5), 15 U.S.C. § 637(a)(5). The statute had a rebuttable presumption that Black, Hispanic, Asian, and Native Americans, among other minorities, were socially and economically disadvantaged. In order to qualify for the government set-aside program, a business had to be "small" and 51% owned by individuals who were socially and economically disadvantaged. Even though Adarand submitted the low bid on a federal project, the contract was awarded to another company because it was certified as a small business controlled by "socially and economically disadvantaged individuals."

Adarand argued that the statute violated the Fifth Amendment because it discriminated on the basis of race. The Government argued that the Program was based on disadvantage and

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should be subjected to, “the most relaxed judicial scrutiny.” However, the Government did concede that the “race-based rebuttable presumption” should be subjected to a heightened level of scrutiny, though the parties disagreed what that should be.

The Court held, in a 6-3 decision, that federal racial classifications, like those of a State, must serve a compelling governmental interest and be narrowly tailored to further that interest. Strict scrutiny was the proper standard for race-based legislation because, “racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.” However, when applied to benign race-based legislation, strict scrutiny should not be, “strict in theory, but fatal in fact.”

Following *Croson* and *Adarand*, governments are precluded from adopting affirmative action programs to address de facto discrimination. If a government believed it had engaged in previous de jure discriminatory conduct, it could adopt a narrowly tailored and time-bounded remedial program to rectify the situation. Set aside programs addressing only societal discrimination are not addressing a compelling interest. However, in the realm of higher education, insuring a diverse student body, which benefits students of all races, can be seen to be compelling. In other words, increasing the presence of under-represented minorities in higher education through affirmative action programs is *not* a remedy to the de facto discrimination that results in fewer under-represented minority applicants meeting “objective” admissions criteria, but a means to a different end—the benefit of a diverse educational experience for all students.

* * *

### ***Grutter v. Bollinger*: Background**

In 2003 (twenty-five years after *Bakke*), the Supreme Court again considered the use of race in connection with university admissions. *Grutter v. Bollinger* considered the admission plan at the University of Michigan Law School. It considered race, but only in the context of other admission criteria. In contrast, Michigan’s undergraduate plan at issue in *Gratz* v. *Bollinger* used a "point" system where students who were members of an under-represented racial or ethnic minority automatically received twenty "points" towards the total needed for admission.

The Court applied strict scrutiny to both admission plans. In *Grutter* (in a five-to-four vote with Justice O'Connor writing for the majority), the Court found the Law School plan to be constitutional, while in *Gratz* (in a six-to-three vote with Chief Justice Rehnquist writing for the majority), the Court found the undergraduate plan to be unconstitutional.

In *Grutter*, the Court found that the law school's asserted purpose in considering race in the admission process—to obtain "the educational benefits that flow from a diverse student body"—was compelling. The Court went on to find that the law school's use of race in the admission process was narrowly tailored to accomplish that purpose. The dissenters posed some non-race-based alternatives that the law school could have used to fulfill the law school's

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diversity purpose, such as admitting students by lottery, but the majority concluded that "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative."

In *Gratz*, Justices O'Connor and Breyer joined the four *Grutter* dissenters to find the undergraduate admission plan unconstitutional. The Court found that the undergraduate plan was not narrowly tailored to achieve the university's asserted compelling interest in diversity. The Court emphasized that the undergraduate admission office, unlike the law school admission office, did not consider "each particular applicant as an individual" because the points awarded for minority status essentially made race decisive "for virtually every minimally qualified underrepresented minority applicant." Because the plan was not narrowly tailored, it was unconstitutional.

**Grutter v. Bollinger**
539 U.S. 306 (2003)

[Majority: O'Connor, Stevens, Souter, Ginsburg, and Breyer. Concurring: Ginsburg. Concurring and dissenting in part Scalia, Thomas. Dissenting: Rehnquist, C.J. and Kennedy.]

**Justice O'Connor delivered the opinion of the Court.**

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

I-A. The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "substantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." More broadly, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other." In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admissions. See *Regents of Univ. of Cal. v. Bakke* (1978). Upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, applicant's undergraduate grade point average (GPA), Law School Admissions Test (LSAT) score, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

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The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School." …

I-B. Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit.… Petitioner alleged that respondents discriminated against her on the basis of race in violation of the 14th Amendment; Title VI of the Civil Rights Act of 1964, and 42 U. S. C. § 1981.…

During the 15-day bench trial, the parties introduced extensive evidence concerning the Law School's use of race in the admissions process. Dennis Shields, Director of Admissions when petitioner applied, testified that he did not direct his staff to admit a particular percentage or number of minority students, but rather to consider an applicant's race along with all other factors. Shields testified that at the height of the admissions season, he would frequently consult the so-called "daily reports" that kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender). This was done, Shields testified, to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body. Shields stressed, however, that he did not seek to admit any particular number or percentage of underrepresented minority students.

Erica Munzel, who succeeded Shields… testified that "'critical mass'" means "'meaningful numbers'" or "'meaningful representation,'" which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass….

Kent Syverud… a professor at the Law School when the 1992 admissions policy was adopted… indicated that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no "'minority viewpoint'" but rather a variety of viewpoints among minority students.…

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Applying strict scrutiny, the District Court determined that the Law School's asserted interest in assembling a diverse student body was not compelling because "the attainment of a racially diverse class… was not recognized as such by *Bakke* and is not a remedy for past discrimination." The District Court went on to hold that even if diversity were compelling, the Law School had not narrowly tailored its use of race to further that interest….

Sitting en banc, the Court of Appeals reversed the District Court's judgment and vacated the injunction. The Court of Appeals first held that Justice Powell's opinion in *Bakke* was binding precedent establishing diversity as a compelling state interest.… The Court of Appeals also held that the Law School's use of race was narrowly tailored because race was merely a "potential 'plus' factor…."

II-A. … Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies.…

In Justice Powell's view, when governmental decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." Under this exacting standard, only one of the interests asserted by the university survived Justice Powell's scrutiny.…[,] "[T]he attainment of a diverse student body." With the important proviso that "constitutional limitations protecting individual rights may not be disregarded," Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the 1st Amendment." Justice Powell emphasized that nothing less than the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." In seeking the "right to select those students who will contribute the most to the 'robust exchange of ideas," a university seeks "to achieve a goal that is of paramount importance in the fulfillment of its mission." Both "tradition and experience lend support to the view that the contribution of diversity is substantial."

Justice Powell was, however, careful to emphasize that in his view race "is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." …

[F]or the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

II-B. The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Because the 14th Amendment "protect[s] *persons*, not *groups*," all "governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to

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detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Peña* (1995).…

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. "Absent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J. A. Croson Co.* (1989). We apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."

Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand.* Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.… When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.…

III-A. With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court… respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body." In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity.…

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.…

Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."

As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students." … [T]he Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

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These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.…

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. …

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." *Sweatt v. Painter* (1950). Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students.…

III-B. Even in the limited circumstance[s] when drawing racial distinctions is permissible to further a compelling state interest, [the] government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Shaw v. Reno* (1996). The purpose of the narrow tailoring requirement is to ensure that "the means chosen ‘fit’ th[e] compelling

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goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.* (1989).

Since *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to Justice Kennedy's assertions, we do not "abandon strict scrutiny." Rather, as we have already explained, we adhere to *Adarand's* teaching that the very purpose of strict scrutiny is to take such "relevant differences into account."

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." *Bakke* (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a "'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, non-mechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant.

We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota….

The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by Justice Powell recognized, there is of course "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." *Bakke*. "[S]ome attention to numbers," without more, does not transform a flexible admissions system into a rigid quota.… Moreover… between 1993 and 1998, the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.…

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure

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that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.

Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz v. Bollinger* (2003), the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. Like the Harvard plan, the Law School's admissions policy "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Bakke* (opinion of Powell, J.).…

What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body. Justice Kennedy speculates that "race is likely outcome determinative for many members of minority groups" who do not fall within the upper range of LSAT scores and grades. But the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke*, and indeed of any plan that uses race as one of many factors.…

Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.…

We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.

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The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too with the suggestion that the Law School simply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission…. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission. …

We are mindful, however, that "[a] core purpose of the 14th Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti* (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits." …

We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.…

**Justice Ginsburg, with whom Justice Breyer joins, concurring.**

[She agreed that race-conscious programs "must have a logical end point… after the objectives for which they were taken have been achieved."]

**Chief Justice Rehnquist, with whom Justice Scalia, Justice Kennedy, and Justice Thomas join, dissenting.**

**…** Before the Court's decision today, we consistently applied the same strict scrutiny analysis regardless of the government's purported reason for using race and regardless of the setting in which race was being used. We rejected calls to use more lenient review in the face of claims that race was being used in "good faith" because "'[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.'" *Adarand Constructors, Inc. v. Peña* (1995).…

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Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.…

In practice, the Law School's program bears little or no relation to its asserted goal of achieving "critical mass." Respondents explain that the Law School seeks to accumulate a "critical mass" of *each* underrepresented minority group. But the record demonstrates that the Law School's admissions practices with respect to these groups differ dramatically and cannot be defended under any consistent use of the term "critical mass."

From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-Americans, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. Similarly, even if all of the Native American applicants admitted in a given year matriculate, which the record demonstrates is not at all the case, how can this possibly constitute a "critical mass" of Native Americans in a class of over 350 students? In order for this pattern of admission to be consistent with the Law School's explanation of "critical mass," one would have to believe that the objectives of "critical mass" offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But respondents offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving "critical mass," without any explanation of why that concept is applied differently among the three underrepresented minority groups.…

[I conclude] that the Law School has managed its admissions program, not to achieve a "critical mass," but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional." …

**Justice Kennedy, dissenting.** [Omitted.]

**Justice Scalia, with whom Justice Thomas joins, concurring in part and dissenting in part.** [Omitted.]

**Justice Thomas, with whom Justice Scalia joins as to Parts I–VII, concurring in part and dissenting in part.**

[Justice Thomas vehemently argued that affirmative action programs violate the notion that “Our Constitution is colorblind.” He noted that **“**the Court has soundly rejected the remedying of societal discrimination as a justification for governmental use of race,” and then asserted that the University’s claimed need for diversity was merely “a faddish slogan of the

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cognoscenti." An extensive portion of Justice Thomas' dissent can be found on conlawincontext.com]

### *Grutter*: Questions for Consideration

At the end of her opinion for the Court, Justice O'Connor writes: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." Some of the other Justices interpret that sentence in various ways. Which interpretation is most faithful to O'Connor's statement?

1. Chief Justice Rehnquist in his dissent (joined by Justices Scalia, Kennedy, and Thomas) writes: "The Court suggests a possible 25-year limitation on the Law School's current program.… These discussions of a time limit are the vaguest of assurances. In truth, they permit the Law School's use of racial preferences on a seemingly permanent basis."

2. Justice Thomas in his dissent (joined by Justice Scalia) writes: "I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years."

3. Justice Ginsberg in her concurrence (joined by Justice Breyer) writes: "one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."

### *Parents Involved in Community Schools v. Seattle School District No. 1*: Note

Prior to 2007, the Court considered the constitutionality of race-based admissions programs at institutions of higher learning. However, in *Parents Involved in Community Schools v. Seattle School District No. 1* (*Seattle Schools*) (2007), the Court considered the constitutionality of the use of race in the assignment of children to elementary and secondary schools.

In *Seattle Schools*, the Court considered race-based programs in Seattle, where racial classifications of "white" or "nonwhite" were used to allocate slots in oversubscribed high schools, and in Louisville, Kentucky, where children were assigned and transferred to elementary schools based on their classification as "black" or "other." In Seattle, students were able to apply to any school. However, once the "voluntary" applicants exceeded a pre-determined racial percentage, additional student applicants of that race were denied admittance. Race was the sole factor considered in assigning students to schools so that each school fell within, "a predetermined range based on the racial composition of the school district as a whole."

While the Seattle School District had never operated de jure segregated schools, Louisville had. Louisville maintained a segregated system until 1975. However, Louisville had achieved "unitary" status following litigation and was consequently unable to claim remediation as a goal at the time of this litigation.

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The white parents of children who were denied admittance to schools based on these programs brought the suit, contending that assigning students on the basis of race violated the Equal Protection Clause. While the Court of Appeals upheld the race-based program, the Supreme Court reversed in a 6-3 judgment.

Applying strict scrutiny, the Court required the school districts to demonstrate that, "the use of individual racial classifications in the assignment plans [were] 'narrowly tailored' to achieve a 'compelling' government interest." To determine whether the School District had a compelling interest, the Court compared the facts to *Grutter*, where the Court found that the University of Michigan Law School had a compelling interest in student body diversity. However, the Court distinguished *Seattle Schools* from *Grutter* because the diversity interest in *Grutter*, "was not focused on race alone, but encompassed 'all factors that may contribute to student body diversity.'" Other bases for diversity included travel, living abroad, language faculties, overcoming adversity and family obstacles, community service, and prior careers. The school, "focused on each applicant as an individual, and not simply as a member of a particular racial group," and they considered race only, "as part of a highly individualized, holistic review," the importance of which was paramount.

The program in *Seattle Schools* was more similar to the undergraduate admissions plan that the Court struck down in *Gratz*. In both instances, the race-based plans did not, "'provide for a meaningful individualized review of applicants' but instead [relied] on racial classifications in a 'non-individualized, mechanical' way." Using racial classifications to achieve racial balancing as opposed to achieve, "exposure to widely diverse, people, cultures, ideas, and viewpoints," was "patently unconstitutional."

In part III-B of the opinion, which Justice Kennedy did not join, the plurality held that, "racial balance is not to be achieved for its own sake." Racial balancing cannot be a compelling state interest because it would, "justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that '[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.'" Even if the Court had found racial balance to be a compelling interest, the means would not have been narrowly tailored because it appeared that the schools could have adopted racially neutral means to achieve their same result.

Justice Kennedy concurred in judgment and in part, with the exclusion of part III-B and IV of the opinion. Kennedy asserted that race could be considered in situations where the plurality did not: "The plurality's postulate that '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race' is not sufficient to decide these cases." Citing *Grutter*, Kennedy stated that, "it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial component." Therefore, whereas the plurality found that Seattle School District had neither a

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compelling interest, nor narrowly tailored and necessary means, Kennedy argued that racial diversity was a compelling interest, but the means were not narrowly tailored enough. Like the plurality, Kennedy faulted Seattle School District for their mechanical and reductionist application of race. Instead he suggested that,

> Students of diverse backgrounds and races [can be brought together] through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of the neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race.…

Justice Breyer dissented, joined by Justices Stevens, Souter, and Ginsburg, arguing that the School District had both a compelling interest and narrowly tailored means. Justice Breyer articulated the compelling interest as the desire to eradicate the remnants of primary and secondary school segregation (not general societal discrimination), and to provide, "better educational opportunities for all children." The dissent argued that the plan was narrowly tailored because it employed "broad ranges" instead of quotas, and, "race bec[ame] a factor only in a fraction of students' non-merit-based assignments.…" Also, Breyer argued that the School Board should also be given some discretion in formulating the plan because of their knowledge and experience.

### *Fisher v. University of Texas (Fisher II)*: Background

Abigail Fisher, a white student who was denied admission as an undergraduate to the University of Texas, alleged that the University's consideration of race as an admissions factor violated the Equal Protection Clause. The university prevailed at summary judgment in the lower courts. In *Fisher v. University of Texas at Austin* (2012) (*Fisher I*), the Supreme Court, in a 7-1 decision, adhered to the affirmative action precepts it had prescribed in *Grutter* and *Gratz.* The Court found that the Fifth Circuit had misapplied *Grutter* and *Gratz* by presuming that the University had acted in good faith and placing the burden of rebutting that presumption on the plaintiff. The Court remanded the case for the Court of Appeals to assess the parties' claims under the correct legal standard.

The Court warned that strict scrutiny must be rigorously applied to determine whether governments have carried their burden of demonstrating that they have a compelling need for affirmative action and that their ends are narrowly tailored to achieve their goals. Although the Court explained that this "searching examination" requires, "some, but not complete judicial deference," to a university's conclusion that diversity is essential to its education mission, the Court held that a university should receive "no deference" with regard to the narrow tailoring requirement. Determination of whether a university has narrowly tailored its affirmation action procedures therefore requires, "a careful judicial inquiry into whether a university could achieve

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sufficient diversity without using racial classifications.… The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity." In his opinion for the Court, Justice Kennedy reiterated the assertion in *Adarand Constructors, Inc. v. Peña* (1995) that strict scrutiny must not be "strict in theory, but fatal in fact," but he explained that "the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact."

In concurring opinions, Justices Scalia and Thomas re-affirmed their contention that the Constitution prohibits state educational institutions from considering race as a factor in admissions. In dissent, Justice Ginsburg contended that the Fifth Circuit had properly applied the standards of *Grutter* and *Gratz* in determining that the university's consideration of race in the admissions process was narrowly tailored to achieve racial diversity.

Choosing not to remand to the District Court, the Court of Appeals again affirmed the entry of summary judgment in the University's favor. The Supreme Court granted certiorari a second time, and again affirmed in the University's favor in *Fisher II* (2016).

At the time that Abigail Fisher was denied admission to the University of Texas, the school employed an admissions process that included both a "top 10% plan" that accounted for 75% of the class and a holistic plan to make up the remaining 25%. The "top 10% plan" had been enacted by the Texas legislature in response to *Hopwood v. Texas* (5th Cir. 1996), which had categorically prohibited the consideration of race in university admissions, and of the class. The top 10% plan guaranteed admission to students who graduated from a Texas high school in the top 10% of their class. Those students could choose between any of the public universities in Texas. The remaining 25% were admitted based on their "Academic Index" (AI), and "Personal Achievement Index" (PAI), which the University calculated. The AI was calculated as a combination of the applicant's SAT score and their academic performance in high school.

Prior to 2003, the PAI did not consider the applicant's race. The PAI was a number from 1 to 6 (6 being best) that was based on the average score a reader gave the applicant on two required essays. The second component resulted in another 1–to–6 score, which was determined by, "a separate reader, who (1) reread[] the applicant's required essays, (2) review[ed] any supplemental information the applicant submit[ted] (letters of recommendation, resumes, an additional optional essay, writing samples, artwork, etc.), and (3) evaluate[d] the applicant's potential contributions to the University's student body based on the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other 'special circumstances.'"

Before *Grutter*, special circumstances included socioeconomic status of the applicant's family or school, familial responsibilities, whether the applicant lived in a single-parent home, relative SAT score to their high school, and the language spoken at home. After the Supreme Court decided *Grutter v. Bollinger*, and upheld an admissions system that, "treated race as a

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relevant feature within the broader context of a candidate's application," the University of Texas gave race weight as a subfactor of the PAI. After *Grutter*, the University undertook a year-long study to determine whether its race-neutral admissions process provided, "the educational benefits of a diverse student body... to all of the University's undergraduate students." They determined it did not, and submitted a proposal to include race as a consideration, to the Board of Regents, "as one of "the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University." After the board approved, the University incorporated race as a subfactor of the PAI score.

Reflecting on the race-conscious plan in his opinion for *Fisher II*, Justice Kennedy argued that, "there is no dispute that race is but a 'factor of a factor of a factor' in the holistic-review calculus. Furthermore, consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities."

**Fisher v. University of Texas (Fisher II)**
579 U.S. __ (2016)

[Majority: Kennedy, Ginsburg, Breyer, and Sotomayor. Dissenting:Thomas, Alito, and Roberts (C.J.) Kagan, J., took no part in the consideration or decision of the case.

**Justice Kennedy delivered the opinion of the Court.**

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

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

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

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

*Fisher I* set forth these controlling principles, while taking no position on the constitutionality of the admissions program at issue in this case. The Court held only that the District Court and the Court of Appeals had "confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications." The Court remanded the case, with instructions to evaluate the record under the correct standard and to determine whether the University had made "a showing that its plan is narrowly tailored to achieve" the educational benefits that flow from diversity. On remand, the Court of Appeals determined that the program conformed with the strict scrutiny mandated by *Fisher I*.

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

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

Petitioner's acceptance of the Top Ten Percent Plan complicates this Court's review. In particular, it has led to a record that is almost devoid of information about the students who secured admission to the University through the Plan…. [The University has a] continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances. The University engages in periodic reassessment of the constitutionality, and efficacy, of its admissions program.… Going forward, that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan.

As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its

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dimensions and, when used in a divisive manner, could undermine the educational benefits the University values. Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest.… Here, the Court is necessarily limited to the narrow question before it: whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

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

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

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

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

The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals. On the first page of its 2004 "Proposal to Consider Race and Ethnicity in Admissions," the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the "'promot[ion of] cross-racial understanding,'" the preparation of a student body " 'for an increasingly diverse workforce and society,'" and the "'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.'" … Later in the proposal, the University explains that it strives to provide an "academic environment" that offers a "robust exchange of ideas, exposure to differing cultures, preparation

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for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." All of these objectives, as a general matter, mirror the "compelling interest" this Court has approved in its prior cases.

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

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

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

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

This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data. In 2002… only 21 percent of undergraduate classes with five or more students in them had more than one African–American student enrolled. Twelve percent of these classes had no Hispanic

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students, as compared to 10 percent in 1996. Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.

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

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

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

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

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

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"adopted with racially segregated neighborhoods and schools front and center stage." "It is race consciousness, not blindness to race, that drives such plans." Consequently, petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.

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

In addition to these fundamental problems, an admissions policy that relies exclusively on class rank creates perverse incentives for applicants. Percentage plans "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages."

For all these reasons, although it may be true that the Top Ten Percent Plan in some instances may provide a path out of poverty for those who excel at schools lacking in resources, the Plan cannot serve as the admissions solution that petitioner suggests. Wherever the balance between percentage plans and holistic review should rest, an effective admissions policy cannot prescribe, realistically, the exclusive use of a percentage plan.

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

A university is in large part defined by those intangible "qualities which are incapable of objective measurement but which make for greatness." Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity….The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary. The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy

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without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

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

### ***Fisher II*** **Dissent, Justice Alito: Note**

In the introduction to his opinion in *Fisher II*, Justice Kennedy noted that one of the controlling principles clarified by *Fisher I* was that, "no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals." It is the university that bears the burden of demonstrating that a non-racial plan would not promote the university's interest in, "the educational benefits of diversity," as well as a racial plan. Thus, a racial plan must be *necessary* to achieve the desired result and *narrowly tailored*.

The majority deferred to the University's decision that a racial admissions plan was necessary and that the plan in place was sufficiently narrowly tailored. However, Justice Alito, joined by Chief Justice Roberts and Justice Thomas in his dissent, disagreed that the University had met its burden of demonstrating the superiority of a race based plan over a race-neutral plan in providing, "the educational benefits of diversity," or that the plan employed by the University of Texas was narrowly tailored enough to satisfy strict scrutiny.

Justice Alito questioned why Justice Kennedy, who dissented in *Grutter*, and remanded *Fisher I* back to the Fifth Circuit, would affirm University of Texas' race-based admissions plan in *Fisher II*. On remand, University of Texas was instructed by the court, "(1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied." Justice Alito was not satisfied that the University accomplished either.

Many of Justice Alito's concerns revolved around the lack of evidence available to the Court. The majority also noted this, citing the fact that the petitioner did not challenge the top ten percent plan as the reason. Justice Alito refused to give deference to the University where the majority was comfortable doing so. He was more skeptical of the notion of "critical mass," (how do you determine what that is? How do you know it's working?), and the University's justification of providing diversity on the classroom level. Again, Justice Alito questioned whether the admissions plan directly resulted in higher classroom diversity, as well as why "overrepresented" minorities like Asian Americans were discriminated against in this aspect.

Additionally, Justice Alito argued that the University achieved sufficient diversity through race-neutral means before they changed their admissions policy in response to *Grutter*. The University claimed that a race-based plan was necessary because the top ten percent plan

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admitted, "*the wrong kind* of African-American and Hispanic students, namely, students from poor families who attend[ed] schools in which the student body [was] predominantly African-American or Hispanic." Justice Alito pointed out that affirmative-action programs were conceived to help, "*disadvantaged* students," not wealthy African-American kids from the Austin suburbs.

Justice Alito found that the University did not meet the stringent standard of strict scrutiny because, "UT… never provided any coherent explanation for its asserted need to discriminate on the basis of race, and… [their] position relie[d] on a series of unsupported and noxious racial assumptions."

* * *

In 2011, the Department of Justice and the Department of Education jointly issued a document, Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools, http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf. The document proposed choices regarding K-12 policies in light of Seattle Schools (2007). What, if any, implications might Fisher II have for K-12 schools? Could educators establish that diversity is a benefit in the K-12 setting as well, or is it merely "racial balancing," a concept condemned by some members of the Court in Seattle Schools?

***Schuette v. Coalition to Defend Affirmative Action* (2014): Note**

*Schuette v. Coalition to Defend Affirmative Action* (2014) upheld an amendment to the Michigan state constitution banning racial affirmative action admissions programs at state universities (passed following *Grutter*). A note discussing this case is posted on conlawincontext.com.

**Section XI-A. The Right to Vote**

**3. The Reapportionment Cases**

[*Replace top paragraph on page 1890 with the following*]:

Contrary to Frankfurter's warning, the Court's decisions have not immersed the Court in a "mathematical quagmire." In various decisions, the Court has made clear that legislatures must try so far as practicable to create districts of equal population. Variations of no more than one percent generally are permitted for congressional districts, while the Court has indicated that deviations for state or local legislative districts are presumptively constitutional if they do not exceed ten percent.

All states have historically used the *total population* of voting districts as the basis for apportionment decisions. In a recent decision, the Court rejected a challenge that apportionment *must* be based on the number of *eligible voters* (rather than all persons living in the districts). *Evenwel v. Abbott*, 578 U.S. ___ (2016). Although the Court held that states could continue to

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apportion voting districts on the basis of total population, the Court did not address whether states *could* consider only the number of eligible voters in making apportionment decisions. (Counting eligible voters versus all persons would likely shift political power away from urban areas to suburban and rural areas.)

[*Insert on page 1894 after* Reynolds v. Sims *(1964).*]

**Voting Rights Act of 1965: Note**

The Voting Rights Act of 1965 provided the federal government with potent authority to prevent racial discrimination in voting. The statute resulted in the enfranchisement of more than one million non-white voters, mostly African-American, and generated an enormous increase in the number of racial minorities who held public office. By empowering racial minorities to elect public officials who would protect their rights, the Act arguably did more to promote civil rights than any judicial decision or other legislation. African-American registration in the Deep South rose from 36 percent in 1964 to 65 percent in 1969. In Mississippi, it increased from seven percent to 59 percent.

Before the enactment of the statute, fewer than ten percent of African-Americans were registered to vote in more than one hundred counties in the Deep South. Although blacks generally were able to register to vote in large cities, registrars in smaller towns and rural areas often turned away blacks who requested registration or had administered impossibly difficult literacy tests. Those who persisted sometimes were beaten or otherwise harassed. The successes of the civil rights movement during the 1950s and early 1960s helped to generate support for federal intervention, but the principal catalyst for the statute was the murder of voting rights activists in Mississippi in 1964 and the attack by Alabama state troopers on peaceful voting rights protestors in Selma in March 1965. In the wake of the Selma protests, in which two participants died, President Johnson placed his formidable political weight behind a federal remedy. In a poignant address to the nation on March 15, 1965, Johnson averred that "the command of the Constitution is plain...It is wrong–deadly wrong–to deny any of your fellow Americans the right to vote." In the dramatic climax of his speech, Johnson declared that "it's not just Negroes, but really it's all of us, who must overcome the crippling legacy of bigotry and injustice. And we *shall* overcome."

The statute, which prohibited racial discrimination in voting, created a presumption that racial discrimination interfered with voting registration in counties in which fewer than fifty percent of eligible persons voted in the 1964 election. This included all counties of Alabama, Alaska, Georgia, Louisiana, Mississippi, and South Carolina, along with various counties in Arizona, California, Florida, Hawaii, New York, North Carolina, South Dakota, and Virginia, as well as townships in Michigan and New Hampshire. The Southern counties had large African-American populations, while the counties in other states had large numbers of Native Americans, Puerto Rican-Americans, or Asian-Americans (Hawaii).

The statute authorized the Attorney General to dispatch federal registrars to these counties to assist with voter registration. In counties in which blacks who had tried to register to vote had suffered violence, the federal registrars literally provided physical protection by accompanying African-Americans to county courthouses to register to vote. Because jurisdictions that had tried to prevent African-Americans from voting often had devised various subterfuges to evade federal court decisions that disallowed various forms of discrimination, the

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statute also required the Department of Justice or a three-judge panel of the U.S. District Court for the District of Columbia to "pre-clear" any effort to change any prerequisite for voting or voting procedure in areas that the statute covered. The statute also banned literacy tests.

The statute raised significant issues of federalism since it created unprecedented federal intervention in state and local voting procedures. The statute also raised questions of separation of powers since it precluded judicial review of administrative findings. The Supreme Court upheld the key provisions of the statute in *South Carolina v. Katzenbach* (1966). The Court's decision, which was unanimous except for Justice Hugo Black's dissent on one point, held that the statute was a valid exercise of Congress's remedial powers under Section 2 of the Fifteenth Amendment. In his opinion for the Court, Chief Justice Earl Warren declared that "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in [voting rights] lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims." In a seven-to-two decision in *Katzenbach v. Morgan* (1966), the Court upheld the statute's provision that no person who had completed the sixth grade in an accredited Puerto Rican school could be denied the right to vote on account of inability to read or write English.

The statute has been renewed and amended several times since 1965. In one of the most significant amendments, Congress in 1982 allowed plaintiffs to demonstrate racial discrimination on the basis of the effects of a plan rather than merely on its intent. This legislation overturned the Court's decision in *Mobile v. Bolden* (1980), in which the Court held that the city's practice of electing city commissioners at large rather than by voting districts did not violate the statute even though it precluded the election of a black commissioner because there was no finding of an intent to discriminate.

Another significant amendment, enacted in 1975 and renewed in subsequent legislation, requires states and counties with significant populations of persons who are not proficient in English to provide ballots and registration forms to persons who request them. More than 300 jurisdictions presently provide multi-lingual voting assistance in Spanish and various Native American and Asian languages.

Section 2 of the Voting Rights Act, as amended, requires that minorities have an equal opportunity of elect candidates of their choice. In a number of states, this provision has resulted in the creation of congressional and legislative districts whose voters are predominately of members of racial minorities. Court decisions about the duty of the legislature to create such districts under section 2 are complex and not entirely consistent. Still, many minority-majority districts have been created.

In *Shelby County v. Holder* in June 2013, the Supreme Court held by a vote of five to four that the coverage formula in the Voting Rights Act is unconstitutional because it is based upon obsolete data concerning presumed voting discrimination in 1964 and that the formula therefore can no longer be used in determining which areas are subject to pre-clearance requirements. Federal authorities therefore may not subject voting changes in any jurisdiction to pre-clearance unless Congress enacts new formulas for determining coverage. This decision is discussed in more detail in the edit of the *Shelby County* opinion posted on conlawincontext.com.

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[*Insert on page 1917 after* Bush v. Gore *(2013).*]

*Shelby County v. Holder*, 570 U.S. ___ (2013), is posted on conlawincontext.com.

**Section XI-B. The Right of Access to Justice**

[*Insert on page 1931 after* M.L.B. v. S.L.J. *(1996).*]

***Turner v. Rogers* (2011): Note**

In *Turner v. Rogers* (2011), the Supreme Court considered "whether the Fourteenth Amendment's Due Process Clause requires the State to provide counsel at a civil contempt hearing to an *indigent* person potentially faced with…incarceration." In a 5-4 decision written by Justice Breyer and joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan, the Court held

> where as here the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide the support). But we attach an important caveat, namely, that the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order.

The state holds a civil contempt hearing when a parent has outstanding child support payments. If the parent demonstrates that he cannot make the payments, he is not held in contempt of court. However, if the parent cannot make this demonstration, the court may hold him in civil contempt. He may be imprisoned up to one year or until he makes the payments.

A South Carolina family court determined that Michael Turner must pay child support to Rebecca Rogers. Turner failed to regularly make these payments and was held in contempt five times and jailed twice. After remaining in arrears, the court held a contempt hearing in which both Turner and Rogers were unrepresented by counsel. Turner told the judge that he had problems with drug addiction and had filed for disability and Social Security Income. However, the Court did not make a finding regarding Turner's ability to pay the amount owed. Still, the Court found Turner in willful contempt of court and placed him in jail for twelve months. In this action, Turner "claimed that the Federal Constitution entitled him to counsel at his contempt hearing."

The Court recognized that precedent did not answer this question. Although the Sixth Amendment requires a state to provide an indigent defendant with counsel in a criminal case where there is possible imprisonment, Turner's case was a civil case. Thus, the Court noted that "where civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case."

Following that reasoning, the Court turned to the factors laid out in *Mathews v. Eldridge* (1976) to determine whether the proceeding was fair under the Due Process Clause. These factors include "(1) the nature of 'the private interest that will be affected,' (2) the comparative 'risk' of an 'erroneous deprivation' of that interest with and without 'additional or substituted procedural safeguards,' and (3) the nature and magnitude of any countervailing interest in not providing 'additional or substitute procedural requirement[s].' " Initially, the Court found that

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the "freedom 'from bodily restraint' lies 'at the core of the liberty protected by the Due Process Clause.' "

Still, looking to these factors, "three related considerations…when taken together, argue strongly against the Due Process Clause requiring the State to provide indigents with counsel in every proceeding of the kind before us." First, the initial question was whether the defendant actually had the ability to pay. The Court noted that this determination should be made "prior to providing a defendant with counsel, even in a criminal case."

Second, the Court recognized that the "person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un*represented by counsel." The hearings would be unbalanced if the custodial parent did not have counsel and the noncustodial parent was provided with counsel. Therefore, the proceedings would be "*less* fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive."

Third, additional procedural safeguards are available which would "significantly reduce the risk of an erroneous deprivation of liberty." These include

> (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.

After weighing these three considerations, the Court decided that "[i]n our view, a categorical right to counsel in proceedings of the kind before us would carry with it disadvantages (in the form of unfairness and delay) that, in terms of ultimate fairness, would deprive it of significant superiority over the alternatives that we have mentioned."

However, in Turner's case, the state did not provide him with counsel nor did it offer any alternative procedural safeguards. Furthermore, the lower court did not expressly find that he could pay his arrearage. Thus, the Court ruled that "[u]nder these circumstances, Turner's incarceration violated the Due Process Clause."

Justices Thomas and Scalia dissented, joined in part by Justices Roberts (C.J.) and Alito. Thomas acknowledged that the Due Process Clause did not give indigent defendants a right to counsel in civil contempt proceedings. From an originalist perspective he reasoned,

> [b]ut if the Due Process Clause created a right to appointed counsel in all proceedings with the potential for detention, then the Sixth Amendment right to appointed counsel would be unnecessary. Under Turner's theory, every instance in which the Sixth Amendment guarantees a right to appointed counsel is covered also by the Due Process Clause.

Thomas also wrote against the majority's holding about the need for the state to provide procedural safeguards which were only mentioned in an amicus brief. He said,

> [t]he majority errs in moving beyond the question that was litigated below, decided by the state courts, petitioned to this Court, and argued by the parties here, to resolve a question raised exclusively in the Federal Government's amicus

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> brief…. [I]t transforms a case entirely to vacate a state court's judgment based on an alternative constitutional ground advanced only by an amicus and outside the question on which the petitioner sought (and this Court granted) review.

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## Chapter 13. The Scope of the 13th and 14th Amendments.

### Section I. Congressional Power to Enforce the 13th and 14th Amendments.

[*Insert on page 1992 after* The Civil Rights Cases (1883).]

#### The Civil Rights Act of 1964: Note

The Civil Rights Act of 1964 greatly expanded prohibitions against private sector discrimination based upon race, gender, religion, and national origin. With the possible exception of the Voting Rights Act of 1965, this statute has done more than any legislation to promote racial equality, and it provided a major impetus for the rapid progress of gender equality during the late 1960s and 1970s.

One of its most important sections, Title II, prohibits discrimination based upon race, color, religion, and national origin in hotels, motels, restaurants, theaters, and all other public accommodations engaged in interstate commerce. Enacted at a time when many such businesses refused to serve African-Americans and other racial minorities or provided segregated facilities, the statute essentially revived the provisions of the Civil Rights Act of 1875, which the Supreme Court had invalidated in the *Civil Rights Cases* in 1883 (p. 1703). Since the Court in the *Civil Rights Cases* had held that Congress had no authority to prohibit racial discrimination pursuant to its remedial powers under Section 5 of the Fourteenth Amendment because private discrimination is not state action, Congress relied primarily upon the Commerce Clause in enacting the 1964 statute even though the Court in modern decisions such as *Shelley v. Kraemer* (1948) (p. ?, *infra*) and *Burton v. Wilmington Parking Authority* (1961) (p. ?, *infra*) had expanded the scope of what constituted state action. The Supreme Court sustained the constitutionality of Title II within months of its enactment in *Heart of Atlanta Motel v. United States* and *Katzenbach v. McClung* (p. ?, *infra*), holding that an Atlanta motel and a Birmingham restaurant were engaged in interstate commerce.

Another major section, Title VII, prohibits a significant number of private employers from employment discrimination on the basis of race, color, religion, gender, or national origin. The statute applies to employers who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the present or preceding calendar year, and it provides certain exceptions for religious groups and nonprofit private membership organizations. Like Title II, this section was enacted under the authority of Congress's power to regulate interstate commerce. The statute created the Equal Employment Opportunity Commission for its enforcement.

The statute also struck against discrimination by state and local governments. Title III prohibits those governments from denying public access to public facilities on the basis of race, color, religion, or national origin, and Title VI prohibits governmental agencies that receive federal funds from discriminating on the basis of race, color, or national origin. Title VI permits

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federal agencies to refuse to grant or to terminate federal financial assistance to state and local governments that violate the statute. This section of the statute was particularly effective in discouraging racial segregation in public schools, which remained widespread in 1964, a decade after *Brown v. Board of Education* (p. ?, *infra*), because it was enacted at time when the federal government was significantly increasing its financial assistance to public education. Title IV of the statute authorizes the Attorney General of the United States to challenge racial segregation in public schools.

The Civil Rights Act arose out of legislation proposed by African-American leaders and other civil rights activists as the civil rights movement gathered momentum during the early 1960s. President John F. Kennedy initially was cool toward civil rights legislation, but increasing violence against civil rights advocates and continued intransigence by white Southern political leaders persuaded him to support a civil rights law, which he embodied in a bill that he proposed to Congress in June 1963. In a nationally televised speech on June 11, 1963, the same day that Alabama Governor George C. Wallace had stood at the doors of the University of Alabama in an unsuccessful attempt to prevent federal marshals from assisting the registration of African-American students, Kennedy declared that "We are confronted primarily with a moral issue…. It is as old as the scriptures and as clear as the American Constitution…. One hundred years have passed since President Lincoln freed the slaves, yet their heirs…are not fully free…. [T]his Nation…will not be fully free until all its citizens are free." The March on Washington on August 28, 1963, at which Martin King delivered his celebrated "I Have a Dream" speech, was organized to demonstrate support for the legislation.

Despite growing momentum for civil rights legislation, the measure encountered vehement opposition from a vocal and determined minority of members of Congress, mostly Southern Democrats and some Republicans, including Senator Barry Goldwater, the 1964 Republican nominee for president. For a long while opponents seemed likely to be able to use various complex rules of the House and Senate to defeat the measure. The legislation probably would not have been enacted if Lyndon B. Johnson had not become President after Kennedy's assassination on November 22, 1963. Johnson declared that the statute would be an appropriate memorial to Kennedy, and he used his profound knowledge of congressional procedure, his close personal relationships with members of Congress, and his formidable powers of persuasion to ensure the success of the legislation, which he signed into law on July 2, 1964. Johnson, a Democrat, correctly foresaw that the legislation would cause a political re-alignment that would end the political dominance of Democrats in the South.

Although the statute has become a foundation of gender equality, its gender provision received little attention from Congress during the tumultuous debate over the measure, which focused almost entirely on race. The inclusion of gender in Title VII was proposed by Representative Howard W. Smith of Virginia, a segregationist who opposed the racial equality provisions of the civil rights bill. Although some historians believe that Smith introduced the gender amendment as a tactical measure to defeat the entire bill, Smith in fact had a long history of championing gender equality and had been an ardent advocate of the unsuccessful Equal

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Rights Amendment for women. The gender provisions of Title VII represented a growing recognition of the need to provide greater legal protection for women workers. In 1963, the Equal Pay Act had prohibited gender-based wage differentials.