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2025 SUPPLEMENT

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Note: *California v. Texas* (2021)

Following the Supreme Court's rejection of challenges to the Affordable Care Act in *Sebelius* in 2012 and *King v. Burwell* in 2015, the 2016 Republican Platform called for its legislative repeal. Even though the Republican Party controlled all three branches of the federal government following the 2016 election, they were unable to achieve this goal. On July 27, 2017, the Senate defeated the attempt to repeal the ACA. Susan Collins (R), John McCain (R), and Lisa Murkowski (R) joined the Democrats and Independents in voting against the proposal, causing it to fail 49-51. (Vice President Mike Pence (R) would have broken the tie if the bill had gotten 50 votes.)

Following the legislative loss, opponents again filed suit alleging that a different post-*Sebelius* amendment that had reduced the tax penalty to zero for persons who did not purchase health insurance (the "individual mandate") meant that the ACA could no longer be justified under the Taxing and Spending Clause. In *California v. Texas* (2021), see this Supplement, page 13), the Court voted 7-2 to reject the challenge on the basis that the plaintiffs lacked standing. This decision was viewed by most commentators as an indication that the Court would not intervene in any further attempts to overturn the ACA.

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

Part II, Section A: State Intergovernmental Immunity and the 10th Amendment

[*Insert on page 221 following note on* Printz.]

Note: *Murphy v. NCAA* (2018)

Sports gambling is a multi-billion dollar industry, much of which occurs illegally. The federal Professional and Amateur Sports Protection Act of 1992 (PASPA) makes it unlawful for a State "to sponsor, operate, advertise, promote, license, or authorize by law or compact...a lottery, sweepstakes, or other betting, gambling, or wagering scheme based...on" competitive sporting events, 28 U.S.C. §3702(1), and for "a person to sponsor, operate, advertise, or promote" those same gambling schemes if done "pursuant to the law or compact of a governmental entity," §3702(2). But PASPA does not make sports gambling itself a federal crime. Instead, it allows the Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations. §3703. "Grandfather" provisions allow existing forms of sports gambling to continue in four States, §3704(a)(1)-(2), and another provision would have permitted New Jersey to set up a sports gambling scheme in Atlantic City within a year of PASPA's enactment, §3704(a)(3).

New Jersey did not take advantage of that option but subsequently changed its mind. After voters approved an amendment to the State Constitution giving the legislature the authority to legalize sports gambling schemes in Atlantic City and at horseracing tracks, the legislature enacted a 2012 law doing just that. The NCAA and three major professional sports leagues brought an action in federal court against New Jersey's Governor and other state officials, seeking to enjoin the law on the ground that it violates PASPA. New Jersey countered that PASPA violates the Constitution's "anticommandeering" principle by preventing the State from modifying or repealing its laws prohibiting sports gambling. The District Court found no anticommandeering violation, the Third Circuit affirmed, and the Supreme Court denied review.

In 2014, the New Jersey Legislature enacted a new law. Instead of affirmatively authorizing sports gambling schemes, this law repealed state-law provisions that prohibited such schemes, insofar as they concerned wagering on sporting events by persons 21 years of age or older; at a horseracing track or a casino or gambling house in Atlantic City; and only as to wagers on sporting events not involving a New Jersey college team or a collegiate event taking place in the State. The plaintiffs in the earlier suit then filed a new action in federal court. They won in the District Court, and the Third Circuit affirmed, holding that the 2014 law, no less than the 2012 one, violates PASPA. The court further held that the prohibition does not "commandeer" the States in violation of the Constitution.

In *Murphy v. NCAA* (2018), the Supreme Court reversed. Justice Alito delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, Kagan, and Gorsuch, JJ., joined. Justice Breyer joined as to all but Part VI–B. Justice Ginsburg dissented, joined by

Justice Sotomayor (in whole) and Justice Breyer (in part). The Court held that, consistent with the holdings of *New York v. United States* (1992) and *Printz v. United States* (1997), PASPA in fact "commandeered" state legislatures. [It must be noted that this opinion in no way limits Congress's power to make sports betting illegal in all fifty states pursuant to its powers under the Commerce Clause—recall *Champion v. Ames* (1903). Obviously, the political influence of Las Vegas makes such an action problematic.] The Court's treatment of the anticommandeering issue follows.

[**Justice Alito**.] III-A. The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.,* the decision to withhold from Congress the power to issue orders directly to the States. When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority "to do all...Acts and Things which Independent States may of right do." ¶32. The Constitution limited but did not abolish the sovereign powers of the States, which retained "a residuary and inviolable sovereignty." The Federalist No. 39. Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of "dual sovereignty." *Gregory v. Ashcroft* (1991).

The Constitution limits state sovereignty in several ways. It directly prohibits the States from exercising some attributes of sovereignty. See, *e.g.,* Art. I, § 10. Some grants of power to the Federal Government have been held to impose implicit restrictions on the States. See, *e.g., Department of Revenue of Ky. v. Davis,* (2008); *American Ins. Assn. v. Garamendi* (2003). And the Constitution indirectly restricts the States by granting certain legislative powers to Congress, see Art. I, § 8, while providing in the Supremacy Clause that federal law is the "supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," Art. VI, cl. 2. This means that when federal and state law conflict, federal law prevails and state law is preempted.

The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.

Although the anticommandeering principle is simple and basic, it did not emerge in our cases until relatively recently, when Congress attempted in a few isolated instances to extend its authority in unprecedented ways. The pioneering case was *New York v. United States* (1992), which concerned a federal law that required a State, under certain circumstances, either to "take title" to low-level radioactive waste or to "regulat[e] according to the instructions of Congress." *Id*. In enacting this provision, Congress issued orders to either the legislative or executive branch

of state government (depending on the branch authorized by state law to take the actions demanded). Either way, the Court held, the provision was unconstitutional because "the Constitution does not empower Congress to subject state governments to this type of instruction." *Id.*

Justice O'Connor's opinion for the Court traced this rule to the basic structure of government established under the Constitution. The Constitution, she noted, "confers upon Congress the power to regulate individuals, not States." *Id*. In this respect, the Constitution represented a sharp break from the Articles of Confederation. "Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly." *Id*. Instead, Congress was limited to acting " 'only upon the States.' " *Id*. Alexander Hamilton, among others, saw this as " '[t]he great and radical vice in...the existing Confederation.' " The Constitutional Convention considered plans that would have preserved this basic structure, but it rejected them in favor of a plan under which "Congress would exercise its legislative authority directly over individuals rather than over States." *Id*.

As to what this structure means with regard to Congress's authority to control state legislatures, *New York* was clear and emphatic. The opinion recalled that "no Member of the Court ha[d] ever suggested" that even "a particularly strong federal interest" "would enable Congress to command a state government to enact *state* regulation." *Id.* "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' " *Id.* "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Id*.

Five years after *New York,* the Court applied the same principles to a federal statute requiring state and local law enforcement officers to perform background checks and related tasks in connection with applications for handgun licenses. *Printz v. United States* (1997). Holding this provision unconstitutional, the Court put the point succinctly: "The Federal Government" may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* This rule applies, *Printz* held, not only to state officers with policymaking responsibility but also to those assigned more mundane tasks. *Id.*

III-B. Our opinions in *New York* and *Printz* explained why adherence to the anticommandeering principle is important. Without attempting a complete survey, we mention several reasons that are significant here.

First, the rule serves as "one of the Constitution's structural protections of liberty." *Printz, supra.* "The Constitution does not protect the sovereignty of States for the benefit of the States or

state governments as abstract political entities." *New York, supra.* "To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *Ibid.* " '[A] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.' " *Id.*

Second, the anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred. *See New York, supra; Printz, supra.*

Third, the anticommandeering principle prevents Congress from shifting the costs of regulation to the States. If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis.

IV-A. The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States. In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.

Neither respondents nor the United States contends that Congress can compel a State to enact legislation, but they say that prohibiting a State from enacting new laws is another matter. Noting that the laws challenged in *New York* and *Printz* "told states what they must do instead of what they must not do," respondents contend that commandeering occurs "only when Congress goes beyond precluding state action and affirmatively commands it." Brief for Respondents 19.

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

Here is an illustration. PASPA includes an exemption for States that permitted sports betting at the time of enactment, §3704, but suppose Congress did not adopt such an exemption. Suppose Congress ordered States with legalized sports betting to take the affirmative step of criminalizing that activity and ordered the remaining States to retain their laws prohibiting sports betting. There is no good reason why the former would intrude more deeply on state sovereignty than the latter.

IV-B. Respondents and the United States claim that prior decisions of this Court show that PASPA's anti-authorization provision is constitutional, but they misread those cases. In none of them did we uphold the constitutionality of a federal statute that commanded state legislatures to enact or refrain from enacting state law.

In *South Carolina v. Baker* (1988), the federal law simply altered the federal tax treatment of private investments. Specifically, it removed the federal tax exemption for interest earned on state and local bonds unless they were issued in registered rather than bearer form. This law did not order the States to enact or maintain any existing laws. Rather, it simply had the indirect effect of pressuring States to increase the rate paid on their bearer bonds in order to make them competitive with other bonds paying taxable interest.

In any event, even if we assume that removal of the tax exemption was tantamount to an outright prohibition of the issuance of bearer bonds, see *Id.,* the law would simply treat state bonds the same as private bonds. The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.

That principle formed the basis for the Court's decision in *Reno v. Condon* (2000), which concerned a federal law restricting the disclosure and dissemination of personal information provided in applications for driver's licenses. The law applied equally to state and private actors. It did not regulate the States' sovereign authority to "regulate their own citizens." *Id.*

In *Hodel V. Virginia Surface Mining and Reclamation Association, Inc.* (1981), the federal law, which involved what has been called "cooperative federalism," by no means commandeered the state legislative process. Congress enacted a statute that comprehensively regulated surface coal mining and offered States the choice of "either implement[ing]" the federal program "or else yield[ing] to a federally administered regulatory program." *Ibid.* Thus, the federal law *allowed* but did not *require* the States to implement a federal program. "States [were] not compelled to enforce the [federal] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Id.* If a State did not "wish" to bear the burden of regulation, the "full regulatory burden [would] be borne by the Federal Government." *Ibid.*

Finally, in *FERC v. Mississippi* (1982), the federal law in question issued no command to a state legislature. Enacted to restrain the consumption of oil and natural gas, the federal law directed state utility regulatory commissions to consider, but not necessarily to adopt, federal " 'rate design' and regulatory standards." *Id.* The Court held that this modest requirement did not infringe the States' sovereign powers, but the Court warned that it had "never ... sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id. FERC* was decided well before our decisions in *New York* and *Printz,* and PASPA, unlike the law in *FERC,* does far more than require States to *consider* Congress's preference that the legalization of sports gambling be halted. See *Printz* (distinguishing *FERC*).

In sum, none of the prior decisions on which respondents and the United States rely involved federal laws that commandeered the state legislative process. None concerned laws that directed the States either to enact or to refrain from enacting a regulation of the conduct of activities occurring within their borders. Therefore, none of these precedents supports the constitutionality of the PASPA provision at issue here.

III. National Power and State Power: State Sovereign Immunity
[Replace Note III-B on page 221with new Note.]

Part III, Section B. Note: *Alden v. Maine* (1999)

B. Note: *Alden v. Maine* (1999)

In *Alden*, a group of probation officers filed suit in state court in Maine for violation of the overtime provisions of the Federal Fair Labor Standards Act (FLSA). Their federal suit had been dismissed due to the 11th Amendment. In *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the Court held that the Commerce Clause confers power on Congress to require states to pay federally prescribed minimum wages to their employees. In *Alden*, the issue was whether the probation officers *themselves* could sue the state of Maine for damages to enforce their statutory right to overtime pay or whether only the U.S. Department of Labor could sue on their behalf. As a practical matter, it is highly unlikely the Department of Labor could or would sue on behalf of all wronged employees nationwide.

In his 5-4 opinion for the Court, Justice Kennedy found the Constitution barred the suit. While sovereign immunity is not explicitly mentioned in the Constitutional text, the majority opinion relied upon inferences from the text, history, and structure of the Constitution to emphasize the need for a vital conception of state sovereignty and state sovereign immunity.

The Court pointed out that the Constitution contains various provisions that "assume the States' continued existence and active participation in the fundamental processes of governance," including the constitutional amendment process as prescribed in Article V. The Court also observed that the limited and enumerated powers of the three branches of the federal government "underscore the vital role reserved to the States by the constitutional design." Moreover, the majority said, the 10th Amendment "was enacted to allay lingering concerns about the extent of the national power." In this case, the Supremacy Clause provided no basis for allowing individuals to bring federal lawsuits against states, the Court explained, because "the supreme Law of the Land" to which it refers extends only to federal laws "that accord with the constitutional design," citing *Printz v. United States* (1997). The Court similarly denied that "the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause, the incidental authority to subject the States to private suits as a means to achieve objectives otherwise within the scope of the enumerated powers." In effect, the power was blocked by an implicit structural independent bar.

In reviewing history, the Court found that the concept of sovereign immunity was deeply rooted in English and early American understanding. The Framers "considered immunity from private suits central to sovereignty." The English common law barred suits against the Crown without its consent. This doctrine of sovereign immunity was "universal" in the States when the Constitution was drafted and ratified, and the Court doubted that the states would have ratified the Constitution if it had jeopardized their sovereignty. The Court quoted Alexander Hamilton in No. 81 of *The Federalist*: "It is inherent in the nature of sovereignty for the sovereign not to be amenable to the suit of an individual *without its consent*." The outrage over *Chisholm v. Georgia* (1793), and the subsequent enactment of the 11th Amendment, the Court contended, was intended "to restore the original constitutional design" by preserving the states' "traditional immunity from private suits." Federal statutes subjecting non-consenting states to private lawsuits were of "relatively recent origin and therefore not probative…of a constitutional tradition that lends meaning to the text."

Responding to the dissent's claim that neither the common law nor natural law supported sovereign immunity, the majority said that "[a]lthough the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design." The majority noted that the text and structure of the Constitution protect many rights, such as trial by jury, that derive from the common law. The common-law lineage of these rights does not mean that they are defeasible by statute or remain mere common-law rights, however. They are, rather, constitutional rights, and form the fundamental law of the land." In denying that the Court was relying upon natural law that was defeasible by statute, the majority similarly explained that "[w]e do not contend the founders could not have stripped the States of sovereign immunity and granted Congress power to subject them to private suit but only that they did not do so. By the same token, the contours of sovereign immunity are determined by the founders' understanding, not by the principles or limitations derived from natural law."

The Court emphasized that the immunity of states from lawsuits based on federal law was an integral part of the fabric of federalism and dual sovereignty. "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." The Court explained that the Court's respect for traditional notions of state sovereign immunity embodied in the structure of the Constitution had caused the Court to uphold state "sovereign immunity in various contexts falling outside the literal text of the 11th Amendment."

The Court rejected the argument "that immunity from suit in federal court suffices to preserve the dignity of the States." A state court lawsuit subjected a state to "the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on the treasury or perhaps even government buildings or property which the State administers on the public's behalf." The Court warned that "[p]rivate suits against non-consenting States–especially suits for money damages–may threaten the financial integrity of the

States" and "place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." Such lawsuits also could provide Congress with "a power and a leverage over the States that is not contemplated by our constitutional design." Pointing out that the federal government could not be sued in state courts without its consent, the Court explained that dual sovereignty demanded that states be entitled to a reciprocal privilege.

The Court contended that its rule would not necessarily mean that states would flout federal law. It explained that states and their officers are bound to obey the Constitution and federal statutes and that the Court therefore was "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States."

The Court noted exceptions to the doctrine of state sovereign immunity. The states in ratifying the Constitution consented to lawsuits brought by other States or the federal government. Moreover, the 14th Amendment permits Congress (in some circumstances–but obviously not here) to authorize private suits against non-consenting States pursuant to its enforcement powers in § 5. The Court stated that another "important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities." Accordingly, immunity "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." Moreover, "certain suits for declaratory or injunctive relief against state officers must…be permitted if the Constitution is to remain the supreme law of the land," citing *Ex parte Young* (1908). Moreover, "[e]ven a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally."

Justice Souter, in a vigorous dissent joined by Justices Stevens, Ginsburg, and Breyer, rejected the historical and structural premises of the Court. In particular, the dissenters denied that sovereign immunity was a fundamental aspect of state sovereignty under common law before the Revolution because sovereignty immunity was "a privilege understood in English law to be reserved for the Crown alone." The dissenters similarly denied that the colonists or the Framers embraced a natural law concept of sovereign immunity as inherent in state sovereignty. Souter found that state constitutions enacted between the Revolution and the ratification of the Constitution did not claim sovereign immunity. According to Souter, no one at the time of ratification espoused the broad vision of sovereign immunity upon which the Court relied in its opinion. Souter also emphasized that none of the decisions of the justices in *Chisholm*, including Justice Iredell's dissent, even mentioned any general theory of state sovereignty or the 10th Amendment. Indeed, at least two justices, James Wilson (one of the Framers) and John Jay, regarded sovereign immunity as an incident of European feudalism that would be anomalous in the American Republic. But if sovereign immunity had been part of the common law of the colonies and the new states, the dissent noted that it was defeasible by statute and should be defeasible by supreme federal law. The dissent rejected the analogy to common law rights that

were protected by the text of the Constitution by noting that unlike these Bill of Rights liberties, sovereign immunity was not explicit in the Constitution's text.

The dissenters also insisted that "[t]here is no evidence that the 10th Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood." They rejected English precedents for sovereign immunity and pointed out that the monarchical origins of sovereign immunity were "inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own."

The dissent insisted that deference to the Framers' intentions regarding the text or structure of the Constitution did not mean that the Framers "hover over the instrument to veto any application of its principles to a world that the Framers could not have anticipated." He observed that "[i]f the Framers would be surprised to see States subjected to suits in their own courts under the commerce power, they would be astonished by the reach of Congress under the Commerce Clause generally…and the administrative state with its reams of regulations would leave them rubbing their eyes." This does not mean, however, that the FLSA or other federal regulations unforeseen by the Framers are unconstitutional, however, for:

> "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in what of what was said a hundred years ago. *Missouri v. Holland* (1920) (Holmes, J.)

In rejecting the Court's contention that state sovereign immunity is an integral part of federalism, the dissenters pointed out that Maine was "not sovereign with respect to the national objective of the FLSA. It is not the authority that promulgated the FLSA, on which the right of action in this case depends. That authority is the United States acting through the Congress, whose legislative power under Article I of the Constitution to extend FLSA coverage to state employees" was decided in *Garcia*. Accordingly, the dissent contended that the Supremacy Clause , "which requires state courts to enforce federal law and state-court judges to be bound by it, requires the Maine courts to entertain this federal cause of action." For the dissenters, the Court's decision "vitiated" *Garcia*. They doubted that lawsuits by the federal government against the states (a route still open) could ensure compliance, because Congress was unlikely to provide adequate funding to "assure compliance with this federal law in the multifarious circumstances of some 4.7 million employees of the 50 States."

With regard to state compliance with federal law, the dissenters sardonically expressed hope that "such voluntary compliance will prove more popular than it has in Maine." In this case, "[t]he 'judgment creditor' in question is not a dunning bill collector, but a citizen whose federal rights have been violated, and a constitutional structure that stints on enforcing federal rights out of an abundance of delicacy toward the States has substituted politesse in place of respect for the rule of law." For the dissenters, the Court's reliance upon what it regarded as the deeply rooted tradition of sovereign immunity was ironic because the Court had abandoned "a principle nearly as inveterate, and much closer to the hearts of the Framers: that where there is a right, there must be a remedy."

The dissenters saw a "striking" resemblance between the Court's concept of sovereign immunity and the version of due process invoked by the Court in the *Lochner* era to nullify social and economic regulations under the due process clauses of the 5th and 14th Amendments. "The Court began this century [in the *Lochner* era] by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution."

An edited version of *Alden v. Maine* is posted with the supplemental materials on conlawincontext.com.

Two facts must be emphasized: *Alden* involved a statute passed pursuant to the Commerce Clause (Article I, s.8) and it was a statute that granted an *individual* cause of action to vindicate the federal interest. There has never been an issue that states do *not* have immunity in any action brought directly in the name of the federal government. The United States is considered a superior sovereign. The controversy in *Alden* related to the majority's refusal to allow Congress to vindicate its acknowledged power under the Commerce Clause to pass the FLSA by creating an individual cause of action pursuant to its powers under the Necessary and Proper Clause. The Court has also stated that Congress may not abrogate state sovereign immunity when exercising the patent or copyright clause of Article I, s.8 (*Florida Prepaid v. College Savings Bank* (1999).

However, an exception exists to this limitation on Article I, s.8, powers: if the Court determines that the plan of the Constitution was to give the federal government plenary authority in an area, a state cannot claim a right to sovereign immunity. The Court has ruled that states implicitly agreed their sovereignty would yield to the exercise of federal power as part of the "plan of the Convention," that is, where "the structure of the original Constitution itself" reflects a waiver of States' immunity. To date, the Court has recognized three instances of this waiver: the bankruptcy clause (*Central Va. Comm. College v. Katz* (2006)), the federal power of eminent domain (*PennEast Pipeline Co. v. New Jersey* (2021)), and the war powers (*Torres v. Texas Department of Public Safety* (2022)). It should be noted that *all* of these state sovereign

immunity cases discussed here have been decided by a 5-4 vote. Concurring in *Torres*, Justice Kagan noted, "In my view, our sovereign immunity decisions have not followed a straight line."

In practice, the *Alden* analysis goes as follows. In *Board of Trustees of the University of Alabama v. Garrett* (2001), the Court extended *Alden* immunity to claims brought in state court pursuant to the federal Americans With Disabilities Act (ADA) because the ADA (like the FLSA in *Alden*) was based on the Commerce Clause (posted on conlawincontext.com). However, in *Torres*, Congress was able to protect individuals from state discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA) because it was passed pursuant to Congress's War Powers. In *Torres*, an individual was denied re-employment by the Texas Highway Patrol after he had been called up for military duty with is Army Reserve unit.

In contrast to most statutes passed pursuant to Article I, s. 8, statutes based on § 5 of the 14th Amendment overcome the *Alden v. Maine* conception of state sovereign immunity. *Alden* is rooted in the notions of state sovereignty and federalism in the founding era. The passage of the 14th Amendment, following the Civil War, radically altered the power relationship between the federal government and the states. However, §5 is valid only for those groups or individuals asserting rights that the Court has recognized as entitled to heightened scrutiny under §1. For example, since the handicapped are not entitled to heightened scrutiny under the Equal Protection Clause, a statute making a state liable for discrimination against the handicapped is unconstitutional since it can only be based on the Commerce Clause. See *Garrett.* In contrast, a state could be liable under a different provision of the Americans With Disabilities Act (ADA) for denying a litigant access to justice when there was no elevator for a handicapped litigant to gain access to a courtroom. The difference lay in the fact that the denial of access to justice receives heightened scrutiny under current law. See *Tennessee v. Lane* (2004) (posted on conlawincontext.com).

In 2019, the Court reaffirmed this commitment to a comprehensive notion of state sovereignty. In *Franchise Tax Board of California v. Hyatt*, the Court ruled that a constitutional commitment to state sovereign immunity precluded an individual from suing a foreign state in state court on a state cause of action. The case was significant primarily because the court, in an opinion by Justice Thomas, joined by Roberts, C.J., and Alito, Gorsuch, and Kavanaugh, JJ., overruled *Nevada v. Hall* (1979). In *Hall*, the Court had reached the opposite conclusion by a 6-3 vote. Justice Thomas said: "*Stare decisis* does not compel continued adherence to this erroneous precedent. … *Hall* failed to account for the historical understanding of state sovereign immunity and … it failed to consider how the deprivation of traditional diplomatic tools reordered the States' relationships with one another. … *Hall* stands as an outlier in our sovereign-immunity jurisprudence, particularly when compared to more recent decisions."

Justice Breyer, in an opinion joined by Ginsburg, Sotomayor, and Kagan, JJ., harshly criticized the majority's rejection of stare decisis: "To overrule a sound decision like *Hall* is to encourage litigants to seek to overrule other cases; it is to make it more difficult for lawyers to

refrain from challenging settled law; and it is to cause the public to become increasingly uncertain about which cases the court will overrule and which cases are here to stay."

In *Gamble v. United States* (2019), the Court reaffirmed the fact that states have a sovereign right to try criminals under state law, whether or not the criminal has been tried for a violation of federal law for the same conduct (the dual sovereignty doctrine). In a majority opinion by Justice Alito, joined by Roberts, C.J., and Thomas, Ginsburg, Breyer, Sotomayor, Kagan, and Kavanaugh, JJ., the Court ruled that the Double Jeopardy Clause was not implicated by trials in two different sovereign jurisdictions. Justices Ginsburg and Gorsuch each wrote dissents, contending that the threat of multiple prosecutions for the same conduct lay at the heart of the Double Jeopardy Clause and should be honored in this context.

This case had drawn attention because of the possibility that a contrary result could have allowed a Donald Trump pardon of his former campaign manager Paul Manafort effectively to immunize Manafort from punishment for some of his various crimes. Manafort, who had been convicted in federal court of various financial crimes during the Mueller investigation, faces the possibility of state charges for the conduct that was the basis of his federal convictions (as well as other possible state charges). If pardoned, Manafort might have then escaped state prosecution for the alleged violations of some state laws.

Chapter 4. Powers and Limits of the Federal Courts.

Part VII, Section B: Political Questions.

When studying Political Questions (page 290 of text), be sure to review *Rucho v. Common Cause* (2019), located at page 45 of this supplement (in Equal Protection chapter on Voting Rights.) The *Rucho* Court, in a 5-4 decision, ruled that challenges to political gerrymandering are non-justiciable, as they present a political question. It explained that some degree of line drawing for partisan political purposes is "permissible," and that there is no judicially manageable test to distinguish how much partisanship in drawing lines is too much.

Part VII, Section C. *Warth v. Seldin* (1975): Notes

[Insert above first new paragraph on page 316.]

In *California v. Texas* (2021), the Court held that both individual and state plaintiffs lacked standing to challenge the constitutionality of the Patient Protection and Affordable Care Act (ACA) because they failed to demonstrate a past or future injury traceable to the statute's provisions for penalties for failing to purchase health insurance.

The Court explained that the individual plaintiffs suffered no traceable injury because amendments to the statute in 2017 virtually eliminated any monetary penalty. In his opinion for the Court, Justice Breyer wrote that "our cases have consistently spoken of the need to assert an injury that is the result of a statute's actual or threatened *enforcement*, whether today or in the future." (emphasis in original) He explained that allowing standing "to attack an unenforceable statutory provision would allow a federal court to issue" the equivalent of an advisory opinion.

Similarly, the Court held that the "state plaintiffs have failed to show that the challenged minimum essential coverage provision, without any prospect of penalty, will harm them by leading more individuals to enroll in these programs."

In a dissent joined by Justice Gorsuch, Justice Alito claimed that the states had standing because they had "offered plenty of evidence that they incur substantial expenses in order to comply with obligations imposed by the ACA." Alito also contended that the elimination of the tax removed that constitutional justification for the ACA provided in *National Federation of Independent Business v. Sebelius* (2013), in which the Court held that the ACA constituted a proper congressional exercise of its taxing power even though it exceeded the scope of the commerce power.

In its recent decision striking down President Biden's student loan forgiveness program, the Court held, six to three, that the state of Missouri had standing to challenge it because the state suffered an injury in fact. *Biden v. Nebraska* (2023). The Court found that such an injury occurred because the program would have cost a nonprofit governmental corporation created by the state to participate in the student loan market an estimated $44 million annually in fees. The Court determined that the corporation was "an instrumentality of Missouri" by both "law and function" because it "was created by the State to further a public purpose, is governed by state

officials and state appointees, reports to the State, and may be dissolved by the State." Since the forgiveness program would cut its revenues, this harm "is necessarily a direct injury to Missouri itself." The Court rejected the government's argument that the corporation rather than the State should have brought the lawsuit because the corporation had the right to sue on its own behalf.

Because the Court found that Missouri had standing, it did not address the standing of the other five states that challenged the program.

The three Justices who dissented on the merits also dissented on the issue of standing. They emphasized that the corporation was separate from the State because it had a separate corporate identity, financial independence, and distinct legal rights.

All nine Justices agreed that two individual borrowers who did not qualify for maximum relief under the program lacked standing to challenge it. *Department of Education v. Brown* (2023). The Court held that the borrowers had failed "to establish that any injury they suffer from not having their loans forgiven is fairly traceable to the Plan."

These plaintiffs claimed that they were less likely to obtain debt relief pursuant to the Higher Education Act of 1965 (HEA) because the government had forgiven debt instead pursuant to a statute, the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), under which they were not eligible for maximum debt relief. The Court determined that "to the extent that the…decision to adopt the Plan under the HEROES Act might have some incidental effect on the likelihood that the Department [of Education] will undertake a separate loan-forgiveness program under a different statute, the relationship is not sufficiently close to persuade us that the latter is sufficiently traceable to the former." The Court explained that the plaintiffs "do not want debt forgiveness under the HEROES Act, which they claim is unlawful. They want debt forgiveness under the HEA. Nothing the Secretary has done deprives them of a 'chance' to seek that result."

In another recent case, the Court held that the states of Texas and Louisiana lacked standing to challenge the Biden Administration's limitations on the arrest and deportation of criminal noncitizens. *United States v. Texas* (2023). The states alleged that the Administration's noncompliance with statutory mandates requiring more arrests and deportations injured the states by forcing them to incur various costs – including expenses for incarceration, social services, and education -- for noncitizens who ought to have been arrested and deported. The Court held that the lawsuit was not redressable by the federal courts because enforcement of the statutes was within the discretion of the executive branch pursuant to Article II of the Constitution. Enforcement of the statutes, the Court explained, required the executive branch to "balance many factors when devising arrest and prosecution policies. That complicated balancing process in turn leaves courts without meaningful standards for assessing those policies." The Court warned that allowing the case to proceed could involve the federal judiciary in other lawsuits alleging under-enforcement of other statutes. "We decline to start the Federal Judiciary down that uncharted path." The Court explained that Congress could use various means, such as withholding of funds or refusal to confirm presidential nominees, to try to persuade the President to enforce the statutes.

In dissent, Justice Alito contended that presidential defiance of the statutes was a wrong that the courts could redress when such defiance injured the states. Alito vigorously objected to the Court's conclusion that the judiciary must step aside and practically force Congress to "go to war with the Executive if it wants that law to be enforced." The Court's ruling, he concluded, "undermines federalism" and could leave the states "powerless to defend their vital interests."

Note: *Food and Drug Administration v. Alliance for Hippocratic Medicine* (2024)

The Supreme Court comprehensively reiterated principles of standing in a unanimous decision denying standing to physicians and medical associations who sought to rescind the Food and Drug Administration (FDA)'s approval of an abortion pill called mifepristone, or reverse regulations relaxing restrictions on its distribution. The Court held that "a general legal, moral, ideological, or policy objection to a particular governmental action" lacked the injury in fact and causation required for standing. The Court explained that the plaintiffs lacked a sufficient stake in the action because they "do not prescribe or use mifepristone. And the FDA is not requiring them to do or refrain from doing anything. Rather, the plaintiffs want the FDA to make mifepristone more difficult for other doctors to prescribe and for pregnant women to obtain." The Court explained that "a plaintiff's desire to make a drug less available *for others* does not establish standing to sue." (emphasis in original).

The Court reaffirmed that standing is premised on separation of powers as embodied in the "Cases" and "Controversies" requirement of Article III and summed up in the late Justice Scalia's basic question, "What's it to you?" As Justice Kavanagh explained in his opinion for the Court, "the plaintiff cannot be a mere bystander, but instead must have a 'personal stake' in the dispute." This "helps ensure that courts decide litigants' legal rights in specific cases, as Article III requires, and that courts do not opine on legal issues in response to citizens who might 'roam the country in search of governmental wrongdoing,'" quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*, *Inc*. (1982). Standing also helps to ensure that the court will resolve issues in a specific factual context with appreciation of real-world consequences rather than as abstractions. "Moreover, the standing doctrine serves to protect the 'autonomy' of those who are most directly affected so that they can decide whether and how to challenge the defendant's action," citing *Valley Forge.*

The Court pointed out that in this case, doctors who prescribed mifepristone and pregnant women who took mifepristone had standing. In contrast, the plaintiff doctors "do not prescribe, manufacture, sell, or advertise mifepristone or sponsor a competing drug" and "suffer no direct

monetary injuries from FDA's relaxing regulation of mifepristone. Nor do they suffer injuries to their property, from FDA's actions. Because the plaintiffs do not use mifepristone, they obviously can suffer no physical injuries from FDA's actions relaxing regulation of mifepristone."

Since the plaintiffs recognized that their moral, political, and ideological objections to mifepristone could not provide a predicate for standing, they advanced what the Court described as "several complicated causation theories to connect FDA's actions to the plaintiffs' alleged injuries in fact."

The Court rejected the doctors' arguments that the FDA's actions "will cause more pregnant women to suffer complications from mifepristone, and those women in turn will need more emergency abortions by doctors," which they might be required to perform against their consciences. The Court pointed out that "federal conscience laws definitively protect doctors from being required to perform abortions or to provide other treatment that violates their consciences." The Court likewise rejected the physicians' argument that these laws might be superseded by the Emergency Medical Treatment and Labor Act, which they claimed might require emergency room doctors to perform abortions in certain circumstances; the Court did not interpret that statute as overriding the conscience laws. Although the doctors argued that they might not have time in an emergency to invoke the conscience laws, the Court explained that federal law protected doctors from repercussions if they refused to perform abortions even in emergency situations.

The Court likewise rejected arguments that the doctors might suffer various monetary and related injuries, particularly "diverting resources and time from other patients to treat patients with mifepristone complications; increasing risk of liability suits from treating those patients; and potentially increasing insurance costs." These arguments, too, the Court concluded, suffered from "a lack of causation." Dismissing these claims as "highly speculative," the Court explained that the doctors "have not offered evidence tending to suggest that FDA's deregulatory actions have both caused an increase in the number of pregnant women seeking treatment from the plaintiff doctors *and* caused a resulting diversion of the doctors' time and resources from other patients." (emphasis in original). The Court likewise found that "the doctors have not identified any instances in the past where they have been sued or required to pay higher insurance costs because they have treated pregnant women suffering mifepristone complications. Nor have the

plaintiffs offered any persuasive evidence or reason to believe that the future will be different." Moreover, the Court pointed out that "the law has never permitted doctors to challenge the government's loosening of general public safety requirements simply because more individuals might then show up at emergency rooms or in doctor's offices with follow-on injuries."

The Court provided several *ad absurdum* examples of the consequences of the doctors' arguments. For example, if the Environmental Protection Agency rolled back emissions standards for power plants, a doctor might have standing because she might need to spend more time treating asthma patients; if a local school district started a football league, a pediatrician might have standing because she might need to spend more time treating concussions; if a federal agency reduced the speed limit, a doctor might be able to sue because he might have to treat more car accident victims; and if the government repealed certain restrictions on guns, a surgeon might have standing to sue because he might need to operate on more gunshot victims. The Court pointed out that "[a]llowing doctors or other healthcare providers to challenge general safety regulations as unlawfully lax would be an unprecedented and limitless approach and would allow doctors to sue in federal court to challenge almost any policy affecting public health." Carried to its logical extreme, this "unchartered path…would seemingly not end until virtually every citizen had standing to challenge virtually every government action that they do not like – an approach that this Court has consistently rejected as flatly inconsistent with Article III."

The Court also rejected the medical associations' claims that they had standing because they had incurred costs in opposing the FDA's actions. The Court explained that "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action. An organization cannot manufacture its own standing in that way." The medical associations' argument, the Court warned, "would mean that all the organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies."

Finally, the Court rejected the argument "that the plaintiffs here must have standing because if these plaintiffs do not have standing, then it may be that no one would have standing to challenge FDA's…actions." After pointing out that "it is not clear that no one else would have standing to challenge FDA's relaxed regulation of mifepristone," the Court explained that it had

never recognized this "if not us, who?" line of reasoning as a basis for standing. "Rather, some issues may be left to the political and democratic processes."

Note: *Murthy v. Missouri* (2024)

In a six to three decision, the Court held that social-media users lacked standing to sue dozens of executive branch officials who allegedly pressured social media platforms to censor their speech concerning the corona virus during the 2020 election season. The Court found that the plaintiffs failed to "demonstrate a substantial risk that, in the near future, they will suffer an injury that is traceable to a government defendant and redressable by the injunction they seek."

The Court explained that the alleged injuries were not sufficiently traceable to the government because the platforms, including Facebook, Twitter (now X), and YouTube "had independent incentives to moderate conduct and often exercised their own judgment" about different topics and at different times. Moreover, since the plaintiffs failed "to link their past social-media restrictions to the defendants' communications with the platforms…the events of the past do little to help any of the plaintiffs establish standing to seek an injunction to prevent future harms."

Justice Alito, in a dissent joined by Justices Thomas and Gorsuch, contended that the plaintiffs had standing because evidence demonstrated that White House "officials wielded potent authority. Their communications with Facebook were virtual demands. And Facebook's quavering responses to those demands show that it felt a strong need to yield."

Chapter 5. The Role of the President.

Part I, The Scope of Executive Power

[*Insert on page 329, replacing current note.*

I. The Scope of Executive Power

The federal government is generally one of enumerated powers. Congress has those powers given it by Article I, and the judiciary has those powers given it by Article III. The President (and executive agencies) similarly have those powers bestowed by Article II. It is common wisdom that the legislature enacts statutes and that the executive branch implements and enforces them. However, the apparent simplicity of this description of the executive function dissolves into ambiguity when one tries to apply it to many real world situations.

The Constitution gives the President no specific power to make laws. Rather, Article II, Section 3 provides that "he shall take Care that the Laws be faithfully executed." Article II, Section 3 also states that the President shall recommend for Congress's consideration "such Measures as he shall judge necessary and expedient." The President's annual State of the Union address is the most public occasion for presidential proposals for legislation, although the president may recommend legislation at any time. The President delivers this address in response to the provision of Article II, Section 3 that the President "shall from time to time give to the Congress Information of the State of the Union." During the past century, Presidents by custom have personally presented their message to a session of both houses of Congress in early January. In earlier years, presidents sent a written statement to Congress. The President also may call Congress into special session at any time (Article II, Section 3), a power that usually has been invoked for the purpose of recommending special legislation. whitman

Activist presidents often have proposed significant legislation. For example, Franklin D. Roosevelt's administration at the height of the New Deal in 1933-35 was the source of many far-reaching statutes such as the Social Security Act and the federal securities laws. Similarly, Lyndon B. Johnson's administration proposed much of the Great Society legislation of 1965-67, including Medicare.

The President has the power to veto any bill passed by Congress. Congress may override this veto, however, through a two-thirds vote of both Houses of Congress. (Article I, Section 7). If the President does not veto the bill within ten days, it becomes law unless Congress adjourns within ten days of the bill's passage. In signing bills, presidents often issue so-called "signing statements" in which they comment about the legislation. Although Presidents have issued these for nearly two centuries, signing statements have become much more frequent during the past thirty years. In many of these signing statements, presidents have expressed constitutional or legal objections to at least parts of the bills. Signing statements also often offer guidance to executive agencies about how to implement parts of the legislation that the President regards as vague or unconstitutional. The Constitution does not mention signing statements and the Supreme Court has not addressed

their constitutionality. In 2006, a task force of the American Bar Association concluded that signing statements "undermine the rule of law and our constitutional system of separation of powers."

The "non-delegation doctrine." Under the so-called "non-delegation doctrine," Congress technically cannot delegate to the President any of its Article I powers. Congress often, however, delegates quasi-legislative power to the President by enacting legislation that grants the President broad latitude in administration of the law. Congress must, however, "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.R. Hampton, Jr. & Co. v. United States* (1928). The scope for such delegation presumably is even broader in foreign relations than it is in domestic affairs. *See United States v. Curtiss-Wright Export Corp.* (1936). In *Schechter Poultry Corp. v. United States* (1935), the Supreme Court nullified a law, the National Industrial Recovery Act of 1933, which gave the President virtually a blank check to make regulations for various industries in an effort to end the Great Depression. *Schechter* and *Panama Refining Co. v. Ryan* (1935), which struck down part of the same statute, are virtually the only cases in which the Court has held that Congress delegated too much power to the President.

Indeed, since 1935, the Court has upheld very broad delegations of power to the executive agencies. The Court requires that when Congress confers decision making authority upon agencies, "*Congress* must 'lay down by legislative act an intelligible principle to which [the agency decisionmaker] is directed to conform.'" *Whitman v. American Trucking Assocation, Inc.* (2001). In a number of cases, for example, a charge to "regulate in the public interest" has been found sufficient.

The orthodox and majority view is that Congress may not delegate legislative power. The other realist view is that the power to legislate has been delegated but may be upheld if adequately limited. *Whitman.* An edited version of *Whitman* is posted with the supplemental materials at conlawincontext.com

The issue of delegation of power returned to public prominence in 2008, when some critics of the so-called "bank bailout" legislation, the Emergency Economic Stabilization Act, contended that the statute delegated too much power to the Treasury Department, to which the statute assigned broad discretion to purchase troubled assets from financial institutions.

In 2019, in a significant case the Court re-affirmed the broad power of Congress to delegate authority to executive agencies. In *Gundy v. United States* (2019), the Court in a five to three decision held that Congress did not violate the non-delegation doctrine by conferring power on the Attorney General to promulgate rules involving the registration of sex offenders. The Court sustained provisions of the Sex Offender Registration and Notification Act (SORNA) that authorized the Attorney General to "specify the applicability" of SORNA's registration requirements to persons who were convicted of sex crimes before the enactment of the statute

and to prescribe rules for their registration. The plaintiff who challenged the statute had been convicted of a sex offense before its enactment and had failed to register as an offender pursuant to a rule promulgated by the Attorney General.

Justice Kagan's opinion for the Court explained that "a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority," quoting *J.W. Hampton, Jr. & Co. v. United* States (1928). "Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority,'" quoting *American Power & Light Co. v. SEC* (1946). The Court observed that those standards "are not demanding" and that "we have over and over upheld even very broad delegations." The Court similarly pointed out that it had "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law," quoting *Whitman v. American Trucking Associations, Inc.* (2001). Indeed, the Court pointed out that it had only twice "found a delegation excessive" -- in its two 1935 decisions concerning the National Industrial Recovery Act, *Schechter Poultry Corp. v. United States* and *Panama Refining Co. v. Ryan.* Applying this standard, the Court denied that the statute provided the Attorney with "unguided" or "unchecked" authority. The Court found that the statute merely required the Attorney General to apply the statute to all pre-Act offenders as soon as feasible, which was "well within permissible bounds" of congressional delegation. The Court rejected the plaintiff's contention that the statute provided the Attorney General with authority to determine whether or not to apply SORNA to pre-Act offenders.

The Court declared that "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional" because Congress is "dependent…on the need to give discretion to executive officials to implement its programs." The Court concluded that "[s]ince Congress is no less endowed with common sense than we are, and better equipped to inform itself of the 'necessities' of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political…it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law," quoting *Mistretta v. United States* (1989) (Scalia, J., dissenting).

In a dissent joined by Chief Justice Roberts and Justice Thomas, Justice Gorsuch complained that SORNA "purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?" Gorsuch contended that the statute went far beyond leaving the Attorney General "with only details to dispatch" since he was "free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them." Moreover, the Attorney General could decide which offenders were subject to the Act and could change his mind at any time or over the

course of different political administrations. Indeed, Gorsuch found that different Attorneys General had "exercised their discretion in different ways." He concluded that "there isn't a single policy decision concerning pre-Act offenders on which Congress even tried to speak, and not a single other case where we have upheld executive authority over matters like these on the ground they constitute mere 'details.'" He contended that the statute allowed "the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing." Quoting Justice Cardozo's concurrence in *Schechter*, Gorsuch alleged that this was "delegation running riot."

Gorsuch contended that the statute contravened the intent of the Framers to promote "fair notice" and "the rule of law" through "a relatively stable and predictable set of rules" by vesting legislative authority in a single branch of government. Gorsuch likewise warned that excessive delegation would frustrate the "demands of bicameralism and presentment." Moreover, "if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to promote minority interests, or apt to provide stability and fair notice." Gorsuch warned that accountability also could suffer because '[l]egislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue. In turn, the executive might point to Congress as the source of the problem."

Gorsuch argued that Congress could delegate power only when it authorized another branch to "fill up the details;" allowed the executive to conduct "fact-finding" after prescribing a rule; or assigned "the executive and judicial branches certain non-legislative responsibilities."

According to Gorsuch, the "intelligible principle" standard that the Court had laid down in *Hampton* has "mutated" and "has been abused" to permit unconstitutional delegations of congressional power. Gorsuch distinguished *Gundy* from cases such as *Hampton* involving the president's "broad authority over the conduct of foreign affairs or other matters in which he enjoys his own inherent Article II powers" because SORNA governed the "duties and rights" of citizens, "a quintessentially legislative power."

Gorsuch denied that the dissent's interpretation of the non-delegation doctrine would "spell doom for…the 'administrative state'" because "separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions like those implicated by SORNA."

In a brief concurring opinion, Justice Alito explained that he would support an effort by the majority to reconsider the approach that the Court has taken since 1935, which "has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies

to adopt important rules pursuant to extraordinarily capacious standards," but that "it would be freakish to single out the provision at issue here for special treatment."

Controversy over the possible resurrection of the nondelegation doctrine continued during the 2021 term of the Court in both the Supreme Court and the lower federal courts.

If a majority of the Supreme Court is troubled by an action taken by an executive agency, they have at least three ways to nullify the action:

1) they can declare the underlying statute unconstitutional as beyond the scope of congressional power, ending the source of the agency's power (*see, e.g., National Federation of Independent Business v. Sebelius* (2012), *Shelby County v. Holder* (2013);

2) they can declare that Congress has delegated standardless legislative power to the agency in violation of the nondelegation doctrine, allowing the agency to legislate rather than execute congressional policy (*see, e.g., Schechter Poultry Corp. v. United States* (1935); or

3) they can invoke the "major question doctrine" and declare that while the statute satisfies the concerns of #1 and #2, it did not contain a clear statement that Congress intended to empower the agency to address "major questions" involving issues of "vast economic or political significance," forcing the overly ambitious agency to await specific congressional approval for such a statute (*see, e.g., FDA v. Brown & Williamson Tobacco Corp.* (2000).

In another possible scenario, the Court can conclude that the agency misinterpreted the plain meaning of the statute, relieving the Court from any obligation to defer to the agency's technical expertise under so-called *Chevron* deference (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984), and nullify the agency action as outside the scope of the enabling legislation *See, e.g., American Hospital Association v. Becerra (2022).* In *Becerra*, the Court struck down regulations from the Department of Health and Human Services without even mentioning *Chevron*. The Court has recently followed this tact in several cases—not explicitly overruling *Chevron,* but implicitly rendering it irrelevant.

While reviving an aggressive use of the nondelegation doctrine was an unresolved issue in *Gundy,* the Court's open recognition of the "major question doctrine" for the first time in *West Virginia v. EPA* (2022) supplies an analogue approach that can achieve the same result. In *West Virginia* the Court, with the current Court's familiar 6-3 split, ruled that the EPA could not mandate a change to alternative fuel sources as a way to reduce carbon emissions and greenhouse gases under its statutory authority in the Clean Air Act to reduce carbon emissions from existing coal-fired generators. The opinion not only limits the Biden administration's ability to fight climate change, but it forecasts the need for new legislation across an entire array of agencies. Given the degree of political polarization in Congress, many pressing social issues are now likely to remain unregulated following the invalidation of current regulations. https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/

The Court re-visited the issue of agency authority in *Biden v. Nebraska* (2023), ruling in a six to three decision that the Secretary of Education exceeded his congressional authority in canceling $430 billion in student loan debt, eliminating the debt of twenty million borrowers and lowering the median amount of other loans from $29,400 to $13,600. Acting at the behest of President Biden, the Secretary purported to act pursuant to the Higher Education Relief Opportunities for Students (HEROES) Act of 2003, which permitted the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs [created by the National Defense Education Act of 1958] as the Secretary deems necessary in connection with a war or other military operation or national emergency." The Secretary contended that the coronavirus constituted a national emergency. In an opinion by Chief Justice Roberts, the Court concluded that "the Act allows the Secretary to 'waive or modify' existing statutory or regulatory provisions…not to rewrite the statute from the ground up."

The Court found that the Secretary previously had made "modifications" which were only minor and mostly procedural. In contrast, the cancellation of the loan debt had "abolished" the statutory provisions "and supplanted them with a new regime entirely." The Court likewise found that the waivers of student loan debt were far more extensive than were previous waivers made by the Secretary pursuant to the statute's authority. Rather than merely relaxing loan requirements or complying with statutory provisions allowing specific and limited forgiveness of debt, the Secretary had drafted "a new section of the Education Act from scratch by 'waiving' provisions root and branch and then filling the empty space with radically new text."

In addition to ruling that the Secretary's actions were at odds with the text, the Court also rejected the Secretary's contention that his actions were consistent with the congressional purpose of providing debt relief in times of emergency. In invoking the "major questions doctrine," the Court declared that the Secretary's actions were so "staggering" that it could not believe that Congress intended to delegate so much power to the executive branch. The Court pointed out that the cancellation amounted to one-third of the federal government's $1.7 trillion in discretionary spending. Since the Secretary's loan forgiveness program had such a "sweeping and unprecedented impact," it seemed to belong "in the 'wheelhouse' of the House and Senate Committees on Appropriations." The Court reiterated the observation of the Court in *West Virginia v. EPA* (2022) that while the phrase "major questions" may be recent, "it refers to 'an identifiable body of law that has developed over a series of significant cases,'" *citing West Virginia*. The Court rejected the government's argument that the doctrine applied only in cases involving the power of agencies to regulate rather than cases involving government benefits since benefits do not burden individual rights or cause regulatory effects that require special caution. The Court explained that spending is one of the most important governmental powers, and that the Court had never created any benefits except to the major questions doctrine.

Justice Amy Comey Barrett wrote a long concurring opinion to explain the parameters of the major questions doctrine. She denied that it is inconsistent with textualism, explaining that it "is a tool for discerning – not departing from – the text's most natural interpretation." The doctrine "situates text in context," which "is not found exclusively" within the exact language of a statute. "Context also includes common sense, which is another thing that 'goes without saying.'" Context, she wrote, "is also relevant to interpreting the scope of a delegation."

Barrett provided numerous homely examples of how words always must be interpreted with common sense. For example, a grocer who instructed a clerk to "buy apples" would not be authorizing the clerk to purchase a thousand applies if the store usually stocked only two hundred. Similarly, "an instruction to 'pick up dessert' is not permission to buy a four-tier wedding cake."

Barrett argued that the vast economic and political significance of the loan cancellation mattered "not because agencies are incapable of making highly consequential decisions, but rather because an initiative of this scope, cost, and political salience is not the type that Congress lightly delegates to an agency." She concluded that the Court's decision "gives Congress's words their best reading."

Justice Kagan, in a dissent joined by Justices Sotomayor and Jackson, argued that the Court had interpreted the statute in an unduly restrictive manner that negated the intent of Congress. Contending that congressional delegation to the Secretary was "both purposive and clear," she explained that loan forgiveness was "the core provision of a recently enacted statute," and that such delegation was "at the statute's very center, in its 'waive or modify' language." She accused the Court of substituting its own policy preferences for those of Congress, particularly in its use of the "major questions" doctrine. As in its *EPA* decision, the Court, according to Kagan, had "prevent[ed] Congress from doing its policy-making job in the way it thinks best."

Kagan pointed out that "Congress delegates to agencies often and broadly. And it usually does so for sound reasons. Because agencies have expertise Congress lacks. Because times and circumstances change, and agencies are better able to keep up and respond. Because Congress knows that if it had to do everything, many desirable and even necessary things wouldn't get done. In wielding the major-questions sword, last Term and this one, this Court overrules those legislative judgments."

Objecting to the Court's assertion that previous waivers and modifications "have been extremely modest," Kagan pointed out that the Court failed to mention that suspension of loan payments and interest during the early period of the coronavirus had cost the federal government more than one hundred billion dollars. Moreover, she argued that "it's all relative. Past actions were more modest because the precipitating emergencies were more modest…In providing more significant relief for a more significant emergency –or call it unprecedented relief for an unprecedented emergency –the Secretary did what the HEROES Act contemplates."

Accusing the Court of judicial activism, Kagan remarked that "[m]aybe Congress was wrong to give the Secretary so much discretion, or maybe he, and the President he serves, did not make good use of it. But if so, there are political remedies – accountability for all the actors, up to the President, who the public thinks have made mistakes."

Kagan alleged that the Court needed to resort to its "made-up major questions doctrine to jettison the Secretary's loan forgiveness plan" because traditional statutory interpretation could not sustain the decision. The Court, she averred, had applied "a rule specifically crafted to kill

significant regulatory action, by requiring Congress to delegate not just clearly but also micro-specifically."

The Biden administration's various responses to the COVID pandemic provided a fertile ground for challenges to its regulatory authority. Three COVID cases made it to the Supreme Court during the 2021 Term. In two of them, the Court nullified the agency action using the logic of the major question doctrine.

In *Alabama Association of Realtors v. Department of Health and Human Services* (2021), the Court struck down a CDC issued moratorium on evictions pursuant to its statutory authority to address disease transmission because allowing the moratorium "would give the CDC a breathtaking amount of authority." It was a Per Curiam opinion, with the three liberal justices dissenting. The Per Curiam opinion relied on "major question" logic, though not mentioning the doctrine by name. The opinion also did not mention the nondelegation doctrine.

In *National Federation of Independent Business v. Department of Labor (2022)*, the court struck down a rule mandating that employers with at least 100 employees require covered workers to receive a COVID–19 vaccine or submit to regular testing. The Per Curiam opinion stressed that although Congress had given the Department of Labor the power to establish safety standards for the workplace under the Occupational Safety and Health Act, it had not given the agency the authority to enact such a "significant encroachment into the lives – and health – of a vast number of employees." The three liberal justices dissented once again. Justice Gorsuch, in a concurrence joined by Justices Thomas and Alito, specifically referred to both the major questions doctrine and the nondelegation doctrine as a basis for nullifying OSHA's action.

In *Biden v. Missouri* (2022), the court by a 5-4 vote allowed a regulation to stand that required vaccines for health care workers. Justice Thomas, joined by Justices Alito, Gorsuch, and Barrett dissented from the Per Curiam opinion. The regulation at issue was not passed by OSHA pursuant to the Occupational Safety and Health Act but by the Department of Health and Human Services pursuant to Medicare and Medicaid legislation. Rather than being directed at protecting the health of workers, the regulation was seen as directed a protecting the health of patients.

2023-2024: A Watershed Term Regarding Federal Regulatory Power

It is an understatement to say that there have been radically opposed perspectives about the proper scope of the powers of the federal government in general throughout American history. If possible, opinions have been in even sharper conflict regarding the proper scope of the power of federal agencies since the New Deal. Beginning in 2016, political discourse began to include pejorative references from the Trump Campaign's CEO Steve Bannon and others to the existence of an alleged "Deep State" composed of reckless career bureaucrats who create binding regulations far beyond the language of enabling statutes. Agency enforcement of vague statutes in controversial areas such as environmental protection (Clean Air Act, Clean Water Act),

workplace safety (Occupational Safety and Health Act), and public health (COVID regulations passed pursuant to the Public Health Service Act) has led to heated criticism of agency actions by regulated industries and the passionate defense of agency actions by public interest groups. In the waning days of the Trump Administration, his Executive Order 13957 attempted to reclassify somewhere between 50,000 and 100,000 federal agency employees to remove their positions from Civil Service protection, converting them into political appointments. (The Biden administration revoked the Order. Project 2025 advocates reviving it.) In 2021, JD Vance said on a podcast that his advice regarding a possible Trump second term was, "Fire every single midlevel bureaucrat, every civil servant in the administrative state, replace them with our people."

This divide is obviously also apparent among the justices on the Supreme Court. Stephen Breyer, upon his retirement, wrote a book: *Reading the Constitution: Why I Chose Pragmatism, Not Textualism.* Still sitting on the Court, Neil Gorsuch has recently written *Over Ruled: The Human Toll of Too Much Law.*

With three justices appointed during the term of Donald Trump, it is no surprise that industry-backed efforts to limit the scope of agency authority have had a sympathetic ear. The 2023 term of the Supreme Court will be remembered as historic in the creation of limitations upon federal agencies. Following the creation of the Major Questions Doctrine in *West Virginia v, EPA* (2022) and its affirmation in *Biden v. Nebraska* (2023), the 2023 Term saw the Court overrule the *Chevron* Doctrine in *Loper Bright Enterprises v. Raimondo* (2024), allowing federal courts to determine the allowable scope of agency regulations. The Court also overturned the ability of federal agencies to initially try allegations of illegal conduct in their domain in *SEC v. Jarkesy* (2024). Ruling that the 7th Amendment gave individuals charged with regulatory infractions the right to a jury trial in federal court, the Court dramatically increased the cost of litigation on the government to enforce regulatory statutes. Finally, in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* (2024), the Court liberalized the statute of limitations rules for challenges of agency regulations. Rather than looking to the date of the passage of the regulation, plaintiffs may now point to the date of the effect of a regulation upon them—effectively eliminating statutes of limitations as an issue in regulatory challenges.

While each of these cases will produce significant litigation to refine the precise scope of their holdings, it is safe to say that the current Court has enacted a constricting shift in the law regarding the "administrative state" as significant as the expansion that occurred during the New Deal.

Note: *Loper Bright Enterprises v. Raimondo* (2024)

In a 6-3 opinion delivered by Chief Justice Roberts, the Supreme Court overruled the *Chevron* doctrine, fundamentally reshaping how courts will review the legality of agency regulations that are purportedly based upon enabling statutes. The *Chevron* doctrine, established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984), required courts to

follow a two-step process when reviewing an agency's creation of a regulation based upon its interpretation of an enabling statute. First, the court would determine if Congress had directly addressed the specific issue in the statute. If congressional intent was clear, that was the end of the matter. If the statute was ambiguous as to its intended scope, however, the court would proceed to the second step, where it would defer to the agency's interpretation as long as it was deemed "permissible." In the case before the Court, the *Chevron* doctrine was applied by lower courts to uphold an agency rule requiring Atlantic herring fishermen to fund observers on their vessels, a decision that the petitioners challenged.

Roberts emphasized the need for Article III courts to interpret Article I statutes. Roberts highlighted early judicial decisions that emphasized the courts' duty to interpret the law, even when giving "great respect" to Executive Branch interpretations. He then contended that the Administrative Procedure Act (APA), enacted in 1946, codified this understanding by requiring courts to decide "all relevant questions of law" and "interpret constitutional and statutory provisions."

Roberts contended that *Chevron* marked a significant and erroneous departure from this traditional approach. According to Roberts, the *Chevron* decision failed to reconcile its deference framework with the requirements of the APA, that mandates that courts, not agencies, interpret the law. The *Chevron* doctrine effectively forced courts to abandon their independent judgment whenever a statute was ambiguous, deferring to agencies even when the agency's interpretation was not the best reading of the statute.

Roberts rejected the dissent’s view that *Chevron* assumed that statutory ambiguities are implicit delegations of authority to agencies to fill in the regulatory gaps. He argued that this presumption is a fiction, unsupported by the reality that ambiguities often arise from legislative oversight, not from an intentional delegation of interpretive authority. Moreover, courts regularly resolve statutory ambiguities in cases without agency involvement, further demonstrating that such ambiguities do not necessarily imply a delegation to an agency.

In considering whether to overrule *Chevron*, Roberts evaluated the doctrine under the principles of stare decisis. He concluded that *Chevron*'s "quality of reasoning," "workability," and the absence of meaningful reliance interests all weighed in favor of overruling it. *Chevron* was, from its inception, a "judicial invention" that contradicted the APA's statutory requirements. Roberts contended that despite numerous attempts to refine and limit *Chevron*, it had remained fundamentally flawed and had failed to provide a clear and stable rule of law.

In a seeming compromise, Roberts said that overruling *Chevron* did not call for a blanket repeal of the holdings of all prior cases that had relied on the doctrine. These cases remain binding precedents under the principle of statutory stare decisis, even though the Court's interpretive methodology has changed. However, especially concerning the liberalization of

statute of limitations rules in *Corner Post*, it is likely that prior holdings will be overturned on a case by case basis in subsequent litigation.

Roberts concluded, "Chevron is overruled," and courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."

Justices Thomas and Gorsuch joined the opinion but also concurred. Justice Thomas made clear that Congress could not pass a statute specifically resurrecting the *Chevron* Doctrine as an Article I congressional effort to empower Article II executive agencies. Any such attempt would unconstitutionally infringe upon the prerogatives of Article III courts to interpret Article I legislation. Justice Gorsuch elaborated on his vision of stare decisis to justify overruling *Chevron.*

Justice Kagan, joined by Sotomayor and Jackson, JJ., offered an impassioned defense of the *Chevron* doctrine. She listed the practical, legal, and constitutional implications of dismantling a doctrine that had guided the relationship between the judiciary and administrative agencies for nearly four decades.

She emphasized the vital role that *Chevron* deference had played in the American legal system. She argued that *Chevron* is not merely a procedural tool but a recognition of the expertise that federal agencies bring to complex statutory interpretation. She contended that the judiciary lacks the technical knowledge and day-to-day experience that agencies possess, making agencies better suited to interpret ambiguous statutes: "When Congress enacts broad, complex, and often technical statutes, it expects agencies—not courts—to fill in the details, utilizing their specialized expertise and experience."

She highlighted the fact that *Chevron* deference is built on the understanding that agencies are accountable to the political branches of government, that are, in turn, accountable to the electorate. This accountability, she argued, justifies deferring to agencies on matters within their purview. "Agencies, unlike courts, are politically accountable. They are more likely to align with the current administration's policies, which reflect the choices of the electorate."

Kagan emphasized the concept of judicial modesty. She argued that *Chevron* deference embodies a proper understanding of the judiciary's role in a constitutional democracy. Courts should recognize the limits of their own expertise and refrain from substituting their judgment for that of specialized agencies. This restraint, according to Kagan, ensures that courts do not overstep their constitutional boundaries. She contended that the majority decision reflected an improper judicial activism that disregards the traditional boundaries of judicial power. She asserted that the Court's decision will lead to a judiciary more frequently second-guessing agency expertise, which could result in less effective and more inconsistent implementation of federal laws. "The Court today takes a wrecking ball to one of the foundations of judicial modesty in administrative law," she warned, "inviting courts to engage in policy decisions that they are ill-equipped to make."

She further contended that without *Chevron* deference, there will be greater uncertainty and an increase in litigation, as courts will be more often called upon to resolve complex regulatory issues that they may not fully understand. "This decision is a recipe for chaos, as courts, lacking the expertise of agencies, will struggle to interpret and apply broad statutory mandates."

Kagan further contended that *Chevron* deference is consistent with the intent of Congress when it enacts broad (vague) or ambiguous statutes. According to Kagan, Congress often leaves gaps or ambiguities in statutes precisely because it expects agencies to fill them in, using their expertise and regulatory experience. "Congress does not legislate in a vacuum. It drafts statutes with the understanding that agencies will interpret and implement them in accordance with the broad purposes of the legislation. The Court's decision today ignores the reality of modern governance, where Congress relies on agencies to navigate the complexities of federal law."

Contrary to the majority's view, Kagan believed that *Chevron* deference protects the separation of powers by preventing courts from substituting their policy judgments for those of agencies. She warns that the Court's decision could lead to an imbalance, where the judiciary plays an outsized role in interpreting and implementing federal laws, to the detriment of democratic governance. "The Court today shifts the balance of power, pulling judicial authority into the realm of policymaking. This is not the role envisioned for the courts by our Constitution."

Note: *Securities and Exchange Commission v. Jarkesy* (2024)

The Supreme Court in a six to three decision held that the Seventh Amendment entitles a defendant to a jury trial in an action brought by the Securities and Exchange Commission (SEC) for civil penalties for securities fraud. The Court found that the SEC action resembled a fraud action under common law and that the penalty, which was monetary damages, was legal rather than equitable. As the Court pointed out, "money damages are the prototypical common law remedy." The Court held that the case did not fall within the "public rights" exception to the Seventh Amendment, which permits the federal government to try a lawsuit without a jury if the action involves the rights of the government rather than private rights. The Court explained that "what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled…The object of this SEC action is to regulate transactions between private individuals interacting in a pre-existing market…This is a common law suit in all but name."

In a dissent joined by Justices Kagan and Jackson, Justice Sotomayor argued that the case fell within the public rights exception because violations of the securities laws are offenses against the United State rather than individuals. The dissent likewise contended that the Court's decision violated separation of powers by requiring an executive agency to use a jury. The dissent explained that "[w]hen a claim belongs to the Government as sovereign, the Constitution permits Congress to enact new statutory obligations, prescribe consequences for the breach of those obligations, and then empower federal agencies to adjudicate such violations and impose the appropriate penalty."

Critics of the decision contend that it is part of the Court's efforts to undermine the power of federal agencies and therefore complements the Court's decision in *Loper Bright Enterprises*. Justice Sotomayor's dissent alleged that the decision "effects a seismic shift in this Court's jurisprudence" and "pulls a rug out under Congress" in its efforts to enable administrative agencies to impose regulatory fines and penalties. She warned that the decision called into question the constitutionality of hundreds of federal statutes and that "dozens of agencies could be stripped of their power to enforce laws enacted by Congress." Sotomayor declared that: "Today's decision is a massive sea change. Litigants seeking further dismantling of the 'administrative state' have reason to rejoice in their win today, but those of us who cherish the rule of law have nothing to celebrate." Denouncing the decision as a "power grab" by the Court, she contended that issues involving the power, efficiency, and fairness of administrative agencies should be decided by Congress, and ultimately the electorate, rather than by the judiciary.

* * *

In a related matter, Executive Order 13957 was issued during the final days of the Trump administration. This Order directed federal agencies to identify civil service employees who served in "policy related roles" in order to allow the President to then remove them from civil service job protection and fire them if he so desired. It has been estimated that this Order could cause up to 50,000 civil service employees to be terminated by a President and then be replaced by political appointees. The Order was rescinded by President Biden shortly after taking office, before any terminations had occurred. Like the aggressive prosecution of nondelegation/major question doctrine claims in court, this Order was widely seen as an attempt to weaken the role of federal administrative agencies in contemporary American government. See, e.g., https://ballotpedia.org/Presidential_Executive_Order_13957_(Donald_Trump,_2020); https://en.wikipedia.org/wiki/Schedule_F_appointment#:~:text=A%20Schedule%20F%20appointment%20was,making%20them%20easy%20to%20fire.

Standards for rule-making. In order to ensure that the vast federal bureaucracy, over which the President presides, exercises delegated power in a fair and responsible manner, the Administrative Procedure Act of 1946 establishes standards for rule-making by both federal executive departments and independent agencies. Federal departments and agencies must provide public notice and a public hearing before issuing rules and regulations pursuant to a formal fact-finding process. Courts will invalidate regulations that are "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." Regulations are published in the *Federal Register* and are compiled in the *Code of Federal Regulations* (CFR).

In *Department of Commerce v. New York* (2019), a politically controversial case arising under the Administrative Procedure Act (APA), the Court ruled five to four that the Secretary of Commerce failed to provide a sufficient explanation for his inclusion of a question about citizenship status on the 2020 census form. Critics of the census question claimed that the Secretary wanted to ask it in order to discourage undocumented aliens from participating in the census, which might have had the effect of diminishing the number of Democratic members of the House of Representatives and Democratic electoral votes and could have affected the

allocation of federal funds for various programs. Finding that the Secretary's sole reason for the question – to help gather data to facilitate enforcement of the Voting Rights Act (VRA) – "seems to have been contrived," the Court remanded the case to the case to the District Court, which in turn had remanded the issue to the Department of Commerce for clarification of its explanation for including the question on the census.

In his decision for the Court, Chief Justice Roberts professed to provide a high level of deference to the discretion of the Secretary, to whom Congress in the Census Act has delegated broad powers to conduct the decennial census, which is mandated by the Enumeration Clause of Article I, section 2, clause 3, and the second section of the Fourteenth Amendment. The Court emphasized that every census between 1860 and 2000 inquired about the citizenship or place or birth of at least some of the persons who respond to the census. Even though the Court found that the Secretary's explanation violated the APA because it appeared to be pretextual, the Court rejected various other challenges to his compliance with that statute. In particular, the Court ruled that the Secretary's action was supported by evidence that would justify the inclusion of the question for various purposes other than his stated purpose and therefore to that extent was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA. The Court explained that the Secretary reasonably could have concluded that the benefits of obtaining more accurate information concerning citizenship outweighed the risk of discouraging participation. The Court also held that the Secretary did not violate the statute by directing inquiries at other agencies in order to formulate the question or transgress the statute through the manner in which he informed Congress about the census question.

The Court nevertheless found that the Secretary had failed to "disclose the basis" for his action, as required by the Court in *Burlington Truck Lines, Inc. v. United States* (1962) because the record disclosed "a significant mismatch between the decision the Secretary made and the rationale he provided." The Court explained, inter alia, that the Secretary began formulating a citizenship question within about a week into his tenure more than a year before he promulgated the question but that his early actions contained "no hint that he was considering VRA enforcement in connection with that project" and that he had tried to elicit requests for citizenship data from the Department of Homeland Security and the Department of Justice's Executive Office for Immigration Review, neither of which is responsible for enforcing the VRA.

Concluding that the Court was presented "with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process," the Court explained that "[t]he reasoned explanation requirement of administrative law…is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case."

In a dissent from the Court's conclusion that the Secretary's explanation may have been a pretext, Justice Thomas, joined by Justices Gorsuch and Kavanaugh, complained that the Court's decision was unprecedented insofar as it questioned the sincerity of an agency's "otherwise adequate rationale." Thomas alleged that the Court never before had suggested that a "pretextual" rationale "was even a possibility" for invalidating an agency decision. Such lack of deference, he warned, could "transform administrative law" and had "opened a Pandora's box of pretext-based challenges in administrative law." He explained that "[s]ignificant policy decisions are regularly criticized as products of partisan influence, interest-group pressure, corruption, and animus. Crediting these accusations on evidence as thin as the evidence here could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the Administrative Procedure Act."

In a separate dissent from the Court's decision, Justice Alioto declared that "the Federal Judiciary has no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons." Alioto pointed out that courts never until now had reviewed "the content of the census." After carefully analyzing the APA, he concluded that the Court had failed "to identify any relevant, judicially manageable limits on the Secretary's decision to put a core demographic question back on the census." In the absence of an adequate standard of review, courts reviewing decisions about the form and content of the census "would inevitably be drawn into second-guessing the Secretary's assessment of complicated policy tradeoffs."

In a concurring and dissenting opinion joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Breyer contended that the Secretary's decision to add the citizenship question itself violated the APA because it was arbitrary and capricious insofar as clear evidence indicated that inclusion of the question would reduce participation in the census without providing countervailing benefits.

Executive orders. Presidents, beginning with Washington in 1789, have issued special orders that have the force of law. These have come to be known as "executive orders." Presidents have issued nearly 14,000 such orders. Although some have been promulgated in response to emergency situations, most involve routine issues of administration. For example, President Obama has issued executive orders to extend the Christmas holiday for federal workers to include the day following Christmas. Although the Constitution does not mention executive orders, the president's power to issue them is derived from Article II's grant of "executive power" and its "take care" clause. Presidential orders also should have a statutory predicate insofar as they should be based upon either an explicit or implicit grant of authority from Congress to address the issue that is the subject of the order.

During recent decades, presidents also have issued numerous "presidential memoranda," which have the same legal effect as executive orders, except that the memoranda are more often

framed in terms of advice to executive agencies. For example, President Obama issued a memorandum instructing the Treasury Department to develop a pilot program to enable low-income workers to establish retirement savings accounts. Both are published in *The Federal Register*.

Pursuant to an executive order signed by President Kennedy in 1962, executive orders must cite the statutory authority upon which they are based. There is no such requirement for presidential memoranda even though they, too, should have a statutory predicate.

Executive orders and memoranda can create political controversy and conflicts between the President and Congress and the states raising questions whether the president has exceeded his authority. Twenty-six states challenged President Obama's authority to issue a series of memoranda in 2014 that would have shielded as many as five million undocumented aliens from deportation. The Supreme Court in *United States v. Texas* (2016) divided four-to-four on the issue, thereby upholding a Court of Appeals decision that held by a two to one vote that Obama had exceeded his constitutional authority.

The Emoluments Clauses. Three separate constitutional provisions prohibit various federal officials from receiving gifts or certain kinds of favors from federal, state, and foreign governments.

The so-called Foreign Emoluments Clause in Art. I, sec. 9, cl. 8, provides that "No Person holding any Office or Profit or Trust under [the United States], shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

The so-called Domestic Emoluments Clause in Art. II, sec. 1, cl. 7, provides that "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them."

The so-called Ineligibility Clause in Art. I, sec. 6, cl. 2, provides that "no Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

These clauses generated little litigation until the election of Donald Trump, whose far flung business interests raised questions about the danger of foreign influence over his presidential policies. Trump's defeat in the 2020 election mooted these issues and indefinitely postponed rulings on the scope of the scope of the Foreign and Domestic Emoluments Clauses, which had generated litigation while Trump was President.

In July 2019, a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit unanimously dismissed a lawsuit in which the District of Columbia and the State of Maryland alleged that Trump violated the Foreign and Domestic Emoluments Clauses by improperly benefiting from foreign patronage of a hotel he owns five blocks from the White House, *District of Columbia v. Trump*, 930 F.3d 209 4th Cir. 2019). The court held that the plaintiffs lacked standing, rejecting claims that Trump's hotel harmed their sovereign and quasi-sovereign interests and generated proprietary and other financial injuries. In particular, the plaintiffs had contended that the hotel was unfair to competing businesses and compromised enforcement of environmental protection.

The court explained that the plaintiffs "have manifested substantial difficulty articulating how they are harmed by the President's receipts of emoluments and the nature of the relief that could redress any harm." The court also pointed out that the emoluments clauses "give no rights and provide no remedies." Pointing out that no court had entertained a claim to enforce the clauses, the court declared that "to allow such a suit to go forward in the district court without a resolution of the controlling issues by a court of appeals could result in an unnecessary intrusion into the duties and affairs of a sitting President."

The U.S. District Court for the Southern District of New York similarly dismissed another case against Trump arising under the Foreign and Domestic Emoluments Clauses by a nonprofit citizens' group for lack of standing in December 2017. *Citizens for Responsibility and Ethics in Washington v. Trump*, 276 F.Supp.3d 174 (S.D.N.Y. 2017).

Terminating any avenue for appeals of the dismissal orders from the lower courts, the U.S. Supreme Court dismissed both these cases as moot four days after Joseph R. Biden became President.

In a third lawsuit, the District Court for the District of Columbia held that 201 Members of Congress had standing to bring an action against Trump under the Foreign Emoluments Clause on account of payments made by foreign governments at various Trump-owned properties and that they stated a cause of action insofar as the term "emolument" extends to any gain, profit, or advantage. *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020). The Court of Appeals for the District of Columbia dismissed the lawsuit a few weeks after Biden became President.

The Supreme Court's major decision addressing presidential authority to issue executive orders was *Youngstown Sheet & Tube Co. v. Sawyer* (1952).

* * *

[*Insert on page 341 after Youngstown Sheet & Tube Co. v. Sawyer and before the* ***.]

Note: *Trump v. Hawaii* (2018)

The Court in this case sustained the validity of President Trump's restrictions on the entry into the United States of persons that the Trump Administration regarded as potential terrorists. The Court, in an opinion delivered by Chief Justice Roberts (joined by Kennedy, Thomas, Alito, and Gorsuch, JJ.), concluded that Trump had acted in accordance with the powers delegated to the president pursuant to the Immigration and Nationality Act (INA) and that the order did not violate the Establishment Clause even though most of the persons affected by the order were Muslims.

Trump's order, as the Court explained, "sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present 'public safety threats.'…To further that purpose, the Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate."

The proclamation explained that the eight countries were selected only after an extensive investigative process by the Department of Homeland Security, which identified countries whose governments were deficient in ensuring the integrity of travel documents and disclosure of information about the criminal histories and possible terrorist links of persons seeking to enter the United States. The Department also considered the extent to which these foreign states were known or potential havens for terrorists. It initially identified sixteen countries as having deficient information-sharing practices and another 31 as "at risk" for deficiencies in such practices. The State Department afterwards spent fifty days in diplomatic efforts to encourage these foreign governments to improve their practices. Many of these countries responded by improving their documentation process and agreeing to share information about known or suspected terrorists. At the end of this fifty day period, the Department of Homeland Security recommended restrictions on entry of various persons from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. The president embodied these recommendations in his proclamation after consulting with Cabinet members and other officials. As the Court explained, the proclamation "imposed a range of restrictions that vary based on the 'distinct circumstances' in each of the eight countries."

The constitutionality of the statute was challenged by the State of Hawaii, whose university recruits students and faculty from the designated countries; three U.S. citizens whose relatives were applying for visas from some of those countries; and an organization that operates a mosque in Hawaii. A federal district court issued a nationwide injunction on the ground that the President failed to make sufficient findings that the entry of the designated foreign nationals would be detrimental to the national interest and because it discriminated on the basis of nationality. The Court of Appeals for the Ninth Circuit affirmed. Neither lower federal court considered the plaintiffs' claims that the proclamation violated the Establishment Clause by discriminating against Muslims.

In reversing this decision, the Court declared that the President acted in accordance with the "plain language" of section 1182(f) of the INA, which provides that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." The Court concluded that this statute, which "exudes deference to the President in every clause," confers "broad discretion" permitting the President "to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings – following a worldwide, multi-agency review – that entry of the covered aliens would be detrimental to the national interest. And plaintiffs' attempts to identify a conflict with other provisions in the INA, and their appeal to the statute's purposes and history, fail to overcome the clear statutory language." The Court remarked that "[t]he 12-page Proclamation – which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions – is more detailed than any prior order a President has issued under [section] 1182(f)." The Court also pointed out that at least three previous presidents, Obama, Clinton, and Reagan, have expansively interpreted the statute by suspending entry "not because the covered nationals themselves engaged in harmful acts but instead to retaliate for conduct by their governments that conflicted with U.S. foreign policy interests."

The Court also rejected the argument that the proclamation violated a provision of the INA, section 1152(a)(1)(A), which prohibits discrimination based on "nationality, place of birth, or place of residence." The Court explained that this provision applies only after a person has been deemed admissible pursuant to section 1182(f). The Court explained that "[t]he distinction between admissibility – to which [section] 1152(a)(1)(A) does not apply – and visa issuance – to which it does – is apparent from the text of the provision, which specifies only that its protections apply to the 'issuance' of 'immigrant visa[s],' without mentioning admissibility or entry."

Finally, the Court concluded that the proclamation did not discriminate on the grounds of religion even though most of the countries covered by it have Muslim-majority populations and even though Trump during his presidential campaign had expressed concerns about possible security risks caused by Muslim immigration into the United States. Although the Court expressed reluctance to inquire into the motives behind a proclamation that was "neutral on its face" and addressed "a matter within the core of executive responsibility," the Court expressed its willingness to "look behind the face of the Proclamation to the extent of applying rational basis review." The Court explained that this "standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes." In applying this standard the Court considered, among various factors, that the proclamation was religiously neutral; that it was "limited to countries that were previously designated by Congress or prior administrations as posing national security risks;"

that it reflected "the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies;" that the proclamation includes "significant exceptions for various categories of foreign nationals," and that it contains a waiver program open to individuals who could demonstrate hardship and the absence of any threat to American security. The Court concluded that "the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility."

In deciding this case, the Court adhered to its traditional reluctance to interfere with presidential or congressional decisions concerning national security. As the Court explained, " '[a]ny rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained," quoting *Mathews v. Diaz* (1976).

In a concurring opinion, Justice Thomas expressed skepticism "that district courts have the authority to enter universal injunctions." Such injunctions, he explained, did not emerge until the 1960s and remained rare until recently, when "they have exploded in popularity." Thomas pointed out that England's "system of equity did not contemplate universal injunctions" and that American courts historically "did not provide relief beyond parties to the case. If those injunctions advantaged nonparties, that benefit was merely incidental." Although Thomas acknowledged that "[d]efenders of these injunctions contend that they ensure that individuals who did not challenge a law are treated the same as plaintiffs who did," he contended that history and traditional limitations on equity and judicial power provided no justification for them.

Dissents by Justices Breyer (joined by Kagan, J.) and Justice Sotomayor (joined by Ginsburg, J.) argued that the proclamation was invalid under the Establishment Clause because it appeared to be motivated by anti-Muslim bias. Expressing concern that there was evidence suggesting that the proclamation's waiver and exemption provisions were not being applied in a religiously neutral manner, Breyer contended that the case should be remanded for additional consideration. He stated, however, that, "[i]f this Court must decide this question without this further litigation," he would conclude that Trump's public statements about the dangers of Muslim immigration would be sufficient to invalidate the proclamation.

In her dissent, Sotomayor cited numerous statements of Trump concerning Muslim immigration, during and after his presidential campaign, as evidence of "a harrowing picture" of anti-Muslim bias that they believed to have found expression in his proclamation. In particular, she pointed out that he had pledged that, if elected, he would ban Muslims from entering the United States until the nation could assess the extent to which their entry posed a security threat. Sotomayor also quoted Trump as having declared during his campaign that "Islam hates us." She contended that the Court in its recent decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* "found less persuasive official expressions of hostility and the failure to disavow them to be constitutionally significant." Although Sotomayor declared that those

statements would permit invalidation of the proclamation even pursuant to a rational basis standard of review, she described the Court's use of this low level scrutiny as "perplexing" since the Court in other cases involving religious discrimination "has applied a more stringent standard of review." The majority responded to this aspect of the dissent by stating that the dissent failed to provide authority for its argument that a higher level review than rational basis scrutiny should apply "in the national security and foreign affairs context." Sotomayor found additional evidence of anti-Muslim bias insofar as she contended that "Congress has already erected a statutory scheme that fulfills the putative national security interests the Government now puts forth to justify the Proclamation." She also averred that "there is reason to suspect that the Proclamation's waiver program is nothing more than a sham" since so few waivers had been granted.

Sotomayor found "stark parallels" between this case and *Korematsu v. United States* (1944) insofar as both were based upon injurious racial classifications and "rooted in dangerous stereotypes about…a particular groups's supposed inability to assimilate and desire to harm the United States." In responding to these allegations, the majority opinion formally overruled *Korematsu*, which it described as "gravely wrong the day it was decided," but contended that "*Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.

Part III. Appointments and the Separation of Powers, Section A: The Removal Power
[Insert on page 365 at end of note on Removal By the President.]

Note: *Seila Law LLC v. Consumer Financial Protection Bureau* (2020)

The Court in a five to four decision held that the Congress lacked power to prohibit the President from removing the director of the Consumer Financial Protection Bureau (CFPB) only for inefficiency, neglect of duty, or malfeasance in office. The Court reasoned that the director of this agency, established in the wake of the financial crisis of 2008 to regulate financial lending practices, exercised such significant executive functions that limitations on the President's power to remove the director would violate separation of powers. The Court explained that significant precedents, including *Myers v. United States* (1926), "establish that the President's removal power is the rule, not the exception."

The Court distinguished *Humphrey's Executor v. United States* (1935), on the ground that the CFPB, unlike the Federal Trade Commission (FTC) was led by a single person rather than by a board with multiple members. The Court also explained that Congress intended for the FTC to be non-political and non-partisan and that Congress therefore provided that no more than three of the five FTC commissioners would come from the same political party and that they would serve staggered seven-year terms to enable "the agency to accumulate technical expertise." In contrast, the CFPB director's five-year term guaranteed abrupt changes in leadership. The Court also found it important that the CFPB director "possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive

practices in a major segment of the U.S. economy," unlike the FTC commissioners at the time of *Humphrey's*, whose powers were more circumscribed.

The Court distinguished *Morrison* v. *Olson* (1988) on the ground that the protections against the removal of the independent counsel "did not unduly interfere with the functioning of the Executive Branch" because the independent counsel was an inferior officer under the Appointments Clause who had limited jurisdiction and tenure and lacked "policymaking or significant administrative authority," quoting *Morrison*.

The dissenters were unconvinced by the Court's attempts to distinguish the CFPB director from members of other independent agencies. Justice Kagan wrote that the "analysis is simple as simple can be. The CFPB Director exercises the same powers, and receives the same removal protections, as the heads of other, constitutionally permissible independent agencies." Kagan was particularly critical of the Court's emphasis on the centralization of the CFPB's powers in its director. She pointed out the independent counsel in *Morrison* "was very much a person, not a committee" and she contended that "*Humphrey's* and later precedents give no support to the majority's view that the number of people at the apex of an agency matters to the constitutional issue."

Kagan pointed out that the Constitution is silent about the President's removal power and she urged judicial deference to congressional decisions about how to structure federal agencies. The Court's decision, she declared, was contrary to the "text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance." She believed that the Court's decision "wipes out" a feature of the CPFB that Congress "thought fundamental to its mission – a measure of independence from political pressure."

Note: *Collins v. Yellen* (2021)

Applying the expansive presidential removal power it outlined in *Seila Law LLC v. Consumer Financial Protection Bureau* (2020), the Court held that Congress violated separation of powers by permitting the President to remove only "for cause" the director of the Federal Housing Finance Agency (FHFA), an independent agency created in the wake of the financial crisis of 2008 to regulate federal mortgage financing companies.

Although the statute referred to the FHFA as "an independent agency of the Federal Government," Justice Alito in his opinion for the Court declared that this term "does not necessarily mean that the Agency is 'independent' of the President." He explained that this "may mean instead that the Agency is not part of and is therefore independent of any other unit of the Federal Government. And describing an agency as independent would be an odd way to signify that its head is removable only for cause because even an agency head who is shielded in that way would hardly be fully 'independent' of Presidential control." He pointed out that Congress had statutorily described other agencies as independent without imposing restrictions on the President's removal power, and that Congress has restricted the removal power for various

agencies it has not characterized as independent, including the Federal Trade Commission (FTC), the Commission on Civil Rights, and the National Labor Relations Board.

Alito found that *Seila Law* was "all but dispositive," even though the powers of the FHFA director were more limited than those of the director of the Consumer Financial Protection Bureau (CFPB). Citing *Myers v. United States* (1926), Alito explained that the "removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote." Similarly, "this control is essential to subject Executive Branch actions to a degree of electoral accountability."

Alito rejected the argument that the limitations on the President's power to remove the FHFA director were permissible because the FHFA regulates government-sponsored enterprises that serve public objectives. He explained that "the President's removal power serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives," as the FHFA clearly does since it helps millions of Americans "buy and keep their homes."

Although Alito acknowledged the FHFA statute's "for cause" removal provision appeared to provide the President with more removal authority than the "inefficiency, neglect of duty, or malfeasance in office" language of the CFPB, he explained that "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer," quoting *Seila Law*.

Justice Kagan, who authored the dissent for four Justice in *Seila Law*, concurred in the Court's opinion only on the basis of *stare decisis*.

In dissent, Justice Sotomayor pointed out that never before had "the Court forbidden simple for-cause tenure protection for an Executive Branch officer who neither exercises significant executive power nor regulates the affairs of private parties." She contended that the FHFA's powers were much closer to those of the FTC at the time of *Humphrey's Executor* than to the powers of the CFPB. She believed that the Court's decision was inconsistent not only with *Humphrey's Executor v. United States* (1935) but also *Morrison v. Olson* (1988). Sotomayor concluded that the "Court has proved far too eager in recent years to insert itself into questions of agency structure best left to Congress. In striking down the independence of the FHFA Director, the Court reaches further than ever before."

Part IV. Executive Privilege: Judicial Immunities
[*Insert on page 373 above* Impeachment.]

Part IV. Executive Privilege: Judicial Immunities

[*Insert on page 373 above* Impeachment.]

Note: *Trump v. Mazars USA, LLP* (2020)

The Court held that Congress may subpoena information from a President in order to promote a valid legislative purpose if the form and scope of such subpoena sufficiently respects the doctrine of separation of powers. It remanded two Court of Appeals decisions sustaining subpoenas issued by committees of the House of Representatives against President Trump and members of his family pursuant to an investigation concerning campaign financing disclosures by presidential candidates and another investigation about foreign influence in the American political process that could have informed legislation on money laundering, terrorist financing, and the global movement of illicit funds through real estate transactions.

In a seven to two decision written by Chief Justice Roberts, the Court declared that Congress can issue subpoenas against the President if they are related to a legitimate congressional task, but that Congress may not issue a subpoena for the purposes of law enforcement because law enforcement powers are constitutionally assigned only to the executive and judicial branches.

The Court rejected President Trump's argument that the criteria for issuance of the subpoena satisfy the exacting standard of "a demonstrated, specific need" that the Court in 1974 in *United States v. Nixon* prescribed for the issuance of the Watergate special prosecutor's subpoena of President Nixon's tapes. The Court explained that *Nixon*, unlike the present case, raised questions of executive privilege involving the President's need to conduct candid and confidential deliberations on sensitive issues involving the nation's affairs. The Court declined to transplant the protection of executive privilege "root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations." The Court found that this "categorical approach would represent a significant departure from the longstanding way of doing business between the branches, giving short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively."

The Court determined, however, that the House had failed "to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information" because "Congress and the President have an ongoing institutional relationship as the 'opposite and rival' political branches established by the Constitution." In particular, the Court found that the subpoena issued by the House bore "little resemblance to criminal subpoenas issued to the President in the course of a specific investigation," as in the *Vance* case, which the Court decided on the same day, since "congressional subpoenas for the President's information unavoidably pit the political branches against one another."

Roberts contended that the House's broad approach aggravated separation of powers concerns "by leaving essentially no limits on the congressional power to subpoena the

President's personal records. Any personal paper possessed by a President could potentially 'relate to' a conceivable subject of legislation, for Congress has broad legislative powers that touch a vast number of subjects." The Court expressed dismay that the House during oral argument "was unable to identify *any* type of information that lacks some relation to potential legislation." (emphasis in original). The Court warned that "[w]ithout limits on its subpoena powers, Congress could 'exert an imperious controul' over the Executive Branch and aggrandize itself at the President's expense, just as the Framers feared," quoting *The Federalist No. 71* (Alexander Hamilton).

Expressing disagreement with the suggestion of the House and the lower courts that these separation of powers concerns were not implicated here, the Court declared that "[w]e would have to be 'blind' not to see…that the subpoenas do not represent a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved." The Court observed that interbranch conflict "does not vanish simply because the subpoenas seek personal papers or because the President is sued in his personal capacity" because the President "is the only person who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs…In fact, a subpoena for personal papers may pose a heightened risk of such impermissible purposes, precisely because of the documents' personal nature and their less evident connection to a legislative task." According to the Court, "[n]o one can say that the controversy here is less significant to the relationship between the branches simply because it involves personal papers. Quite the opposite. That appears to be what makes the matter of such great consequence to the President and Congress."

In trying to establish guidelines for the resolution of such conflict, which the Court found that neither side had done, the Court called for a "balanced approach" that considered four factors.

"First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers…Congress may not rely on the President's information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective." In particular, the Court warned that "[t]he President's unique constitutional position means that Congress may not look to him as a 'case study' for general legislation."

Second, the Court explained that "courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." Moreover, the Court stated that specificity in the subpoena helps to prevent unnecessary intrusion into the President's execution of his duties.

"Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress's legislative purpose the better."

Fourth, the Court warned that "courts should be careful to assess the burdens imposed on the President by a subpoena," particularly because burdens imposed by a congressional subpoena "stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage."

The Court observed that it had never before adjudicated the constitutionality of a congressional subpoena against a President because the President and Congress had resolved without judicial intervention previous disputes regarding such subpoenas.

In a dissent, Justice Thomas contended that "Congress has no power to issue a legislative subpoena for private, nonofficial documents – whether they belong to the President or not. Congress may be able to obtain these documents as part of an investigation of the President, but to do so, it must proceed under the impeachment power." He asserted that "Congress' legislative powers do not authorize it to engage in a nationwide inquisition with whatever resources it chooses to appropriate for itself."

Justice Alito also dissented, contending that "legislative subpoenas for a President's personal documents are inherently suspicious. Such documents are seldom of any special value in considering potential legislation, and subpoenas for such documents can easily be used for improper non-legislative purposes." Accordingly, Alito warned that "courts must be very sensitive to separation of powers issues when they are asked to approve the enforcement of such subpoenas." Alito explained that courts should require Congress "to make more than a perfunctory showing that it is seeking the documents for a legitimate legislative purpose and not for the purpose of exposing supposed Presidential wrongdoing."

In the present case, Alito discerned "disturbing evidence of an improper law enforcement purpose." In particular, he remarked that "the sheer volume of documents sought calls out for explanation."

Alito specified that "the House should provide a description of the type of legislation being considered, and while great specificity is not necessary, the description should be sufficient to permit a court to assess whether the particular records sought are of any special importance." Alito further explained that the "House should also spell out its constitutional authority to enact the type of legislation that it is contemplating, and it should justify the scope of the subpoenas in relation to the articulated legislative needs." Finally, he asserted that the House "should explain why the subpoenaed information, as opposed to information available from other sources, is needed." Without satisfaction of these criteria, Alito stated that he "would hold that enforcement of the subpoenas cannot be ordered."

Note: *Trump v. Vance* (2020)

In *Trump v. Vance* (2020), the Supreme Court by a vote of 7-2 held that Article II and the Supremacy Clause do not provide a sitting President with absolute immunity from a subpoena in a state criminal law case. The Court also held, by a vote of 5-4, that a prosecutor seeking such a subpoena does not need to satisfy a higher standard of need than what is required for a federal subpoena. The majority opinion written by Chief Justice Roberts.

The case arose out of President Trump attempted to enjoin enforcement of a subpoena *duces tecum* issued by the New York County District Attorney's office on Trump's accounting firm for financial records of Trump and his businesses. This was the first criminal subpoena ever directed against a President. Although the Court in *United States v. Burr* (1807) and *United States v. Nixon* (1974) had held that sitting Presidents were not immune from subpoenas in federal criminal investigations, Trump contended that state subpoenas categorically posed "a unique threat" of impairment of a President's duties under Article II.

In particular, Trump argued that such a subpoena would distract a President's attention from his duties, stigmatize him in a manner that would undermine his leadership at home and abroad, and make him an "easily identifiable target" for harassment by a multitude of state prosecutors.

In arguing that a state subpoena would unduly distract a President, Trump relied heavily upon *Nixon v. Fitzgerald* (1982), in which the Court held that a President was absolutely immune from damages arising out of his official acts. Although the Court in *Fitzgerald* found that the prospect of such liability could distract the President in ways that could unduly impair the performance of his duties, the Court in *Vance* explained that "*Fitzgerald* did not hold that distraction was sufficient to confer absolute immunity." The Court pointed out that it had "rejected immunity based on distraction alone 15 years later in *Clinton v. Jones*," in which the Court held that a civil lawsuit could proceed against a President during his term in office. The Court in *Vance* recalled that the principal basis for the Court decision in *Jones* "was not mere distraction but the distortion of the Executive's 'decision-making process' with respect to official acts that would stem from 'worry' as to the possibility of damages." The Court found that "[j]ust as a 'properly managed' civil suit is generally 'unlikely to occupy any substantial amount of' a President's time or attention," citing *Jones*, "two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties." The Court rejected Trump's argument that a criminal subpoena imposes a heavier distraction than did the civil proceedings in *Fitzgerald* and *Jones*, explaining that the "President's objection…must be limited to the *additional* distraction caused by the subpoena itself" in state criminal investigations of a President, which Trump conceded were not unconstitutional. (emphasis in original).

In rejecting Trump's claim "that the stigma of being subpoenaed will undermine his leadership at home and abroad," the Court declared that "there is nothing inherently stigmatizing

about a President performing 'the citizen's normal duty of…furnishing information relevant' to a criminal investigation," *quoting Branzburg v. Hayes* (1972). Although the Court acknowledged that a subpoena could affect "a President's public standing" if he is under investigation, the Court observed that "again, the President concedes that such investigations are permitted under Article II and the Supremacy Clause, and receipt of a subpoena would not seem to categorically magnify the harm to the President's reputation."

In turning aside Trump's contention that a President could become a target for harassment if he were subject to state criminal subpoenas, the Court explained that it had "rejected a nearly identical argument in *Clinton*." The Court was unconvinced by Trump's contention that "state criminal subpoenas pose a heightened risk" because "while federal prosecutors are accountable to and removable by the President, the 2,300 district attorneys in this country are responsive to local constituencies, local interests, and local prejudices" and might abuse the criminal process to register dissatisfaction with the President. Although the Court acknowledged "that harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive," the Court contended that such risk "was not 'serious' because federal courts have the tools to deter and, where necessary, dismiss vexatious civil suits," *quoting Clinton*. In particular, the Court pointed out that grand juries are prohibited from engaging in malicious or harassing investigations. If such abuses did occur, the President could avail himself of the federal courts for an injunction to force "state officials to conform their conduct to federal law.

The Court invoked three reasons for rejecting Trump's argument that a state prosecutor must satisfy a heightened standard of need for issuing a subpoena upon a President in a criminal case. First, the Court relied upon *Burr*'s holding that a President stands "in nearly the same situation with any other individual" with respect to private papers, *quoting Burr.* Second, the Court explained that Trump had failed to show that heightened protection was needed in order for him to fulfill his Article II functions. Finally, the Court declared that "the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence," particularly since a heightened standard would "hobble" a grand jury's ability to obtain necessary information. Even if withheld evidence could be preserved until the end of a President's term, the state meanwhile "would be deprived of investigative leads that the evidence might yield, allowing memories to fade and documents to disappear. This could frustrate the identification, investigation and indictment of third parties (for whom applicable statutes of limitation might lapse)." The Court also expressed fear that "it could prejudice the innocent by depriving the grand jury of "*exculpatory* evidence." (emphasis in original).

The Court explained that its ruling would not leave a President defenseless, for he "may avail himself of the same protections available to every other citizen." Moreover, a President "can challenge the subpoena as an attempt to influence the performance of his official duties, in violation of the Supremacy Clause," which would protect "against local political machinations" contrived to impede "the effective operation of a federal constitutional power." A President

likewise could "argue that compliance with a particular subpoena would impede his constitutional duties."

In a concurrence, Justices Kavanaugh and Gorsuch argued in favor of applying the "demonstrated, specific need" standard of *United States v. Nixon* because "this case again entails a clash between the interests of the criminal process and the Article II interests of the Presidency."

In his dissent, Justice Thomas argued that "the demands on the President's time and the importance of his tasks are extraordinary, and the office of the President cannot be delegated to subordinates. A subpoena imposes both demands on the President's limited time and a mental burden, even when the President is not directly engaged in complying."

Justice Alito's dissent contended that *Burr* was inapposite insofar as the President himself was not the target of the investigation in that case and that *Burr*, *Nixon,* and *Clinton* were distinguishable because they arose in federal court and therefore lacked the concerns about federalism that Alito believed were central to the *Vance* case.

Alito averred that "[t]here is no question that a criminal prosecution holds far greater potential for distracting a President and diminishing his ability to carry out his responsibilities than does the average civil suit." He observed that "[t]he subpoena at issue here is unprecedented. Never before has a local prosecutor subpoenaed the records of a sitting President. The Court's decision threatens to impair the functioning of the Presidency and provides no real protection against the use of the subpoena power by the Nation's 2,300+ local prosecutors." Alito concluded that "[r]espect for the structure of Government created by the Constitution demands greater protection for an institution that is vital to the Nation's safety and well-being."

Note: *Trump v. United States* (2024)

In a politically significant and controversial six to three decision, the U.S. Supreme Court ruled that the doctrine of separation of powers provides presidents with absolute immunity from criminal prosecution for actions taken in the performance of their core constitutional duties. The Court left open the question of whether the president receives absolute immunity or merely presumptive immunity from criminal prosecution for other official actions, those which are "within the outer perimeter of his official responsibility."

The decision arose out of a lawsuit alleging that Donald J. Trump conspired to overturn the results of the 2020 election by knowingly spreading false claims of election fraud. The United States District Court for the District of Columbia rejected Trump's claim that presidents have absolute immunity in criminal actions involving their official conduct. The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's ruling in a decision which the Supreme Court reversed.

The Supreme Court defined a president's core duties as those "within his exclusive sphere of constitutional authority," including commanding the armed forces; granting reprieves and pardons; appointing various federal officers, including judges and ambassadors; recognizing foreign governments and making treaties; managing issues involving terrorism, trade and immigration; overseeing the actions of executive departments; and recommending legislation to Congress. The Court explained that such immunity does not "extend to conduct in areas where his authority is shared with Congress."

The Court explained that such absolute immunity "is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution." Pointing out that these same considerations provided the basis for *Nixon v. Fitzgerald* (1982), in which the Court recognized presidential immunity from civil actions arising out of his performance of his duties, the Court concluded that the need for such immunity was even greater in a criminal context. "Although the President might be exposed to fewer criminal prosecutions than the range of civil damages suits that might be brought by various plaintiffs, the threat of trial, judgment, and imprisonment is a far greater deterrent. Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decision-making than the potential payment of civil damages."

Similarly, the Court found that "the separation of powers principles explicated in our precedent necessitate at least a *presumptive*' immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility." This immunity, the Court explained, "is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution." The Court stated that "the current stage of the proceedings in this case does not require us to decide whether this immunity is presumptive or absolute."

The Court held that Trump enjoyed absolute immunity for one of the various allegations accusing him of conspiring to overturn the results of the 2020 election by allegedly trying to use the Justice Department to convince various States to replace their legitimate electors with a slate selected by Trump. The Court explained that a President has "exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials."

The Court determined that Trump had at least presumptive immunity for allegations that he tried to enlist the vice president to fraudulently certify electors chosen by Trump insofar as communications between a President and a Vice President constitute official conduct. The Court directed the District Court on remand to decide whether to rebut this presumption by determining "whether a prosecution involving Trump's alleged attempts to influence the Vice President's oversight of the certification proceeding in his capacity as President of the Senate would pose any dangers of intrusion on the authority and functions of the Executive Branch."

The Court likewise remanded the case to the lower court to determine whether Trump was acting in an official capacity in his communications about the election with persons outside the executive branch of the federal government, including state officials, private parties, and the general public. His communications with the public included a speech and tweets to 89 million persons immediately before disorderly conduct at the Capitol on the day that the electoral votes were counted. The Court explained that whether this involved official conduct "may depend on the content and context of each," a task that the district court needed to perform on remand.

Relying on *Clinton v. Jones* (1997), the Court affirmed that there is no immunity for unofficial acts. The Court acknowledged that it "can be difficult" to distinguish between official and unofficial acts. As in *Nixon v. Fitzgerald*, the Cout held that "courts may not inquire into the President's motives" because this would intrude "on the Article II interests that immunity seeks to protect." The Court further explained that courts may not "deem an action unofficial merely because it allegedly violates a generally applicable law."

The Court distinguished its rejection of absolute immunity in cases in which prosecutors had sought evidence from the President, particularly *United States v. Burr* (1807) and *United States v. Nixon* (1974), explaining that "[c]riminally prosecuting a President for official conduct undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession, as in *Burr* and *Nixon*."

The Court rejected Trump's assertion that the Court must dismiss the indictment because impeachment and conviction by the Senate must precede the criminal prosecution of a President. Trump based this on the Impeachment Judgment Clause of Article I, §3, cl. 7, which states that a judgment of guilty by the Senate "shall not extend further than to removal from Office, and disqualification to hold and enjoy any office of honor, Trust or Profit under the United States" and that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." The Court pointed out that "the Clause does not address whether and on what conduct a President may be prosecuted if he was never impeached and convicted." The Court remarked that Trump's interpretation would permit a president to avoid prosecution if he "manages to conceal certain crimes throughout his Presidency, or if Congress is unable to muster the political will to impeach the President for his crimes."

Chief Justice Roberts's majority opinion complained that the dissents "strike a note of chilling doom that is wholly disproportionate to what the Court actually does today." Roberts accused the dissenters of "ignoring the Constitution's separation of powers and the Court's precedent and instead fear mongering on the basis of extreme hypotheticals about a future where the President 'feels empowered to violate federal criminal law,'" quoting Justice Sotomayor. Roberts accused the dissent of overlooking "the more likely prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next."

Justices Sotomayor, Kagan, and Jackson dissented. In a dissent joined by Justices Kagan and Jackson, Sotomayor emphasized that the decision offended basic principles of the rule of law. She declared that the decision "reshapes the institution of the Presidency" and "makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law." This, she claimed, "will have disastrous consequences for the Presidency and for our democracy." The Court, she alleged, "has replaced a presumption of equality before the law with a presumption that the President is above the law for all of his official acts." She observed that "There is a twisted irony in saying, as the majority does, that the person charged with "tak[ing] Care that the Laws be faithfully executed' can break them with impunity."

Sotomayor emphasized that the text of the Constitution provides no criminal immunity for presidents. She also claimed that history provided no evidence of such immunity, pointing to President Ford's pardon of former President Nixon in 1974.

She further argued that the Court's dichotomy between official and unofficial conduct was so narrow that it was "almost…a nullity" because "the category of Presidential action that can be deemed 'unofficial' is destined to be "vanishingly small."

Sotomayor distinguished *Fitzgerald* on the ground that "the public interest in a federal criminal prosecution of a former President is vastly greater than the public interest in a private individual's civil suit." Application of the *Fitzgerald* balancing test therefore should have yielded "the opposite result."

Sotomayor likewise questioned the Court's premise that the prospect of criminal prosecutions could unduly inhibit the President's ability to discharge his duties. She contended that "the threat of criminal liability is much smaller" than is "the threat of vexatious civil litigation." Moreover, "federal criminal prosecutions require 'robust procedural safeguards' not found in civil suits," quoting the District Court's opinion. Finally, she pointed out that "every sitting President has so far believed himself under the threat of criminal liability after his term of office and nevertheless boldly fulfilled the duties of his office."

Furthermore, she warned that the Court's concept of immunity for core functions "will effectively insulate all sorts of noncore conduct from criminal prosecution," as illustrated by the Court's willingness to find that Trump was absolutely immune from prosecution for any conduct involving his discussions with Justice Department officials.

The Court's decision, Sotomayor predicted, will insulate the President from prosecution for any use of his official powers, no matter how unlawful. "Orders the Navy's Seals Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune."

In a separate dissent, Justice Jackson likewise emphasized that the decision helps place the President above the law and removed a significant deterrent to criminal conduct, alleging that

"the practical consequences are a five-alarm fire that threatens to consume democratic self-governance and the normal operations of our Government." She claimed that "whether the President will be exempt from legal liability for murder, assault, theft, fraud, or any other reprehensible and outlawed criminal act will turn on whether he committed that act in his official capacity, such that the answer to the immunity question will always and inevitably be: It depends."

Disputing the Court's fundamental assertion that lack of immunity could inhibit presidents from boldness in discharging their duties, she explained that this "ignores (or rejects) the foundational principles upon which the traditional individual accountability paradigm is based. Worse still, promoting more vigor from Presidents in exercising their official duties – and, presumably, less deliberation – invites breathtaking risks in terms of harm to the American people that, in my view, far outweigh the benefits."

Justice Jackson also contended that the Court's decision "unilaterally altered the balance of power" among the three branches of government by "aggrandizing power in the Judiciary and the Executive, to the detriment of Congress."

Questions:

1. Could the dissent also have relied upon the Constitution's provision in Article I, Section I, Clause 8 that the President must take an oath promising to "preserve, protect and defend the Constitution of the United States"?
2. Do you agree with Justice Sotomayor that the Court's decision could immunize the President from ordering the assassination of a political rival? Organizing a military coup? Taking a bribe in exchange for a pardon?
3. Has the Court provided intelligible standards for lower courts to follow?

Chapter 7. Limits on State Power.

Part II, The Dormant Commerce Clause

Section D. Extra-Territorial Regulation

[*Insert on page 513 following note* on Brown Foreman Distillers.]

Note: National Pork Producers Council v. Ross (2023)

Proposition 12 ("Prop 12") was a California ballot proposition in that state's general election on November 6, 2018. The measure was self-titled the *Prevention of Cruelty to Farm Animals Act* and prohibited the sale of meat and egg products in California if the animals had been raised in extremely confined conditions common to "factory" farms. The initiative passed by almost a 2-1 margin.

While most egg producers agreed to comply and veal producers were changing their methods anyway, pork producers filed suit, alleging a violation of the Dormant Commerce Clause. The essence of their complaint was that California imported virtually all of its pork from out of state. While conceding that the proposition was non-discriminatory, plaintiffs contended that California was impermissibly attempting to control out of state farming methods. Plaintiffs relied on the balancing test set forth in *Pike v. Bruce Church, Inc.* (1970), contending that a court must assess "'the burden imposed on interstate commerce'" by a state law and prevent its enforcement if the law's burdens are "'clearly excessive in relation to the putative local benefits.'"

Dormant Commerce Clause cases raise the controversial issue of balancing a state's right to exercise its police powers against the national interest in fostering the free flow of commerce. Ordinarily, states legislate in an effort to benefit local economic interests. It is rare that states pass legislation that affects interstate commerce yet is truly non-discriminatory. In *Pike*, while announcing a balancing test, the Court also recognized that Arizona's requirement of local processing of cantaloupes conferred an economic benefit (investment and employment) on Arizona. Thus, *Pike* is not a purely non-discriminatory case, which the plaintiffs conceded was the situation in the instant case.

Justices have been divided over the years on how to approach Dormant Commerce Clause cases. Is it proper to balance the benefit to the state against the harm to the free flow of commerce at all? What role should the presence or absence of economic discrimination by the state play? In *Kassell v. Consolidated Freightways Corp.* (1981), a case striking Iowa's ban on double trailer trucks over 60 feet long, the Court split three ways over how to analyze these issues. A four justice plurality openly embraced balancing and said discrimination against interstate commerce was probative to the question of deference to the state. They struck the statute on the basis that the significant burden imposed on interstate trucking exceeded the marginal safety gains. A two justice concurrence held that balancing was not proper, but that evidence of economic discrimination was a per se violation of the Dormant Commerce Clause.

They struck the statute because of evidence of local protectionism. A three justice dissent also opposed balancing and was skeptical of a court's ability to determine discriminatory intent.

The Court rendered a similarly fragmented opinion in *National Pork Producers Council v. Ross* (*Ross*). The case was complicated by two factors. First, unlike most alleged Dormant Commerce Clause violations, the plaintiff conceded that Prop 12 was evenhanded. Thus, the case falls into a very small set of cases where the Court is not concerned about a state's improper economic motivations but is applying an "extraterritoriality doctrine" that forbids enforcement of state laws that have the "practical effect of controlling commerce outside the State." Second, the complaint was dismissed on the pleadings, so there was no factual record to help the Court conduct a balancing test.

Justice Gorsuch wrote the lead opinion rejecting the challenge, joined in the most part by Thomas, Sotomayor, Kagan, and Barrett, JJ.. Two sections (IV-B and IV-D lost the votes of Sotomayor and Kagan) and section IV-C lost the vote of Barrett. Sotomayor, joined by Kagan, and Barrett wrote concurrences. Chief Justice Roberts wrote the main dissent (concurring in part with Gorsuch), joined by Alito, Kavanaugh, and Jackson, JJ. Justice Kavanaugh also wrote a dissent (concurring in part).

All of the justices agree on two points: the central concern of Dormant Commerce Clause jurisprudence is the prevention of economic discrimination by a state that favors its own citizens and injures out of state competition and most cases involve this scenario. Second, while there is a limit on non-discriminatory state behavior that has an extra-territorial economic impact on commerce occurring in other states, it is not a per se rule that invalidates such statutes.

Other than those two points, it is difficult to predict how the justices will evaluate future claims. It seems that Justice Gorsuch shares Justice Thomas's disdain for the doctrine. [See dissent of Thomas, J., in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.* (1997).] In section IV-B, citing Justice Scalia, Justice Gorsuch said that a court attempting to balance a state's interest in health, safety, or morality against the national interest in the free flow of commerce is like being asked to decide "whether a particular line is longer than a particular rock is heavy." Justices Sotomayor and Kagan did not join this because they consider balancing legitimate. Justice Barrett did join this section, but in her concurrence said she would support balancing when the state's interests and the national interest are comparable. She said that the benefits and burdens of Prop 12 were "incommensurable."

Justice Sotomayor's concurrence makes clear that she rejected the plaintiff's claim "because petitioners fail to allege a substantial burden on interstate commerce as required by *Pike*, not because of [the need for] any fundamental reworking of that doctrine." She believed there was not a substantial burden on interstate commerce because California was open to out of state competition.

Justice Gorsuch spelled out the reasoning on this point. Out-of-state pork producers could choose to modify their existing operations in order to comply with Prop 12, segregate their

operations to ensure that pork products entering California are compliant, or withdraw from the California market. The fact that California's new law might shift market share from one set of producers to another did not constitute a sufficient burden on interstate commerce. As the Court has held in *Exxon Corp. v. Governor of Maryland* (1978) and *Minnesota* v. *Clover Leaf Creamery Co.* (1981), the Dormant Commerce Clause operates to protect the interstate *market*, not *particular players* in that market.

Chief Justice Roberts' dissent contended that the impact of Prop 12 on the national pork market did constitute a substantial burden. (On this point, Justice Barrett would have provided a fifth vote to strike the regulation had she not disagreed on the Court's ability to balance the benefits and burdens at issue in this case.)

Justice Kavanaugh's dissent raised a potential parade of horrors, where states try to dictate the enforcement of controversial social polices in other states by linking compliance to access to their domestic market. However, as Justice Gorsuch noted,

> "Everyone agrees that Congress may seek to exercise this power to regulate the interstate trade of pork, much as it has done with various other products. Everyone agrees, too, that congressional enactments may preempt conflicting state laws. … But everyone also agrees that we have nothing like that here. Despite the persistent efforts of certain pork producers, Congress has yet to adopt any statute that might displace Proposition 12 or laws regulating pork production in other States.

Section G. The Dormant Commerce Clause and State Taxation of Commerce.
[*After the last sentence on page 522 insert a new heading: G. The Dormant Commerce Clause and State Taxation of Commerce.*]

Note: *South Dakota v. Wayfair* (2018)

South Dakota, taxes in-state retail sales of goods and services. North Carolina and many other states do the same. In South Dakota, many but not all, Sellers are required to collect and remit the tax to the State. Under Supreme Court precedent, sellers who lacked a physical presence in the state, could not be required to collect the state's sales and services taxes. See, *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753, and *Quill Corp.* v. *North Dakota*, 504 U. S. 298. For such sales, in-state consumers were responsible for paying a use tax at the same rate, but compliance had been "notoriously low."

With the rise of internet sales, many sellers lacked a physical presence in the state. The estimate that the Court cited was that "*Bellas Hess* and *Quill* cause[d] South Dakota to lose between $48 and $58 million annually in sales tax revenue.

Concerned about the erosion of its sales tax base and corresponding loss of critical funding for state and local services, the South Dakota Legislature enacted a law requiring out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the State." The Act covers only sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State.

Wayfair and other top retailers (respondents) had no employees or real estate or qualifying physical presence in South Dakota, but each met the Act's minimum sales or transactions requirement. Nonetheless, they did not collect the State's sales tax. South Dakota filed suit in state court, seeking a declaration that the Act's requirements are valid and applicable to respondents and also sought an injunction requiring Wayfair and the other respondents to register for licenses to collect and remit the sales tax. The state courts held the act unconstitutionally violated the Dormant Commerce Clause.

The Supreme Court reversed. Kennedy delivered the opinion of the Court in which Thomas, Ginsberg, Alito, and Gorsuch, JJ., joined. Thomas, J., and Gorsuch, J., filed concurring opinions. Roberts, C.J., dissented in an opinion joined by Breyer, Kagan, and Sotomayor, JJ.

The Court explained that the Dormant Commerce Clause limits state regulation of interstate commerce. States "1. may not discriminate against interstate commerce and" 2. they may not unduly burden interstate commerce." These principles also "animate" the Court's precedents on taxation of interstate commerce. As applied to state taxation of interstate commerce, the Court has set out four guiding principles. Taxes "will be sustained so long as they (1) apply to an activity with a substantial nexus with the taxing State, (2) are fairly apportioned, (3) do not discriminate against interstate commerce, and (4) are fairly related to the services the State provides."

The Court rejected the physical presence rule and overruled cases requiring it. It said each year the rule became more and more divorced from economic reality. It imposed significant revenue losses on the states. It favored many out of state sellers over sellers located within the states. It created market distortions and creates an tax shelter for businesses that sell to state consumers but that limit their physical presence in the state. It held that

> "Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*."
>
> "Between targeted advertising and instant access to most consumers via any internet-enabled device, 'a business may be present in a State in a meaningful way without' that presence 'being physical in the traditional sense of the term.' … A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill*, simply irrelevant."

In addition as applied the physical presence rule undermined the role of the states in the federal system. "The physical presence rule as defined and enforced in *Bellas Hess* and *Quill* is not just a technical legal problem—it is an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions." For example, the Court noted, citing South Dakota's brief:

> "Wayfair offers to sell a vast selection of furnishings. Its advertising seeks to create an image of beautiful, peaceful homes, but it also says that "'[o]ne of the best things about buying through Wayfair is that we do not have to charge sales tax.'" What Wayfair ignores in its subtle offer to assist in tax evasion is that creating a dream home assumes solvent state and local governments. State taxes fund the police and fire departments that protect the homes containing their customers' furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the "sound local banking institutions to support credit transactions [and] courts to ensure collection of the purchase price,"

In addition, it was unfair and unjust to in-state and out-of-state competitors who must pay the tax.

The four dissenters argued for stare decisis but also pointed out policy arguments for leaving the matter to Congress. Chief Justice Roberts, joined by Justice Breyer, Sotomayor, and Kagan dissented. They agreed that *Quill* had been wrongly decided, but held the matter of fixing the problems should be left up to Congress. The physical presence rule had become intertwined with commercial decisions, and provided a bonus to small retailers. Adjusting the competing interest should be left to the Congress, which of course, has the constitutional power to change the Court's dormant commerce decisions:

> "E-commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-presence rule. Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress. The Court should not act on this important question of current economic policy, solely to expiate a mistake made over 50 years ago. …

Chief Justice Roberts noted the myriad state and local taxes which which small retailers must now comply:

> "The burden will fall disproportionately on small businesses. One vitalizing effect of the Internet has been connecting small, even 'micro' businesses to potential buyers across the Nation. People starting a business selling their embroidered pillowcases or carved decoys can offer their wares throughout the country—but probably not if they have to figure out the tax due on every sale. See Sales Taxes Report 22 (indicating that "costs will likely increase the most for businesses that do not have established legal teams, software systems, or outside counsel to assist with compliance related questions"). And the software said to facilitate compliance is still in its infancy, and its capabilities and expense are subject to debate. … The Court's decision today will surely have the effect of dampening opportunities for commerce in a broad range of new markets.'

Congress, the dissenters argued is far better suited to adjusting the complex policy choices:

> "Here, after investigation, Congress could reasonably decide that current trends might sufficiently expand tax revenues, obviating the need for an abrupt policy shift with potentially adverse consequences for e-commerce. Or Congress might decide that the benefits of allowing States to secure additional tax revenue outweigh any foreseeable harm to e-commerce. Or Congress might elect to accommodate these competing interests, by, for example, allowing States to tax Internet sales by remote retailers only if revenue from such sales exceeds some set amount per year. See Goodlatte Brief 12–14 (providing varied examples of how Congress could address sales tax collection). In any event, Congress can focus directly on current policy concerns rather than past legal mistakes. Congress can also provide a nuanced answer to the troubling question whether any change will have retroactive effect."

Chapter 8. The Incorporation of the Bill of Rights.

Part VI, Section C-3: Incorporation After *Duncan*.
[On page 631, replace current #9 with the following.]

9. *Timbs v. Indiana* (2019). The court incorporated the Excessive Fines Clause as a limit on the states under the Due Process Clause. Eight people join the majority opinion. Justice Thomas concured in the judgment, again basing incorporation on the Privileges or Immunities Clause.

10. The Supreme Court has so far not held that *all* rights in the Bill of Rights limit state power. Those the Court has not yet applied to the states include the right to civil jury trial, grand jury indictment, and the protection against quartering troops

* * *

Part IX, Section B: The Roberts Court and Incorporation
[*Insert on page 650, after "I dissent."*]

Note: *Timbs v. Indiana* (2019).

In *Timbs v. Indiana* (2019), a near-unanimous Court incorporated the Excessive Fines Clause of the 8th Amendment into the Due Process Clause of the 14th Amendment. Timbs pled guilty in Indiana state court to the offense of dealing in a controlled substance and conspiracy to engage in theft. When he was arrested, the police seized Timbs' Land Rover. Timbs had purchased it for $42,000 with money he had received from an insurance policy when his father died. The state sought forfeiture of the vehicle, but the Indiana trial court refused to order the forfeiture. It noted that the maximum fine for Timbs' crime was $10,000 and it found the requested forfeiture would have violated the Excessive Fines Clause of the 8th Amendment as applied to the states under the Due Process Clause of the 14th Amendment. Though the Indiana Court of appeals affirmed, the Supreme Court of Indiana reversed on the ground that the excessive fines clause had not been incorporated as a limit on the states.

Justice Ginsburg wrote for eight members of the Court. (Justice Thomas concurred in the judgment only, again arguing that the Privileges or Immunities Clause should be resurrected.) The Court's opinion noted:

> The constitutional Amendments adopted in the aftermath of the Civil War… fundamentally altered our country's federal system. *McDonald* v. Chicago (2010). With only "a handful" of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States.
>
> [T]he protection against excessive fines guards against abuses of government's punitive or criminal law-enforcement authority. This safeguard, we hold, is 'fundamental

to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.' *McDonald* v. *Chicago*, (2010)."

On that point, the Court cited a rich history of the excessive fines clause—running from the Magna Cara (1215) through the English Bill of Rights (1689), and early state Constitutions through the ratification of the 14th Amendment, at which time 35 of 37 states expressly prohibited excessive fines. At the time of the opinion, all 50 states prohibited excessive fines. The Court's decision incorporated the Excessive Fines Clause through the Due Process Clause of the Fourteenth Amendment.

The Court explained that it had held that the excessive fines clause "limits the government's power to extract payments, whether in cash or in kind," 'as punishment for some offense.'" Once a clause was incorporated from the Bill of Rights, it noted that guarantees are "enforced against the States under the 14th Amendment according to the same standards that protect those personal rights against federal encroachment." The Court explained that "the sole exception" is our holding that the 6th Amendment requires jury unanimity in federal, but not state, criminal proceedings. *Apodaca* v. *Oregon*, (1972)." The Court explained, that "exception to th[e] general rule…was the result of an unusual division among the Justices," and it "does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government," again citing *McDonald*.

Ramos v. Louisiana
590 U.S. -- (2020)

[Justice Gorsuch announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, an opinion with respect to Parts II–B, IV–B–2, and V, in which Justice Ginsburg, Justice Breyer, and Justice Sotomayor join, and an opinion with respect to Part IV–A, in which Justice Ginsburg and Justice Breyer join.]

Accused of a serious crime, Evangelisto Ramos insisted on his innocence and invoked his right to a jury trial. Eventually, 10 jurors found the evidence against him persuasive. But a pair of jurors believed that the State of Louisiana had failed to prove Mr. Ramos's guilt beyond reasonable doubt; they voted to acquit.

In 48 States and federal court, a single juror's vote to acquit is enough to prevent a conviction. But not in Louisiana. Along with Oregon, Louisiana has long punished people based on 10-to-2 verdicts like the one here. So instead of the mistrial he would have received almost anywhere else, Mr. Ramos was sentenced to life in prison without the possibility of parole.

Why do Louisiana and Oregon allow non-unanimous convictions? Though it's hard to say why these laws persist, their origins are clear. Louisiana first endorsed non-unanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to "establish the supremacy of the white race," and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice

exempted white residents from the most onerous of these requirements. [Convictions of serious crimes would also facilitate disqualifying citizens of African dissent.]

Nor was it only the prospect of African-Americans voting that concerned the delegates.... With a careful eye on racial demographics, the convention delegates sculpted a "facially race-neutral" rule permitting 10-to-2 verdicts in order "to ensure that African-American juror service would be meaningless."

Adopted in the 1930s, Oregon's rule permitting non-unanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute "the influence of racial, ethnic, and religious minorities on Oregon juries." ... Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States' respective non-unanimity rules.

We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense....

[Justice Gorsuch delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, concluding that the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense.]

I. The Sixth Amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The Amendment goes on to preserve other rights for criminal defendants but says nothing else about what a "trial by an impartial jury" entails.

Still, the promise of a jury trial surely meant *something*—otherwise, there would have been no reason to write it down.... The text and structure of the Constitution clearly suggest that the term "trial by an impartial jury" carried with it *some* meaning about the content and requirements of a jury trial.

One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury trial" meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law. As Blackstone explained, no person could be found guilty of a serious crime unless "the truth of every accusation ... should ... be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion." A " 'verdict, taken from eleven, was no verdict' " at all.

This same rule applied in the young American States. Six State Constitutions explicitly

required unanimity. Another four preserved the right to a jury trial in more general terms. But the variations did not matter much; consistent with the common law, state courts appeared to regard unanimity as an essential feature of the jury trial.

It was against this backdrop that James Madison drafted and the States ratified the Sixth Amendment in 1791. By that time, unanimous verdicts had been required for about 400 years....

There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

II-A. ... It turns out that the Sixth Amendment's otherwise simple story took a strange turn in 1972. That year, the Court confronted these States' unconventional schemes for the first time—in *Apodaca* v. *Oregon* and a companion case, *Johnson* v. *Louisiana*. Ultimately, the Court could do no more than issue a badly fractured set of opinions. Four dissenting Justices would not have hesitated to strike down the States' laws, recognizing that the Sixth Amendment requires unanimity and that this guarantee is fully applicable against the States under the Fourteenth Amendment. But a four-Justice plurality took a very different view of the Sixth Amendment. These Justices declared that the real question before them was whether unanimity serves an important "function" in "contemporary society." Then, having reframed the question, the plurality wasted few words before concluding that unanimity's costs outweigh its benefits in the modern era, so the Sixth Amendment should not stand in the way of Louisiana or Oregon.

The ninth Member of the Court adopted a position that was neither here nor there. On the one hand, Justice Powell agreed that, as a matter of "history and precedent, ... the Sixth Amendment requires a unanimous jury verdict to convict." But, on the other hand, he argued that the Fourteenth Amendment does not render this guarantee against the federal government fully applicable against the States. In this way, Justice Powell doubled down on his belief in "dual-track" incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government. [This view had been rejected by the Court, before and since.]

... The Court had already, nearly a decade earlier, "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.' " It's a point we've restated many times since, too, including as recently as last year. Still, Justice Powell frankly explained, he was "unwillin[g]" to follow the Court's precedents. So he offered up the essential fifth vote to uphold Mr. Apodaca's conviction—if based only on a view of the Fourteenth Amendment that he knew was (and remains) foreclosed by precedent.

II-B. ... [T]his Court's precedents, both then and now, prevent the Court from applying

the Sixth Amendment to the States in some mutated and diminished form under the Fourteenth Amendment. So what could we possibly describe as the "holding" of *Apodaca*?

Really, no one has found a way to make sense of it.... [Louisiana] contends that this Court has never definitively ruled on the propriety of non-unanimous juries under the Sixth Amendment—and that we should use this case to hold for the first time that non-unanimous juries are permissible in state and federal courts alike.

III. ... How does the State deal with the fact this Court has said 13 times over 120 years that the Sixth Amendment *does* require unanimity? Or the fact that five Justices in *Apodaca* said the same? The best the State can offer is to suggest that all these statements came in dicta. But even supposing (without granting) that Louisiana is right and it's dicta all the way down, why would the Court now walk away from many of its own statements about the Constitution's meaning? And what about the prior 400 years of English and American cases requiring unanimity—should we dismiss all those as dicta too?

[Louisiana] argues that the drafting history of the Sixth Amendment reveals an intent by the framers to leave this particular feature behind. The State points to the fact that Madison's proposal for the Sixth Amendment originally read: "The trial of all crimes ... shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites...." Louisiana notes that the House of Representatives approved this text with minor modifications. Yet, the State stresses, the Senate replaced "impartial jury of freeholders of the vicinage" with "impartial jury of the State and district wherein the crime shall have been committed" and also removed the explicit references to unanimity, the right of challenge, and "other accustomed requisites." In light of these revisions, Louisiana would have us infer an intent to abandon the common law's traditional unanimity requirement.

But this snippet of drafting history could just as easily support the opposite inference. Maybe the Senate deleted the language about unanimity, the right of challenge, and "other accustomed prerequisites" because all this was so plainly included in the promise of a "trial by an impartial jury" that Senators considered the language surplusage....

Faced with this hard fact, Louisiana's only remaining option is to invite us to distinguish between the historic features of common law jury trials that (we think) serve "important enough" functions to migrate silently into the Sixth Amendment and those that don't. And, on the State's account, we should conclude that unanimity isn't worthy enough to make the trip.

But to see the dangers of Louisiana's overwise approach, there's no need to look any further than *Apodaca* itself. There, four Justices, pursuing the functionalist approach Louisiana espouses, began by describing the " 'essential' " benefit of a jury trial as " 'the interposition ... of the commonsense judgment of a group of laymen' " between the defendant and the possibility of an " 'overzealous prosecutor.' " And measured against that muddy yardstick, they quickly concluded that requiring 12 rather than 10 votes to convict offers no meaningful improvement. Meanwhile, these Justices argued, States have good and important reasons for dispensing with unanimity, such as seeking to reduce the rate of hung juries.

Who can profess confidence in a breezy cost-benefit analysis like that? Lost in the accounting are the racially discriminatory *reasons* that Louisiana and Oregon adopted their peculiar rules in the first place.[144] What's more, the plurality never explained why the promised benefit of abandoning unanimity—reducing the rate of hung juries—always scores as a credit, not a cost. But who can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what the plurality said it should—deliberating carefully and safeguarding against overzealous prosecutions? And what about the fact, too, that some studies suggest that the elimination of unanimity has only a small effect on the rate of hung juries? Or the fact that others profess to have found that requiring unanimity may provide other possible benefits, including more open-minded and more thorough deliberations? It seems the *Apodaca* plurality never even conceived of such possibilities.

... When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed. As judges, it is not our role to reassess whether the right to a unanimous jury is "important enough" to retain. With humility, we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics.[2]

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[1] The dissent chides us for acknowledging the racist history of Louisiana's and Oregon's laws, and commends the *Apodaca* plurality's decision to disregard these facts. But if the Sixth Amendment calls on judges to assess the functional benefits of jury rules, as the *Apodaca* plurality suggested, how can that analysis proceed to ignore the very functions those rules were adopted to serve? The dissent answers that Louisiana and Oregon eventually re-codified their non-unanimous jury laws in new proceedings untainted by racism. But that cannot explain *Apodaca*'s omission: The States' proceedings took place only *after* the Court's decision. Nor can our shared respect for "rational and civil discourse," supply an excuse for leaving an uncomfortable past unexamined. Still, the dissent is right about one thing—a jurisdiction adopting a non-unanimous jury rule even for benign reasons would still violate the Sixth Amendment.

[2] The dissent seems to suggest that we must abandon the Sixth Amendment's historical meaning in favor of *Apodaca*'s functionalism because a parade of horribles would follow otherwise. In particular, the dissent reminds us that, at points and places in our history, women were not permitted to sit on juries. But we hardly need *Apodaca*'s functionalism to avoid repeating that wrong. Unlike the rule of unanimity, rules about who qualified as a defendant's "peer" varied considerably at common law at the time of the Sixth Amendment's adoption. Reflecting that fact, the Judiciary Act of 1789—adopted by the same Congress that passed the Sixth Amendment—initially pegged the qualifications for federal jury service to the relevant state jury qualification requirements. 1 Stat. 88. As a result, for much of this Nation's early history the composition of federal juries varied both geographically and over time. See Hickey, Federal Legislation: Improvement of the Jury System in Federal Courts, 35 Geo. L. J. 500, 506–507 (1947); *Taylor v. Louisiana* (1975). Ultimately, however, the people themselves adopted further constitutional amendments that prohibit invidious discrimination. So today the Sixth Amendment's promise of a jury of one's peers means a jury selected from a representative cross section of the entire community. See *Strauder*; *Smith v. Texas*, (1940); *Taylor*.
Relatedly, the dissent suggests that, before doing anything here, we should survey all changes in jury

IV-A. ... The dissent contends that ... we risk defying *Marks* v. *United States* (1977). According to *Marks*, when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " But notice that the dissent never actually gets around to telling us which opinion in *Apodaca* it considers to be the narrowest and controlling one under *Marks*—or why. So while the dissent worries that we defy a *Marks* precedent, it is oddly coy about where exactly that precedent might be found.

... *Marks* never sought to offer or defend such a rule....

The dissent's backup argument fares no better. In the end, even the dissent is forced to concede that Justice Powell's *reasoning* in *Apodaca* lacks controlling force. So far, so good. But then the dissent suggests *Apodaca* somehow still manages to supply a controlling precedent as to its *result*....

IV-B-1. ... Even if we accepted the premise that *Apodaca* established a precedent, no one on the Court today is prepared to say it was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true. Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But *stare decisis* has never been treated as "an inexorable command." And the doctrine is "at its weakest when we interpret the Constitution" because a mistaken judicial interpretation of that supreme law is often "practically impossible" to correct through other means....

... Whether we look to the [*Apodaca*] plurality opinion or Justice Powell's separate concurrence, *Apodaca* was gravely mistaken; again, no Member of the Court today defends either as rightly decided. I]t's just an implacable fact that the *Apodaca* plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of Louisiana's and Oregon's laws. Instead, the plurality subjected the Constitution's jury trial right to an incomplete functionalist analysis of its own creation for which it spared one paragraph. And, of course, five Justices expressly rejected the plurality's conclusion that the Sixth Amendment does not require unanimity. Meanwhile, Justice Powell refused to follow this Court's incorporation precedents....

When it comes to reliance interests, it's notable that neither Louisiana nor Oregon claims anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke.... [N]on-unanimous verdicts [are not part of our national culture; they are] insufficient to convict in 48 States and federal court....

[P]rior convictions in only two States are potentially affected by our judgment. Those States credibly claim that the number of non-unanimous felony convictions still on direct appeal

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practices since 1791. It sounds like an interesting study—but not one that could alter the plain meaning of the Constitution or obliviate its undisputed unanimity requirement.

are somewhere in the hundreds, and retrying or plea bargaining these cases will surely impose a cost. But new rules of criminal procedures usually do, often affecting significant numbers of pending cases across the whole country....

IV-B-2. The second and related reliance interest the dissent seizes upon involves the interest Louisiana and Oregon have in the security of their final criminal judgments. In light of our decision today, the dissent worries that defendants whose appeals are already complete might seek to challenge their non-unanimous convictions through collateral (*i.e.,* habeas) review.

But ... [u]nder *Teague* v. *Lane*, newly recognized rules of criminal procedure do not normally apply in collateral review. True, *Teague* left open the possibility of an exception for "watershed rules" "implicat[ing] the fundamental fairness [and accuracy] of the trial." ...

Instead, the dissent suggests that the feeble reliance interests it identifies should get a boost because the right to a unanimous jury trial has "little practical importance going forward." In the dissent's telling, Louisiana has "abolished" non-unanimous verdicts and Oregon "seemed on the verge of doing the same until the Court intervened." But, as the dissent itself concedes, a ruling for Louisiana would invite other States to relax their own unanimity requirements. In fact, 14 jurisdictions have already told us that they would value the right to "experiment" with non-unanimous juries....

Taken at its word, the dissent would have us discard a Sixth Amendment right in perpetuity rather than ask two States to retry a slice of their prior criminal cases. Whether that slice turns out to be large or small, it cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties. Indeed, the dissent can cite no case in which the one-time need to retry defendants has *ever* been sufficient to inter a constitutional right forever....

V. On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one before us suggests that the error was harmless. Louisiana does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others....

Reversed.

Justice Sotomayor, concurring as to all but Part IV–A.

I agree with most of the Court's rationale, and so I join all but Part IV–A of its opinion. I write separately, however, to underscore three points. First, overruling precedent here is not only warranted, but compelled. Second, the interests at stake point far more clearly to that outcome than those in other recent cases. And finally, the racially biased origins of the Louisiana and Oregon laws uniquely matter here....

Justice Kavanaugh, concurring in part.

I. ... Historically, some of the Court's most notable and consequential decisions have

entailed overruling precedent. See, *e.g., Obergefell* v. *Hodges* (2015); *Citizens United v. Federal Election Comm'n* (2010) [and many other cases including Brown v. Board of Education] ....

The lengthy and extraordinary list of landmark cases that overruled precedent includes the single most important and greatest decision in this Court's history, *Brown* v. *Board of Education*, which repudiated the separate but equal doctrine of *Plessy v. Ferguson* (1896).

As those many examples demonstrate, the doctrine of *stare decisis* does not dictate, and no one seriously maintains, that the Court should *never* overrule erroneous precedent. As the Court has often stated and repeats today, *stare decisis* is not an "inexorable command." ...

Rather, applying the doctrine of *stare decisis*, this Court ordinarily adheres to precedent, but *sometimes* overrules precedent. The difficult question, then, is when to overrule an erroneous precedent....

In constitutional cases, by contrast [to statutory cases], the Court has repeatedly said—and says again today—that the doctrine of *stare decisis* is not as "inflexible." ...

As Justice Scalia put it, the doctrine of *stare decisis* always requires "reasons that go beyond mere demonstration that the overruled opinion was wrong," for "otherwise the doctrine would be no doctrine at all." *Hubbard v. United States* (1995). To overrule, the Court demands a special justification or strong grounds....

The *stare decisis* factors identified by the Court in its past cases include:

- the quality of the precedent's reasoning;
- the precedent's consistency and coherence with previous or subsequent decisions;
- changed law since the prior decision;
- changed facts since the prior decision;
- the workability of the precedent;
- the reliance interests of those who have relied on the precedent; and
- the age of the precedent.

But the Court has articulated and applied those various individual factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together. And in my view, that muddle poses a problem for the rule of law and for this Court, as the Court attempts to apply *stare decisis* principles in a neutral and consistent manner.

As I read the Court's cases on precedent, those varied and somewhat elastic *stare decisis* factors fold into three broad considerations that, in my view, can help guide the inquiry and help determine what constitutes a "special justification" or "strong grounds" to overrule a prior constitutional decision.

First, is the prior decision not just wrong, but grievously or egregiously wrong? A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it. In conducting that inquiry, the Court may examine the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors. A case may be egregiously wrong when decided, see, *e.g.*, *Korematsu v. United States* (1944); *Plessy v. Ferguson* (1896), or may be unmasked as egregiously wrong based on later legal or factual understandings or developments, see, *e.g.*, *Nevada v. Hall* (1979), or both.

Second, has the prior decision caused significant negative jurisprudential or real-world consequences? In conducting that inquiry, the Court may consider jurisprudential consequences (some of which are also relevant to the first inquiry), such as workability, as well as consistency and coherence with other decisions, among other factors. Importantly, the Court may also scrutinize the precedent's real-world effects on the citizenry, not just its effects on the law and the legal system. See, *e.g., Brown v. Board of Education* (1954) ....

Third, would overruling the prior decision unduly upset reliance interests? This consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that inquiry, the Court may examine a variety of reliance interests and the age of the precedent, among other factors.

In short, the first consideration requires inquiry into how wrong the precedent is as a matter of law. The second and third considerations together demand, in Justice Jackson's words, a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other." Jackson, 30 A. B. A. J., at 334.

Those three considerations together provide a structured methodology and roadmap for determining whether to overrule an erroneous constitutional precedent. The three considerations correspond to the Court's historical practice and encompass the various individual factors that the Court has applied over the years as part of the *stare decisis* calculus. And they are consistent with the Founding understanding and, for example, Blackstone's shorthand description that overruling is warranted when (and only when) a precedent is "manifestly absurd or unjust." 1 Blackstone, Commentaries on the Laws of England, at 70.

Taken together, those three considerations set a high (but not insurmountable) bar for overruling a precedent, and they therefore limit the number of overrulings and maintain stability in the law. Those three considerations also constrain judicial discretion in deciding when to overrule an erroneous precedent. To be sure, applying those considerations is not a purely mechanical exercise, and I do not claim otherwise. I suggest only that those three considerations may better structure how to consider the many traditional *stare decisis* factors.

It is inevitable that judges of good faith applying the *stare decisis* considerations will sometimes disagree about when to overrule an erroneous constitutional precedent, as the Court does in this case. To begin with, judges may disagree about whether a prior decision is wrong in the first place—and importantly, that disagreement is sometimes the *real* dispute when judges

joust over *stare decisis*. But even when judges agree that a prior decision is wrong, they may disagree about whether the decision is so egregiously wrong as to justify an overruling. Judges may likewise disagree about the severity of the jurisprudential or real-world consequences caused by the erroneous decision and, therefore, whether the decision is worth overruling. In that regard, some judges may think that the negative consequences can be addressed by narrowing the precedent (or just living with it) rather than outright overruling it. Judges may also disagree about how to measure the relevant reliance interests that might be affected by an overruling. And on top of all of that, judges may also disagree about how to weigh and balance all of those competing considerations in a given case.

This case illustrates that point. No Member of the Court contends that the result in *Apodaca* is correct. But the Members of the Court vehemently disagree about whether to overrule *Apodaca*.

II. Applying the three broad *stare decisis* considerations to this case, I agree with the Court's decision to overrule *Apodaca*.

First, *Apodaca* is egregiously wrong. The original meaning and this Court's precedents establish that the Sixth Amendment requires a unanimous jury. See, *e.g., Patton v. United States* (1930); *Thompson v. Utah* (1898). And the original meaning and this Court's precedents establish that the Fourteenth Amendment incorporates the Sixth Amendment jury trial right against the States. See *Duncan v. Louisiana* (1968); see also *Malloy* (1964); see generally *Timbs* v. *Indiana* (2019); *McDonald v. Chicago* (2010). When *Apodaca* was decided, it was already an outlier in the Court's jurisprudence, and over time it has become even more of an outlier. As the Court today persuasively explains, the original meaning of the Sixth and Fourteenth Amendments and this Court's two lines of decisions—the Sixth Amendment jury cases and the Fourteenth Amendment incorporation cases—overwhelmingly demonstrate that *Apodaca*'s holding is egregiously wrong.

Second, *Apodaca* causes significant negative consequences. It is true that *Apodaca* is workable. But *Apodaca* sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule (although exactly how many is of course unknowable). That consequence has traditionally supplied some support for overruling an egregiously wrong criminal-procedure precedent. See generally *Malloy* (1964).

In addition, and significant to my analysis of this case, the origins and effects of the non-unanimous jury rule strongly support overruling *Apodaca*. Louisiana achieved statehood in 1812. And throughout most of the 1800s, the State required unanimous juries in criminal cases. But at its 1898 state constitutional convention, Louisiana enshrined non-unanimous juries into the state constitution. Why the change? The State wanted to diminish the influence of black jurors, who had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875. See *Strauder v. West Virginia* (1880); T. Aiello, Jim Crow's Last Stand: Non-unanimous Criminal Jury Verdicts in Louisiana (2015). Coming on the heels of the State's 1896 victory in *Plessy v. Ferguson*, the 1898 constitutional convention expressly sought to "establish the supremacy of the white race." Semmes, Chairman of the Committee on the Judiciary, Address at the Louisiana Constitutional Convention in 1898, in Official Journal of the

Proceedings of the Constitutional Convention of the State of Louisiana 375 (H. Hearsey ed. 1898). And the convention approved non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service. See Aiello; Frampton, The Jim Crow Jury, 71 Vand. L. Rev. 1593, 1620 (2018).

In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors. After all, that was the whole point of adopting the non-unanimous jury requirement in the first place. And the math has not changed. Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors "can simply ignore the views of their fellow panel members of a different race or class." *Johnson v. Louisiana* (1972) (Stewart, J., dissenting). That reality—and the resulting perception of unfairness and racial bias—can undermine confidence in and respect for the criminal justice system. The non-unanimous jury operates much the same as the unfettered peremptory challenge, a practice that for many decades likewise functioned as an engine of discrimination against black defendants, victims, and jurors. In effect, the non-unanimous jury allows backdoor and unreviewable peremptory strikes against up to 2 of the 12 jurors.

In its 1986 decision in *Batson* v. *Kentucky*, the Court recognized the pervasive racial discrimination woven into the traditional system of unfettered peremptory challenges. The Court therefore overruled a prior decision, *Swain v. Alabama* (1965), that had allowed those challenges. See generally *Flowers* v. *Mississippi* (2019).

In my view, *Apodaca* warrants the same fate as *Swain*. After all, the "requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury." *Johnson* (1972) (Stewart, J., dissenting). And as Justice Thurgood Marshall forcefully explained in dissent in *Apodaca*, to "fence out a dissenting juror fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests." *Johnson* (1972) (Marshall, J., dissenting in both *Johnson* and *Apodaca*)....

To state the point in simple terms: Why stick by an erroneous precedent that is egregiously wrong as a matter of constitutional law, that allows convictions of some who would not be convicted under the proper constitutional rule, and that tolerates and reinforces a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects?

Third, overruling *Apodaca* would not unduly upset reliance interests. Only Louisiana and Oregon employ non-unanimous juries in criminal cases....

* * *

In sum, *Apodaca* is egregiously wrong, it has significant negative consequences, and overruling it would not unduly upset reliance interests. I therefore agree with the Court's decision to overrule *Apodaca.*

Justice Thomas, concurring in the judgment.

I agree with the Court that petitioner Evangelisto Ramos' felony conviction by a non-

unanimous jury was unconstitutional. I write separately because I would resolve this case based on the Court's longstanding view that the Sixth Amendment includes a protection against non-unanimous felony guilty verdicts, without undertaking a fresh analysis of the meaning of "trial ... by an impartial jury." I also would make clear that this right applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause....

I. ... As the Court acknowledges, our decisions have long recognized that unanimity is required. Because this interpretation is not demonstrably erroneous, I would resolve the Sixth Amendment question on that basis....

I-B. ... There is considerable evidence that the phrase "trial ... by ... jury" in the Sixth Amendment was understood since the founding to require that a felony guilty verdict be unanimous. Because our precedents are thus not outside the realm of permissible interpretation, I will apply them.… [citing Blackstone and other English text writers and American treaties, uniform practices among American states by the 18th century and treaties and state decisions prior the the 14th Amendment's enactment as well as treaties from the Reconstruction period.] ...

II. The remaining question is whether that right is protected against the States. In my view, the Privileges or Immunities Clause provides this protection. I do not adhere to this Court's decisions applying due process incorporation, including *Apodaca* and—it seems—the Court's opinion in this case....

Justice Alito, with whom The Chief Justice joins, and with whom Justice Kagan joins as to all but Part III–D, dissenting.

The doctrine of *stare decisis* gets rough treatment in today's decision. Lowering the bar for overruling our precedents, a badly fractured majority casts aside an important and long-established decision with little regard for the enormous reliance the decision has engendered. If the majority's approach is not just a way to dispose of this one case, the decision marks an important turn....

II-A. I begin with the question whether *Apodaca* was a precedent at all. It is remarkable that it is even necessary to address this question, but in Part IV–A of the principal opinion, three Justices take the position that *Apodaca* was never a precedent. The only truly fitting response to this argument is: "Really?"

Consider what it would mean if *Apodaca* was never a precedent. It would mean that the entire legal profession was fooled for the past 48 years. Believing that *Apodaca* was a precedent, the courts of Louisiana and Oregon tried thousands of cases under rules allowing conviction by a vote of 11 to 1 or 10 to 2, and appellate courts in those States upheld these convictions based on *Apodaca*. But according to three Justices in the majority, these courts were deluded.

This Court, for its part, apparently helped to perpetuate the illusion, since it reiterated time and again what *Apodaca* had established. See *Timbs* v. *Indiana* (2019) (*Apodaca* held "that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings");

McDonald v. Chicago (2010) (Sixth Amendment "does not require a unanimous jury verdict in state criminal trials")....

II-C. ... Under the *Marks* rule, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." ...

Finally, our three colleagues contend that treating *Apodaca* as a precedent would require the Court "to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected." ... And no one on this Court or on a lower court had any trouble locating the narrow common ground between Justice Powell and the plurality in *Apodaca*: The States need not require unanimity to comply with the Constitution.

For all these reasons, *Apodaca* clearly was a precedent, and if the Court wishes to be done with it, it must explain why overruling *Apodaca* is consistent with the doctrine of *stare decisis*.

III-A. ... There are circumstances when past decisions must be overturned, but we begin with the presumption that we will follow precedent, and therefore when the Court decides to overrule, it has an obligation to provide an explanation for its decision.

This is imperative because the Court should have a body of *neutral* principles on the question of overruling precedent. The doctrine should not be transformed into a tool that favors particular outcomes.

III-B. What is the majority's justification for overruling *Apodaca*? With no apparent appreciation of the irony, today's majority, which is divided into four separate camps, criticizes the *Apodaca* majority as "badly fractured." But many important decisions currently regarded as precedents were decided without an opinion of the Court. Does the majority mean to suggest that all such precedents are fair game? ...

III-C. Up to this point, I have discussed the majority's reasons for overruling *Apodaca,* but that is only half the picture. What convinces me that *Apodaca* should be retained are the enormous reliance interests of Louisiana and Oregon. For 48 years, Louisiana and Oregon, trusting that *Apodaca* is good law, have conducted thousands and thousands of trials under rules allowing non-unanimous verdicts. Now, those States face a potential tsunami of litigation on the jury-unanimity issue.

At a minimum, all defendants whose cases are still on direct appeal will presumably be entitled to a new trial if they were convicted by a less-than-unanimous verdict and preserved the issue in the trial court....

I do not disregard the interests of petitioner and others who were convicted by a less-than-unanimous vote. It is not accurate to imply that these defendants would have been spared

conviction if unanimity had been required. In many cases, if a unanimous vote had been needed, the jury would have continued to deliberate and the one or two holdouts might well have ultimately voted to convict. This is almost certainly the situation in Oregon, where it is estimated that as many as two-thirds of all criminal trials have ended with a non-unanimous verdict. See Brief for State of Oregon as *Amicus Curiae* 12. It is impossible to believe that all these cases would have resulted in mistrials if unanimity had been demanded. Instead, after a vote of 11 to 1 or 10 to 2, it is likely that deliberations would have continued and unanimity would have been achieved.

Nevertheless, the plight of defendants convicted by non-unanimous votes is important and cannot be overlooked, but that alone cannot be dispositive of the *stare decisis* question. Otherwise, *stare decisis* would never apply in a case in which a criminal defendant challenges a precedent that led to conviction....

III-D. ... By striking down a precedent upon which there has been massive and entirely reasonable reliance, the majority sets an important precedent about *stare decisis*. I assume that those in the majority will apply the same standard in future cases.

* * *

Under the approach to *stare decisis* that we have taken in recent years, *Apodaca* should not be overruled. I would therefore affirm the judgment below, and I respectfully dissent.

Note: *New York State Rifle & Pistol Association v. Bruen* (2022)

In its first Second Amendment decision since *McDonald* in 2010, the Court (6-3) relied entirely on originalism in striking down a New York statute permitting the carrying of a concealed pistol or revolver only upon a showing of special need. In an opinion by Justice Thomas, the Court specifically rejected the "two-step" analysis that Courts of Appeal had tended to adopt since *Heller*, which combined "history with means-end scrutiny." *Heller* and *McDonald*, according to the Court "do not support applying means-ends scrutiny in the Second Amendment context." Indeed, the Court claimed that those decisions "expressly rejected" any balancing of interests and "specifically ruled out the intermediate scrutiny test" that the state urged the Court to adopt in *Bruen*. The Court explained that:

"when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."

The Court observed that lower court judges during the past decade too often had deferred "to the determination of legislatures" in applying an intermediate scrutiny test.

The statute allowed officials to grant permission only if "proper cause" existed, which courts had defined as demonstrating "a special need for self-protection distinguishable from that of the general community." The plaintiffs in the case had been denied permits because their

stated desire for self-protection was found to be indistinguishable from other citizens in the small upstate towns (Troy and Averill Park in Rensselaer County) in which they resided. One of the applicants had expressed concern about a recent rash of robberies in his neighborhood. The other applicant wanted a handgun only for general self-defense. Since New York categorically prohibits the open carriage of handguns, a New York citizen could carry a weapon only by receiving a concealed-carry license.

In analyzing the text of the Second Amendment, the Court cited its conclusion in *Heller* that the words "bear arms" included the right to "wear, bear, or carry…upon the person or in the clothing or in a pocket for the purpose…of being armed and ready for offensive or defensive action in a case of conflict with another person." The Court explained that "[t]his definition of 'bear' naturally encompasses public carry….Moreover, confining the right to 'bear' arms to the home would make little sense given that self-defense is 'the *central component* of the [Second Amendment] right itself," *quoting Heller* (emphasis in original).

The Court acknowledged that "[h]istorical analysis can be difficult, *quoting McDonald*, and that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." The Court found that it did not need to address the question of whether the relevant date for evaluating a state regulation challenged as an infringement of the Second Amendment was 1791 or 1868 because "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry."

After a long survey of history, the Court concluded that "[a]part from a few late-19th-century outlier jurisdictions [mostly western territories], American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense" or required citizens to demonstrate a special need for protection in order to do so.

The Court contended that its reliance on history for interpreting the Second Amendment was consistent with its use of history to interpret other clauses, particularly the First Amendment's Free Speech guarantee. The Court explained that in order to carry its burden of showing that some kinds of speech fall outside the category of protected speech, "the government must generally point to *historical* evidence about the reach of the First Amendment's protections" (emphasis in original). The Court also pointed to its use of history in analyzing the Sixth Amendment's Confrontation Clause, and its recent emphasis on history in Establishment Clause cases.

In discussing how it will apply history to Second Amendment cases, the Court explained that "[i]n some cases, that inquiry will be fairly straightforward," as for example, "when a challenged regulation addresses a general societal problem that has persisted since the 18th century." The Court acknowledged that "other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach."

Although the Court explained that "we do not not provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least to two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." Since *Heller* and *McDonald* emphasized that individual self-defense is "the *central component* of the Second Amendment right," the Court held that "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry" (emphasis in original).

The Court explained that "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check." While courts should not sustain every regulation that "remotely resembles a historical analogue," the Court cautioned that "analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster" (emphasis in original).

The Court distinguished the so-called "may issue" law of New York and five other states and the District of Columbia from the "shall issue" laws of 43 other states, in which authorities must issue licenses permitting concealed weapons if the applicants satisfy certain requirements, including finger printing; a general background check and mental health records check; training in firearms handling; and instruction regarding the permissible use of force.

Justice Kavanaugh, in a concurring opinion joined by Chief Justice Roberts, emphasized that the Court's decision did not affect the constitutionality of the "shall issue" laws of those 43 states. Kavanaugh explained that "[u]nlike New York's may-issue regime, those shall-issue regimes do not grant open-ended discretion to licensing officials and do not require a showing of some special need apart from self-defense."

In a dissent joined by Justices Sotomayor and Kagan, Justice Breyer criticized the Court for failing to conduct the kind of balancing test that it nearly always undertakes in cases involving personal liberties. Emphasizing that gun violence is a growing problem and that 45,222 Americans were killed by firearms in 2020, Breyer declared that "when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms." Expressing "fear that the Court's interpretation ignores these significant dangers and leaves States without the ability to address them," Breyer concluded his dissent by alleging that the Court failed to consider "the potentially deadly consequences of its decision."

Breyer complained that the Court was particularly remiss in concluding that the statute was invalid because the Court lacked any evidentiary record about the manner in which the statute actually had been applied. "Based on the pleadings alone," Breyer explained that "we

cannot know how often New York courts find the denial of a concealed-carry license to be arbitrary and capricious or on what basis. We do not even know how a court would have reviewed the licensing officer's decisions in [the plaintiffs'] cases because they do not appear to have sought judicial review at all." Although the Court characterized the state's proper cause requirement as "demanding," Breyer wrote that "[t]o the contrary, *amici* tell us that New York's licensing regime is purposefully flexible: It allow counties and cities to respond to the particular needs and challenges of each area."

In response to the Court's contention that New York could have adopted the more flexible "shall issue" standard of 43 states, Breyer pointed out that New York and the six other "may issue" jurisdictions – the District of Columbia, New Jersey, Massachusetts, Maryland, California, and Hawaii – are among the most densely populated in the United States." Since "densely populated urban areas face different kinds and degrees of dangers from gun violence than rural areas," Breyer wrote that "[i]t is thus easy to see why the seven 'may issue' jurisdictions might choose to regulate firearm carriage more strictly than other States."

Pointing out that legislatures likewise needed to conduct balancing tests, he argued that courts should defer to legislative determinations: "Balancing…lawful uses against the danger of firearms is primarily the responsibility of elected bodies, such as legislatures. It requires consideration of facts, statistics, expert opinions, predictive judgments, relevant values, and a host of other circumstances…" Breyer explained that different states might regulate firearms in different manners because circumstances differ widely among states. For example, "New York, which must account for the roughly 8.5 million people living in the 303 square miles of New York City, might choose to adopt different (and stricter) firearms regulations than States like Montana or Wyoming, which do not contain any city remotely comparable in terms of population or density."

In criticizing the Court's substitution of originalism for a balancing test, Breyer explained that "[a]lthough I agree that history can often be a useful tool in determining the meaning and scope of constitutional provisions," he believed that "the Court's near-exclusive reliance on that single tool today goes much too far."

Breyer averred that:

"The Court's near-exclusive reliance on history is not only unnecessary, it is deeply impractical. It imposes a task on the lower courts that judges cannot easily accomplish. Judges understand well how to weigh a law's objectives (its 'ends') against the methods used to achieve those objectives (its 'means'). Judges are far less accustomed to resolving difficult historical questions. Courts are, after all, staffed by lawyers, not historians. Legal experts typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems."

Moreover, Breyer pointed out that lower courts "typically have fewer research resources, less assistance from *amici* historians, and higher caseloads than we do." He also complained that the Court's opinion "gives the lower courts precious little guidance regarding how to resolve modern constitutional questions based almost solely on history." He likewise explained that "even under ideal conditions, historical evidence will often fail to provide clear answers to difficult questions" and that "[e]ven seemingly straightforward historical restrictions on firearm use may prove surprisingly difficult to apply to modern circumstances." Breyer emphasized that modern weapons often are very different from those known to the Framers, and that "[s]mall founding-era towns are unlikely to have faced the same degrees and types of risks from gun violence as major metropolitan areas do today, so the types of regulations they adopted are unlikely to address modern needs."

Breyer disagreed with the Court's contention that *Heller* rejected means-ends scrutiny, pointing out that the Court in *Heller* had conducted such an analysis after concluding that history supports the view that the Second Amendment was intended to protect an individual right to keep and bear arms. Breyer likewise rejected the Court's assertion that means-end scrutiny is not used in evaluating other constitutional liberties, including freedom of speech. Although Breyer acknowledged that the Court does use history to determine whether expressive conduct constitutes protected speech, he explained that "if conduct falls within a category of protected speech, we then use means-ends scrutiny to determine whether a challenged regulation unconstitutionally burdens that speech. And the degree of scrutiny we apply often depends on the type of speech burdened and the severity of the burden."

In addition to rejecting the Court's exclusive reliance on text and history, Breyer contended that the Court's decision was wrong even on its own terms because it misinterpreted the history of legislation regulating concealed weapons. Breyer found evidence of restrictions on concealment of weapons in public going back to 1328, evidence that the Court dismissed because it was so long before the enactment of the Second Amendment. But Breyer contended that the "American Colonies continued the English tradition of regulating public carriage on this side of the Atlantic" and that this tradition "continued into the founding era." Breyer likewise cited considerable evidence of similar state regulations during the 19th and 20th centuries, which he found relevant as evidence of legislative understandings of the Second Amendment even though the Court dismissed the significance of any post 1791 or post 1868 regulations. Breyer concluded that:

"[T]he history…seems to establish a robust tradition of regulations restricting the public carriage of firearms. To the extent that any uncertainty remains between the Court's view of the history and mine, that uncertainty counsels against relying on history alone. In my view, it is appropriate in such circumstances to look beyond the history and engage in what the Court calls means-end scrutiny. Courts must be permitted to consider the State's interest in preventing gun violence, the effectiveness of the contested law in achieving that interest, the degree to which the law burdens the Second Amendment right, and, if appropriate, any less restrictive alternatives."

In a concurring opinion, Justice Alito responded to Justice Breyer's dissent by questioning the relevance of the apparent increase in gun violence, expressing skepticism that laws prohibiting the carrying of concealed weapons would deter such violence. On the contrary, Alito explained that law-abiding citizens often need weapons for self-defense when they are in pubic, particularly in high-crime areas.

Responding to Breyer's argument that the evidentiary record failed to demonstrate how difficult it was for a law-abiding New Yorker to obtain a permit to carry a concealed weapon in public, Alito contended that the record "tells us everything we need on this score" because New York's solicitor general had stated during oral argument before the Court that the state generally would deny a permit even to a person who pleaded that there "have been a lot of muggings in this area, and I am scared to death" and that such an applicant "would have to show more – for example, that she had been singled out for attack." Alito declared that "[a] law that dictates that answer violates the Second Amendment."

In response to Breyer's complaint about the Court's refusal to apply an ends-means analysis, Alito stated that "[t]his mode of analysis places no firm limits on the ability of judges to sustain any law restricting the possession or use of a gun." Alito concluded that "unfortunately, many Americans have good reason to fear that they will be victimized if they are unable to protect themselves. And today, no less than in 1791, the Second Amendment guarantees their right to do so."

Note: *United States v. Rahimi* (2024)

The Supreme Court refined and clarified the scope of *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) in an eight-to-one decision sustaining the constitutionality of a statute prohibiting possession of firearms by persons who are subject to restraining orders for domestic violence. Chief Justice Roberts's opinion for the Court explained that the statute was consistent with Bruen insofar as gun regulations since the nation's founding "have included provisions preventing individuals who threaten physical harm to others from misusing firearms."

Reiterating *Heller's* assertion that Second Amendment rights are "not unlimited," the Court reversed the Fifth Circuit's decision, which had held that the law was inconsistent with the Nation's historical regulation of firearms. Observing that "some courts have misunderstood the methodology of our recent Second Amendment cases," the Court explained that "[t]hese precedents were not meant to suggest a law trapped in amber." Rather, courts must consider "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." In applying this test, courts must consider "[w]hy and how the regulation burdens the right…For example, if laws at the founding regulated firearm use to address particular problems, that will be a strong indictor that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations."

The Court found that regulations on misuse of weapons to harm or menace people were well established by the time of the enactment of the Second Amendment in 1791, dating

back in the common law as early as the 1200s and in British statutory law as early as 1328. The Court also pointed out that common law in the colonies authorized magistrates to require persons who were deemed likely to commit various forms of misbehavior, including spousal abuse, to post bonds which would be forfeited if the surety committed acts of violence, including those which involved the use of firearms. The Court likewise found that English common law in the colonies had prohibited the carrying of weapons in ways which threatened the public order and that several states during the late 18th and early 19th centuries had codified these so-called "going armed" laws.

The Court explained that the surety and "going armed" laws, taken together, "confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." The statute, the Court concluded, "fits neatly within the tradition the surety and going armed laws represent."

The Court found that the statute provided adequate procedural protections because, among other features, it provided actual notice and an opportunity to be heard, and required a magistrate to find that a defendant posed a credible threat to the physical safety of the defendant's partner or family. The Court distinguished these protections from the state statute in Bruen, which presumed that no citizen had a right to carry a concealed weapon, absent a special need.

Justice Thomas, the sole dissenter, argued that "[n]ot a single historical regulation justifies the statute." Thomas contended that the surety laws were not relevant because they resulted in a fine rather than deprivation of firearms, and that the "going around" statutes were directed at threats to the community rather toward individuals. In a concurring opinion joined by Justice Kagan, Justice Sotomayor contended that Justice Thomas's dissent "would make the historical inquiry so exacting as to be useless."

Justice Jackson alleged in a concurrence that *Bruen* left legislatures, courts, and the public without "a solid anchor" for evaluating the constitutionality of firearm regulations. She explained that "[c]onsistent analyses and outcomes are likely to remain elusive because whether Bruen's test is satisfied in a particular case seems to depend upon the suitability of whatever historical sources the parties can manage to cobble together, as well as the level of generality at which a court evaluates those sources – neither of which we have as yet adequately clarified." She advised that "the Court should also be mindful of how its legal standards are actually playing out in real life." Similarly, Justice Sotomayor remained "troubled by *Bruen's* myopic focus on history and tradition, which fails to give full consideration to the real and present stakes of the problems facing our society today."

Chapter 9. Equal Protection.
Part X. Affirmative Action [Delete current section on pp. 771-794 and replace with following material.]

Background: *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College [and UNC-CH]* (2023)

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 was whether strict scrutiny of racial classifications should be relaxed when a racial majority has adopted those classifications to aid a racial minority. 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?

Contemporaneous with the passage of the Civil Rights Act of 1964 was an Executive Order issued by the Johnson administration stating that a certain percentage of federal government contracts should be directed to minority owned businesses. At issue was whether or not a state or the federal government could legislate to address the reality of racial economic inequalities that had developed over the course of the Jim Crow era. See, e.g., Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017); Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (2006). Universities also began programs to address the shortage of minorities in non-HBCU higher education, the result of decades of pervasive Jim Crow policies—whether implemented by the universities or the result of social realities.

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. Six of the nine justices had been on the Court for *Swann v. Charlotte-Mecklenburg Board of Education* (1971). This was an era when the inequalities of public education were a central issue in American politics.

Four Justices (Brennan, Blackmun, Marshall, and White) voted to uphold the program, using "intermediate" tier scrutiny. *Craig v. Boren* (1976) had adopted intermediate scrutiny as a compromise for the level of scrutiny applied to gender. While the invidious discrimination of a racial majority against a racial minority clearly merited strict scrutiny, what was appropriate when the dominant political group imposed a limit upon itself? Justice Brennan contended that strict scrutiny was not appropriate, as the majority could certainly protect itself through the political process. Under intermediate scrutiny, the racial classification must have an "important" purpose

and the means must be substantially related to the ends. For these Justices, the medical school's goal of remedying de facto discrimination was sufficiently important: “Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice." Four other justices (Burger, Rehnquist, Stevens, and Stewart) found that the program violated Title VI of the Civil Rights Act of 1964’s ban on discrimination on the basis of race and therefore 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. Powell asserted, however, 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 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. Ironically, it is the Harvard approach that is deemed unconstitutional forty-five years later.

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)**.

As the composition of the Court changed, a majority 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. When applied to benign race-based legislation, however, Justice O’Connor’s majority opinion noted that strict scrutiny should not be “strict in theory, but fatal in fact” –a rare judicial comment acknowledging the Court’s approach to varying levels of scrutiny.

It thus came as no surprise when in 2003 Justice O'Connor, again writing for the Court, upheld an affirmative action program at the University of Michigan Law School in spite of using strict scrutiny analysis. In ***Grutter v. Bollinger,*** O'Connor found the use of race to be permissible in a multi-factored approach to admission. In contrast, she joined Chief Justice Rehnquist's opinion nullifying an affirmative action program in the companion case, ***Gratz v. Bollinger*** **(2003)**, because the use of race by the undergraduate admissions office was a determinative factor in admission.

At the end of her opinion for the Court, Justice O'Connor wrote, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." Twenty years later, a majority of the Court would emphasize this language as a justification to reject the approach of *Grutter*.

The Court effectively ended the era of judicial intervention in K-12 school desegregation begun in 1954 with *Brown v. Board of Education* in *Board of Education of Oklahoma City v. Dowell* (1991). In ***Parents Involved in Community Schools v. Seattle School District No. 1*** **(*Seattle Schools*) (2007)**, the Court considered the constitutionality of using race to assign children to elementary and secondary schools when neighborhood schools or magnet programs resulted in large racial disparities. 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."

The Court ruled that using racial classifications to achieve racial balancing as opposed to achieving "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."

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 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.…

Thus, as of 2007, non-remedial affirmative action plans were allowed only in the higher education context—not employment, contracting, or K-12 education.

In ***Fisher v. University of Texas at Austin* (2016) (*Fisher II*)** Justice Kennedy, who had dissented in *Grutter v. Bollinger*, wrote for a 4-3 plurality and upheld an affirmative action program at the University of Texas on the basis of *Grutter*. He concluded 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." The case was decided by a 4-3 vote because Justice Scalia had died and Justice Kagan had recused herself because of involvement in the case when she was Solicitor General.

Note: *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College [and UNC-CH] (2023)*

The deceased Justice Scalia was replaced by Neil Gorsuch in 2017. Justice Kennedy retired and was replaced by Brett Kavanaugh in 2018. Justice Ginsburg died in office and was replaced by Amy Coney Barrett in 2020. The Court that heard ***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College [and UNC-CH]* (2023)** consisted of the three *Fisher II* dissenters (Roberts, C.J. and Thomas and Alito, JJ.) plus the three new appointees. Of note, the Republican Party Platform had specifically repudiated affirmative action since 2012. Justices Gorsuch, Kavanaugh, and Barrett were all appointed by Donald Trump.

Chief Justice Roberts wrote the opinion for the six-person majority—a result that had been predicted by virtually all followers of the Court. Sotomayor, Kagan, and Jackson, JJ. dissented. Roberts, who had stated in *Seattle Schools* that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" summarily dismissed the universities' justifications for their affirmative action plans. While Harvard and UNC had both won in the District and Circuit Courts in decisions that had followed the *Grutter* analysis, Roberts concluded that the *Grutter* analysis could no longer be applied in traditional higher education settings. While he did not *technically* overrule *Grutter*, reserving the question of whether or not it could still apply to the U.S. military academies, all members of the Court who wrote opinions treated *Grutter* as dead letter. (The organization that financed this litigation is currently pursuing a claim against West Point.)

Roberts marched through Equal Protection precedents, emphasizing the literal text of the clause and downplaying the racial context of the statutes being challenged:

> "These decisions reflect the 'core purpose' of the Equal Protection Clause: 'do[ing] away with all governmentally imposed discrimination based on race.' *Palmore* v. *Sidoti* (1984). … Eliminating racial discrimination means eliminating all of it.… It is 'universal in [its] application.' *Yick Wo v. Hopkins* (1886). ..."

> Outside the [previous affirmative action] cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. … The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. See *Johnson* v. *California* (2005).

Roberts then contrasted these two permissible actions employing race with the use of race in the affirmative action context:

> But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.
>
> Because "[r]acial discrimination [is] invidious in all contexts," *Edmonson* v. *Leesville Concrete Co.* (1991), we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny, *Fisher* v. *University of Tex. at Austin* (2016) (*Fisher II*). "Classifying and assigning" students based on their race "requires more than…an amorphous end to justify it." *Parents Involved*.
>
> Respondents have fallen short of satisfying that burden. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."
>
> Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. …
>
> Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, UNC works to avoid the underrepresentation of minority groups, while Harvard likewise "guard[s] against inadvertent drop-offs in representation" of certain minority groups from year to year. To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.
>
> For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. And

> still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question." …
>
> The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype.

Roberts then contended that affirmative action has a negative effect on students who are not admitted in the "zero sum game" of college admissions and that the use of race relies on the assumption that persons of a certain ethnicity will always exhibit stereotypical characteristics which are sought for a diverse class. He then proceeded to discuss Justice O'Connor's "25 year" comment in *Grutter* and says that the universities' inability to articulate a clear endpoint is a basis in and of itself to stop the use of such programs.

At the end of his opinion, Roberts attempted to articulate a standard that lower courts can use to determine if an applicant's mention of race is permissible:

> At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. … A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.
>
> Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

Justice Gorsuch also thought the case was straight-forward. In *Bostock v. Clayton County* (2020) Justice Gorsuch wrote for a 6-3 majority which held that Title VII of the Civil Rights Act of 1964 protects employees against "sex discrimination" that is related to sexuality or gender identity, (The opinion was joined by current members of the Court Roberts, C.J., and Kagan and Sotomayor, JJ.) Here, Gorsuch argued that "race discrimination" violates Title VI of the Civil Rights Act of 1964, whether the conduct involves pernicious or "benign" distinctions:

> The principal dissent contends that this understanding of Title VI is contrary to precedent. But the dissent does not dispute that everything said here about the meaning of Title VI tracks this Court's precedent in *Bostock* interpreting materially identical language in Title VII. That raises two questions: Do the dissenters think *Bostock* wrongly decided? Or do they read the same words in neighboring provisions of the same statute—enacted at the same time by the same Congress—to mean different things? Apparently, the federal government takes the latter view. The Solicitor General insists that there is "ambiguity in the term 'discrimination'" in Title VI but no ambiguity in the term "discriminate" in Title VII. Respectfully, I do not see it.

Justice Kavanaugh also thought the case was straight-forward:

> I join the Court's opinion in full. I add this concurring opinion to further explain why the Court's decision today is consistent with and follows from the Court's equal protection precedents, including the Court's precedents on race-based affirmative action in higher education. [Justice Kavanaugh contends that Justice O'Connor's statement in

Grutter (in 2003) that, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" was part of the holding of the case and justified ending affirmative action in 2023.]

Justice Barret joined the majority opinion but did not write separately.

Only in the concurring opinion of Justice Thomas and in the dissenting opinions of Justices Sotomayor and Jackson is there any acknowledgement that the issue of affirmative action had provoked controversy and an outpouring of intense feelings in American culture—both for and against. Themselves products of the affirmative action era, they drew radically conflicting conclusions from their experiences.

Justice Thomas had ruled against affirmative action in every case since he joined the Court in 1991. A Yale law professor had allegedly said during Thomas's enrollment that no Black students would have been admitted into his class without affirmative action. Thomas is reported as saying he deeply resented "having to prove himself" every day during law school. Excerpts from his opinion follow.

Justice Thomas, concurring.

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

To satisfy strict scrutiny, universities must be able to establish a compelling reason to racially discriminate. *Grutter* recognized "only one" interest sufficiently compelling to justify race-conscious admissions programs: the "educational benefits of a diverse student body." Expanding on this theme, Harvard and UNC have offered a grab bag of interests to justify their programs, spanning from "'training future leaders in the public and private sectors'" to "'enhancing appreciation, respect, and empathy,'" with references to "'better educating [their] students through diversity'" in between. The Court today finds that each of these interests are too vague and immeasurable to suffice, and I agree.

Even in *Grutter*, the Court failed to clearly define "the educational benefits of a diverse student body." Thus, in the years since *Grutter*, I have sought to understand exactly how racial diversity yields *educational* benefits. With nearly 50 years to develop their arguments, neither Harvard nor UNC—two of the foremost research institutions in the world—nor any of their *amici* can explain that critical link. …

If Harvard cannot even *explain* the link between racial diversity and education, then surely its interest in racial diversity cannot be compelling enough to overcome the constitutional limits on race consciousness.

UNC fares no better. It asserts, for example, an interest in training students to "live together in a diverse society." This may well be important to a university experience, but it is a *social* goal, not an educational one. …

Of course, even if these universities had shown that racial diversity yielded any concrete or measurable benefits, they would still face a very high bar to show that their interest is compelling. To survive strict scrutiny, any such benefits would have to outweigh the tremendous harm inflicted by sorting individuals on the basis of race. … As the Court's opinions in these cases make clear, all racial stereotypes harm and demean individuals. …

The Court also correctly refuses to defer to the universities' own assessments that the alleged benefits of race- conscious admissions programs are compelling. … Universities' self-proclaimed righteousness does not afford them license to discriminate on the basis of race. … To the extent past is prologue, the university respondents' histories hardly recommend them as trustworthy arbiters of whether racial discrimination is necessary to achieve educational goals. … [C]ourts have an independent duty to interpret and uphold the Constitution that no university's claimed interest may override. The Court today makes clear that, in the future, universities wishing to discriminate based on race in admissions must articulate and justify a compelling and measurable state interest based on concrete evidence. Given the strictures set out by the Court, I highly doubt any will be able to do so. …

[T]he case for affirmative action has emphasized a number of rationales over the years, including: (1) restitution to compensate those who have been victimized by past discrimination, (2) fostering "diversity," (3) facilitating "integration" and the destruction of perceived racial castes, and (4) countering longstanding and diffuse racial prejudice. See R. Kennedy, *For Discrimination: Race, Affirmative Action, and the Law* 78 (2013); see also P. Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 22–46 (2002). Again, this Court has only recognized one interest as compelling: the educational benefits of diversity embraced in *Grutter*. Yet, as the universities define the "diversity" that they practice, it encompasses social and aesthetic goals far afield from the education-based interest discussed in *Grutter*. …

The Court refuses to engage in this lexicographic drift, seeing these arguments for what they are: a remedial rationale in disguise. As the Court points out, the interest for which respondents advocate has been presented to and rejected by this Court many times before. …

Respondents and the dissents argue that the universities' race-conscious admissions programs ought to be permitted because they accomplish positive social goals. I would have thought that history had by now taught a "greater humility" when attempting to "distinguish good from harmful uses of racial criteria." *Parents Involved*. From the Black Codes, to discriminatory and destructive social welfare programs, to discrimination by individual government actors, bigotry has reared its ugly head time and again. Anyone who today thinks that some form of racial discrimination will prove "helpful" should thus tread cautiously, lest racial discriminators succeed (as they once did) in using such language to disguise more invidious motives. …

Even taking the desire to help on its face, what initially seems like aid may in reality be a burden, including for the very people it seeks to assist. Take, for example, the college admissions policies here. "Affirmative action" policies do nothing to increase the overall number of blacks and Hispanics able to access a college education. Rather, those racial policies simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended. See T. Sowell, *Affirmative Action Around the World* (2004). In doing so, those policies sort at least some blacks and Hispanics into environments where they are less likely to succeed academically relative to their peers. The resulting mismatch places "many blacks and Hispanics who likely would have excelled at less elite schools...in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I* (Thomas, J., concurring).

It is self-evident why that is so. As anyone who has labored over an algebra textbook has undoubtedly discovered, academic advancement results from hard work and practice, not mere

declaration. Simply treating students as though their grades put them at the top of their high school classes does nothing to enhance the performance level of those students or otherwise prepare them for competitive college environments. In fact, studies suggest that large racial preferences for black and Hispanic applicants have led to a disproportionately large share of those students receiving mediocre or poor grades once they arrive in competitive collegiate environments. Take science, technology, engineering, and mathematics (STEM) fields, for example. Those students who receive a large admissions preference are more likely to drop out of STEM fields than similarly situated students who did not receive such a preference. "Even if most minority students are able to meet the normal standards at the 'average' range of colleges and universities, the systematic mismatching of minority students begun at the top can mean that such students are generally overmatched throughout all levels of higher education." T. Sowell, *Race and Culture* (1994).

These policies may harm even those who succeed academically. I have long believed that large racial preferences in college admissions "stamp [blacks and Hispanics] with a badge of inferiority." *Adarand* (opinion of Thomas, J.). They thus "tain[t] the accomplishments of all those who are admitted as a result of racial discrimination" as well as "all those who are the same race as those admitted as a result of racial discrimination" because "no one can distinguish those students from the ones whose race played a role in their admission." *Fisher I* (opinion of Thomas, J.). Consequently, "[w]hen blacks" and, now, Hispanics "take positions in the highest places of government, industry, or academia, it is an open question...whether their skin color played a part in their advancement." *Grutter* (Thomas, J., concurring). "The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those...who would succeed without discrimination."

Yet, in the face of those problems, it seems increasingly clear that universities are focused on "aesthetic" solutions unlikely to help deserving members of minority groups. In fact, universities' affirmative action programs are a particularly poor use of such resources. To start, these programs are overinclusive, providing the same admissions bump to a wealthy black applicant given every advantage in life as to a black applicant from a poor family with seemingly insurmountable barriers to overcome. In doing so, the programs may wind up helping the most well-off members of minority races without meaningfully assisting those who struggle with real hardship. Simultaneously, the programs risk continuing to ignore the academic underperformance of "the purported 'beneficiaries'" of racial preferences and the racial stigma that those preferences generate. *Grutter* (opinion of Thomas, J.). Rather than performing their academic mission, universities thus may "see[k] only a facade—it is sufficient that the class looks right, even if it does not perform right." …

Given the history of discrimination against Asian Americans, especially their history with segregated schools, it seems particularly incongruous to suggest that a past history of segregationist policies toward blacks should be remedied at the expense of Asian American college applicants. … Today's 17-year-olds, after all, did not live through the Jim Crow era, enact or enforce segregation laws, or take any action to oppress or enslave the victims of the past. Whatever their skin color, today's youth simply are not responsible for instituting the segregation of the 20th century, and they do not shoulder the moral debts of their ancestors. Our Nation should not punish today's youth for the sins of the past. …

It has become clear that sorting by race does not stop at the admissions office. In his *Grutter* opinion, Justice Scalia criticized universities for "talk[ing] of multiculturalism and racial

diversity," but supporting "tribalism and racial segregation on their campuses," including through "minority only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies." This trend has hardly abated with time, and today, such programs are commonplace. In fact, a recent study considering 173 schools found that 43% of colleges offered segregated housing to students of different races, 46% offered segregated orientation programs, and 72% sponsored segregated graduation ceremonies. In addition to contradicting the universities' claims regarding the need for interracial interaction, these trends increasingly encourage our Nation's youth to view racial differences as important and segregation as routine.

Meanwhile, these discriminatory policies risk creating new prejudices and allowing old ones to fester. I previously observed that "[t]here can be no doubt" that discriminatory affirmative action policies "injur[e] white and Asian applicants who are denied admission because of their race." *Fisher I*. Petitioner here clearly demonstrates this fact. Moreover, "no social science has disproved the notion that this discrimination 'engenders attitudes of superiority or, alternatively, provokes resentment among those who believe that they have been wronged by the government's use of race.'" *Grutter* (opinion of Thomas, J.). Applicants denied admission to certain colleges may come to believe—accurately or not—that their race was responsible for their failure to attain a life-long dream. These individuals, and others who wished for their success, may resent members of what they perceive to be favored races, believing that the successes of those individuals are unearned.

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

That is because race is a social construct; we may each identify as members of particular races for any number of reasons, having to do with our skin color, our heritage, or our cultural identity. And, over time, these ephemeral, socially constructed categories have often shifted. For example, whereas universities today would group all white applicants together, white elites previously sought to exclude Jews and other white immigrant groups from higher education. In fact, it is impossible to look at an individual and know definitively his or her race; some who would consider themselves black, for example, may be quite fair skinned. Yet, university admissions policies ask individuals to identify themselves as belonging to one of only a few reductionist racial groups. With boxes for only "black," "white," "Hispanic," "Asian," or the ambiguous "other," how is a Middle Eastern person to choose? Someone from the Philippines? Whichever choice he makes (in the event he chooses to report a race at all), the form silos him into an artificial category. Worse, it sends a clear signal that the category matters.

But, under our Constitution, race is irrelevant, as the Court acknowledges. In fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities. Of course, that is false. Members of the same race do not all share the exact same experiences and viewpoints; far from it. A black person from rural Alabama surely has different experiences than a black person from Manhattan or a black first-generation immigrant from Nigeria, in the same way that a white person from rural Vermont has a different perspective than a white person from Houston, Texas. Yet, universities' racial policies suggest that racial identity "*alone constitutes the being* of the

race or the man." J. Barzun, *Race: A Study in Modern Superstition* (1937). That is the same naked racism upon which segregation itself was built. Small wonder, then, that these policies are leading to increasing racial polarization and friction. This kind of reductionist logic leads directly to the "disregard for what does not jibe with preconceived theory," providing a "cloa[k] to conceal complexity, argumen[t] to the crown for praising or damning without the trouble of going into details"—such as details about an individual's ideas or unique background. *Ibid.* Rather than forming a more pluralistic society, these policies thus strip us of our individuality and undermine the very diversity of thought that universities purport to seek.

The solution to our Nation's racial problems thus cannot come from policies grounded in affirmative action or some other conception of equity. Racialism simply cannot be undone by different or more racialism. Instead, the solution announced in the second founding is incorporated in our Constitution: that we are all equal, and should be treated equally before the law without regard to our race. Only that promise can allow us to look past our differing skin colors and identities and see each other for what we truly are: individuals with unique thoughts, perspectives, and goals, but with equal dignity and equal rights under the law.

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

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

> "[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Ibid*.

With the passage of the Fourteenth Amendment, the people of our Nation proclaimed that the law may not sort citizens based on race. It is this principle that the Framers of the Fourteenth Amendment adopted in the wake of the Civil War to fulfill the promise of equality under the law. And it is this principle that has guaranteed a Nation of equal citizens the privileges or immunities of citizenship and the equal protection of the laws. To now dismiss it as "two-dimensional flatness," is to abdicate a sacred trust to ensure that our "honored dead...shall not have died in vain." A. Lincoln, Gettysburg Address (1863).

Yet, Justice Jackson would replace the second Founders' vision with an organizing principle based on race. In fact, on her view, almost all of life's outcomes may be unhesitatingly ascribed to race. This is so, she writes, because of statistical disparities among different racial groups. Even if some whites have a lower household net worth than some blacks, what matters to Justice Jackson is that the *average* white household has more wealth than the *average* black household.

This lore is not and has never been true. Even in the segregated South where I grew up, individuals were not the sum of their skin color. Then as now, not all disparities are based on race; not all people are racist; and not all differences between individuals are ascribable to race. Put simply, "the fate of abstract categories of wealth statistics is not the same as the fate of a given set of flesh-and-blood human beings." T. Sowell, Wealth, Poverty and Politics 333 (2016). Worse still, Justice Jackson uses her broad observations about statistical relationships between race and select measures of health, wealth, and well-being to label all blacks as victims. Her desire to do so is unfathomable to me. I cannot deny the great accomplishments of black Americans, including those who succeeded despite long odds.

Nor do Justice Jackson's statistics regarding a correlation between levels of health, wealth, and well-being between selected racial groups prove anything. Of course, none of those statistics are capable of drawing a direct causal link between race—rather than socioeconomic status or any other factor—and individual outcomes. So Justice Jackson supplies the link herself: the legacy of slavery and the nature of inherited wealth. This, she claims, locks blacks into a seemingly perpetual inferior caste. Such a view is irrational; it is an insult to individual achievement and cancerous to young minds seeking to push through barriers, rather than consign themselves to permanent victimhood. If an applicant has less financial means (because of generational inheritance or otherwise), then surely a university may take that into account. If an applicant has medical struggles or a family member with medical concerns, a university may consider that too. What it cannot do is use the applicant's skin color as a heuristic, assuming that because the applicant checks the box for "black" he therefore conforms to the university's monolithic and reductionist view of an abstract, average black person.

Accordingly, Justice Jackson's race-infused world view falls flat at each step. Individuals are the sum of their unique experiences, challenges, and accomplishments. What matters is not the barriers they face, but how they choose to confront them. And their race is not to blame for everything—good or bad—that happens in their lives. A contrary, myopic world view based on individuals' skin color to the total exclusion of their personal choices is nothing short of racial determinism.

Justice Jackson then builds from her faulty premise to call for action, arguing that courts should defer to "experts" and allow institutions to discriminate on the basis of race. Make no mistake: Her dissent is not a vanguard of the innocent and helpless. It is instead a call to empower privileged elites, who will "tell us [what] is required to level the playing field" among castes and classifications that they alone can divine. Then, after siloing us all into racial castes and pitting those castes against each other, the dissent somehow believes that we will be able—at some undefined point—to "march forward together" into some utopian vision. Social movements that invoke these sorts of rallying cries, historically, have ended disastrously.

Unsurprisingly, this tried-and-failed system defies both law and reason. Start with the obvious: If social reorganization in the name of equality may be justified by the mere fact of statistical disparities among racial groups, then that reorganization must continue until these disparities are fully eliminated, regardless of the reasons for the disparities and the cost of their elimination. If blacks fail a test at higher rates than their white counterparts (regardless of whether the reason for the disparity has anything at all to do with race), the only solution will be race-focused measures. If those measures were to result in blacks failing at yet higher rates, the only solution would be to double down. In fact, there would seem to be no logical limit to what the government may do to level the racial playing field—outright wealth transfers, quota systems, and racial preferences would all seem permissible. In such a system, it would not matter

how many innocents suffer race-based injuries; all that would matter is reaching the race-based goal.

Worse, the classifications that Justice Jackson draws are themselves race-based stereotypes. She focuses on two hypothetical applicants, John and James, competing for admission to UNC. John is a white, seventh-generation legacy at the school, while James is black and would be the first in his family to attend UNC. Justice Jackson argues that race-conscious admission programs are necessary to adequately compare the two applicants. As an initial matter, it is not clear why James's race is the only factor that could encourage UNC to admit him; his status as a first-generation college applicant seems to contextualize his application. But, setting that aside, why is it that John should be judged based on the actions of his great-great-great-grandparents? And what would Justice Jackson say to John when deeming him not as worthy of admission: Some statistically significant number of white people had advantages in college admissions seven generations ago, and you have inherited their incurable sin?

Nor should we accept that John or James represent all members of their respective races. All racial groups are heterogeneous, and blacks are no exception—encompassing northerners and southerners, rich and poor, and recent immigrants and descendants of slaves. See, *e.g.*, T. Sowell, Ethnic America 220 (1981) (noting that the great success of West Indian immigrants to the United States—disproportionate among blacks more broadly—"seriously undermines the proposition that color is a fatal handicap in the American economy"). Eschewing the complexity that comes with individuality may make for an uncomplicated narrative, but lumping people together and judging them based on assumed inherited or ancestral traits is nothing but stereotyping.[11]

To further illustrate, let's expand the applicant pool beyond John and James. Consider Jack, a black applicant and the son of a multimillionaire industrialist. In a world of race-based preferences, James' seat could very well go to Jack rather than John—both are black, after all. And what about members of the numerous other racial and ethnic groups in our Nation? What about Anne, the child of Chinese immigrants? Jacob, the grandchild of Holocaust survivors who escaped to this Nation with nothing and faced discrimination upon arrival? Or Thomas, the great-grandchild of Irish immigrants escaping famine? While articulating her black and white world (literally), Justice Jackson ignores the experiences of other immigrant groups (like Asians) and white communities that have faced historic barriers.

Though Justice Jackson seems to think that her race-based theory can somehow benefit everyone, it is an immutable fact that "every time the government uses racial criteria to 'bring the races together,' someone gets excluded, and the person excluded suffers an injury solely because of his or her race." *Parents Involved* (Thomas, J., concurring). Indeed, Justice Jackson seems to have no response—no explanation at all—for the people who will shoulder that burden. How, for example, would Justice Jackson explain the need for race-based preferences to the Chinese student who has worked hard his whole life, only to be denied college admission in part because of his skin color? If such a burden would seem difficult to impose on a bright-eyed young person, that's because it should be. History has taught us to abhor theories that call for elites to pick racial winners and losers in the name of sociological experimentation.

Nor is it clear what another few generations of race- conscious college admissions may be expected to accomplish. Even today, affirmative action programs that offer an admissions boost to black and Hispanic students discriminate against those who identify themselves as members of other races that do not receive such preferential treatment. Must others in the future make sacrifices to re-level the playing field for this new phase of racial subordination? And then,

out of whose lives should the debt owed to those further victims be repaid? This vision of meeting social racism with government-imposed racism is thus self-defeating, resulting in a never-ending cycle of victimization. There is no reason to continue down that path. In the wake of the Civil War, the Framers of the Fourteenth Amendment charted a way out: a colorblind Constitution that requires the government to, at long last, put aside its citizens' skin color and focus on their individual achievements.

Universities' recent experiences confirm the efficacy of a colorblind rule. To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means. For example, the University of California purportedly recently admitted its "most diverse undergraduate class ever," despite California's ban on racial preferences. Similarly, the University of Michigan's 2021 incoming class was "among the university's most racially and ethnically diverse classes, with 37% of first-year students identifying as persons of color." In fact, at least one set of studies suggests that, "when we consider the higher education system as a whole, it is clear that the vast majority of schools would be as racially integrated, or more racially integrated, under a system of no preferences than under a system of large preferences." Race-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies.

In fact, meritocratic systems have long refuted bigoted misperceptions of what black students can accomplish. I have always viewed "higher education's purpose as imparting knowledge and skills to students, rather than a communal, rubber-stamp, credentialing process." *Grutter* (opinion concurring in part and dissenting in part). And, I continue to strongly believe (and have never doubted) that "blacks can achieve in every avenue of American life without the meddling of university administrators." *Id*. Meritocratic systems, with objective grading scales, are critical to that belief. Such scales have always been a great equalizer—offering a metric for achievement that bigotry could not alter. Racial preferences take away this benefit, eliminating the very metric by which those who have the most to prove can clearly demonstrate their accomplishments—both to themselves and to others.

Schools' successes, like students' grades, also provide objective proof of ability. Historically Black Colleges and Universities (HBCUs) do not have a large amount of racial diversity, but they demonstrate a marked ability to improve the lives of their students. To this day, they have proved "to be extremely effective in educating Black students, particularly in STEM," where "HBCUs represent seven of the top eight institutions that graduate the highest number of Black undergraduate students who go on to earn [science and engineering] doctorates." "HBCUs have produced 40% of all Black engineers." And, they "account for 80% of Black judges, 50% of Black doctors, and 50% of Black lawyers." In fact, Xavier University, an HBCU with only a small percentage of white students, has had better success at helping its low-income students move into the middle class than Harvard has.

Why, then, would this Court need to allow other universities to racially discriminate? Not for the betterment of those black students, it would seem. The hard work of HBCUs and their students demonstrate that "black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement." *Missouri* v. *Jenkins* (1995) (Thomas, J., concurring). And, because race-conscious college admissions are plainly not necessary to serve even the interests of blacks, there is no justification to compel such programs more broadly.

* * *

The great failure of this country was slavery and its progeny. And, the tragic failure of this Court was its misinterpretation of the Reconstruction Amendments, as Justice Harlan predicted in *Plessy*. We should not repeat this mistake merely because we think, as our predecessors thought, that the present arrangements are superior to the Constitution.

The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled. And, it sees the universities' admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes. Those policies fly in the face of our colorblind Constitution and our Nation's equality ideal. In short, they are plainly—and boldly—unconstitutional. See *Brown II* (noting that the *Brown* case one year earlier had "declare[d] the fundamental principle that racial discrimination in public education is unconstitutional").

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

Justices Sotomayor and Jackson drew radically different lessons from their experiences with affirmative action. Excerpts from Justice Sotomayor's and Jackson's dissents follow. (Justice Jackson recused herself from the Harvard case because she had been on the Harvard Board of Overseers. There is no question she would have applied her analysis of the UNC plan to the Harvard plan.)

Justice Sotomayor, with whom Justice Kagan and Justice Jackson join, dissenting.

The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. In *Brown* v. *Board of Education* (1954), the Court recognized the constitutional necessity of racially integrated schools in light of the harm inflicted by segregation and the "importance of education to our democratic society." *Id.* For 45 years, the Court extended *Brown*'s transformative legacy to the context of higher education, allowing colleges and universities to consider race in a limited way and for the limited purpose of promoting the important benefits of racial diversity. This limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses. Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution's guarantee of equality and have promoted *Brown*'s vision of a Nation with more inclusive schools.

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

To promote [the goal of protecting African-Americans in the post-war South], Congress enshrined a broad guarantee of equality in the Equal Protection Clause of the Amendment. That

Clause commands that "[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, §1. Congress chose its words carefully, opting for expansive language that focused on equal protection and rejecting "proposals that would have made the Constitution explicitly color-blind." A. Kull, The Color-Blind Constitution 69 (1992); see also, *e.g.*, Cong. Globe 1287 (rejecting proposed language providing that "no State...shall...recognize any distinction between citizens...on account of race or color"). This choice makes it clear that the Fourteenth Amendment does not impose a blanket ban on race-conscious policies. …

Black people were the targeted beneficiaries of the Bureau's programs, especially when it came to investments in education in the wake of the Civil War. Each year surrounding the passage of the Fourteenth Amendment, the Bureau "educated approximately 100,000 students, nearly all of them black," and regardless of "degree of past disadvantage." E. Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 781 (1985). The Bureau also provided land and funding to establish some of our Nation's Historically Black Colleges and Universities (HBCUs). In 1867, for example, the Bureau provided Howard University tens of thousands of dollars to buy property and construct its campus in our Nation's capital. Howard University was designed to provide "special opportunities for a higher education to the newly enfranchised of the south," but it was available to all Black people, "whatever may have been their previous condition." The Bureau also "expended a total of $407,752.21 on black colleges, and only $3,000 on white colleges" from 1867 to 1870.

Indeed, contemporaries understood that the Freedmen's Bureau Act benefited Black people. Supporters defended the law by stressing its race-conscious approach. …

The desegregation cases that followed *Brown* confirm that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness. …

If there was a Member of this Court who understood the *Brown* litigation, it was Justice Thurgood Marshall, who "led the litigation campaign" to dismantle segregation as a civil rights lawyer and "rejected the hollow, race-ignorant conception of equal protection" endorsed by the Court's ruling today. Justice Marshall joined the *Bakke* plurality and "applaud[ed] the judgment of the Court that a university may consider race in its admissions process." In fact, Justice Marshall's view was that *Bakke*'s holding should have been even more protective of race-conscious college admissions programs in light of the remedial purpose of the Fourteenth Amendment and the legacy of racial inequality in our society. See *id.*, (arguing that "a class-based remedy" should be constitutionally permissible in light of the hundreds of "years of class-based discrimination against [Black Americans]"). The Court's recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness. …

In short, for more than four decades, it has been this Court's settled law that the Equal Protection Clause of the Fourteenth Amendment authorizes a limited use of race in college admissions in service of the educational benefits that flow from a diverse student body. From *Brown* to *Fisher*, this Court's cases have sought to equalize educational opportunity in a society structured by racial segregation and to advance the Fourteenth Amendment's vision of an America where racially integrated schools guarantee students of all races the equal protection of the laws.

Today, the Court concludes that indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions. That interpretation of the Fourteenth Amendment is not only contrary to precedent and the entire teachings of our history, but is also grounded in the illusion that racial inequality was a problem of a different generation. Entrenched racial inequality remains a reality today. That is true for society writ large and, more specifically, for Harvard and the University of North Carolina (UNC), two institutions with a long history of racial exclusion. Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.

After more than a century of government policies enforcing racial segregation by law, society remains highly segregated. About half of all Latino and Black students attend a racially homogeneous school with at least 75% minority student enrollment. The share of intensely segregated minority schools (*i.e.*, schools that enroll 90% to 100% racial minorities) has sharply increased.[6] To this day, the U. S. Department of Justice continues to enter into desegregation decrees with schools that have failed to "eliminat[e] the vestiges of *de jure* segregation."

Moreover, underrepresented minority students are more likely to live in poverty and attend schools with a high concentration of poverty.[8] When combined with residential segregation and school funding systems that rely heavily on local property taxes, this leads to racial minority students attending schools with fewer resources. See *San Antonio Independent School Dist.* v. *Rodriguez* (1973) (Marshall, J., dissenting) (noting school funding disparities that result from local property taxation). In turn, underrepresented minorities are more likely to attend schools with less qualified teachers, less challenging curricula, lower standardized test scores, and fewer extracurricular activities and advanced placement courses. It is thus unsurprising that there are achievement gaps along racial lines, even after controlling for income differences. …

Given the central role that education plays in breaking the cycle of racial inequality, these structural barriers reinforce other forms of inequality in communities of color. See E. Wilson, Monopolizing Whiteness, 134 Harv. L. Rev. 2382, 2416 (2021) ("[E]ducational opportunities...allow for social mobility, better life outcomes, and the ability to participate equally in the social and economic life of the democracy"). Stark racial disparities exist, for example, in unemployment rates, income levels, wealth and homeownership, and healthcare access.

Put simply, society remains "inherently unequal." *Brown*. Racial inequality runs deep to this very day. That is particularly true in education, the "'most vital civic institution for the preservation of a democratic system of government.'" *Plyler* v. *Doe* (1982). As I have explained before, only with eyes open to this reality can the Court "carry out the guarantee of equal protection." *Schuette v. BAMN* (2014) (dissenting opinion). …

The Court today stands in the way of respondents' commendable undertaking and entrenches racial inequality in higher education. The majority opinion does so by turning a blind eye to these truths and overruling decades of precedent, "content for now to disguise" its ruling as an application of "established law and move on." *Kennedy* v. *Bremerton School Dist.* (2022) (Sotomayor, J., dissenting). As Justice Thomas puts it, "*Grutter* is, for all intents and purposes, overruled." *Ante*.

It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*. …

At bottom, the six unelected members of today's majority upend the status quo based on their policy preferences about what race in America should be like, but is not, and their

preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law. …

In the end, when the Court speaks of a "colorblind" Constitution, it cannot really mean it, for it is faced with a body of law that recognizes that race-conscious measures are permissible under the Equal Protection Clause. Instead, what the Court actually lands on is an understanding of the Constitution that is "colorblind" *sometimes*, when the Court so chooses. Behind those choices lie the Court's own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures. …

Thus, although the Members of this majority pay lip service to respondents' "commendable" and "worthy" racial diversity goals, *ante*, they make a clear value judgment today: Racial integration in higher education is not sufficiently important to them. "Today, the proclivities of individuals rule." *Dobbs* v. *Jackson Women's Health Organization* (2022) (dissenting opinion).

The majority offers no response to any of this. Instead, it attacks a straw man, arguing that the Court's cases recognize that remedying the effects of "societal discrimination" does not constitute a compelling interest. *Ante*. Yet as the majority acknowledges, while *Bakke* rejected that interest as insufficiently compelling, it upheld a limited use of race in college admissions to promote the educational benefits that flow from diversity. It is that narrower interest, which the Court has reaffirmed numerous times since *Bakke* and as recently as 2016 in *Fisher II*, that the Court overrules today.

The Court's precedents authorizing a limited use of race in college admissions are not just workable—they have been working. Lower courts have consistently applied them without issue, as exemplified by the opinions below and SFFA's and the Court's inability to identify any split of authority. Today, the Court replaces this settled framework with a set of novel restraints that create troubling equal protection problems and share one common purpose: to make it impossible to use race in a holistic way in college admissions, where it is much needed. …

The Court's suggestion that an already advantaged racial group is "disadvantaged" because of a limited use of race is a myth. …

In a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law, including at Harvard and UNC. …

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

Further, the Court's demand that a student's discussion of racial self-identification be tied to individual qualities, such as "courage," "leadership," "unique ability," and "determination," only serves to perpetuate the false narrative that Harvard and UNC currently provide "preferences on the basis of race alone." *Ante* (claiming without support that "race alone...explains the admissions decisions for hundreds if not thousands of applicants"). … After extensive discovery and two lengthy trials, neither SFFA nor the majority can point to a single

example of an underrepresented racial minority who was admitted to Harvard or UNC on the basis of "race alone."

In the end, the Court merely imposes its preferred college application format on the Nation, not acting as a court of law applying precedent but taking on the role of college administrators to decide what is better for society. The Court's course reflects its inability to recognize that racial identity informs some students' viewpoints and experiences in unique ways. The Court goes as far as to claim that *Bakke*'s recognition that Black Americans can offer different perspectives than white people amounts to a "stereotype." *Ante*.

It is not a stereotype to acknowledge the basic truth that young people's experiences are shaded by a societal structure where race matters. Acknowledging that there is something special about a student of color who graduates valedictorian from a predominantly white school is not a stereotype. Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students. "For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." *Utah* v. *Strieff* (2016) (Sotomayor, J., dissenting). Those conversations occur regardless of socioeconomic background or any other aspect of a student's self-identification. They occur because of race. As Andrew Brennen, a UNC alumnus, testified, "running down the neighborhood...people don't see [him] as someone that is relatively affluent; they see [him] as a black man." …

Cherry-picking language from *Grutter*, the Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they do not have a specific expiration date. *Ante*. This new durational requirement is also not grounded in law, facts, or common sense. *Grutter* simply announced a general "expect[ation]" that "the use of racial preferences [would] no longer be necessary" in the future. As even [the plaintiff] SFFA acknowledges, those remarks were nothing but aspirational statements by the *Grutter* Court. …

Justice Thomas, for his part, offers a multitude of arguments for why race-conscious college admissions policies supposedly "burden" racial minorities. *Ante*, at 39. None of them has any merit.

He first renews his argument that the use of race in holistic admissions leads to the "inevitable" "underperformance" by Black and Latino students at elite universities "because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I* (concurring opinion). Justice Thomas speaks only for himself. The Court previously declined to adopt this so-called "mismatch" hypothesis for good reason: It was debunked long ago. The decades-old "studies" advanced by the handful of authors upon whom Justice Thomas relies, *ante*, have "major methodological flaws," are based on unreliable data, and do not "meet the basic tenets of rigorous social science research." By contrast, "[m]any social scientists have studied the impact of elite educational institutions on student outcomes, and have found, among other things, that attending a more selective school is associated with higher graduation rates and higher earnings for [underrepresented minority] students—conclusions directly contrary to mismatch." *Id.* This extensive body of research is supported by the most obvious data point available to this institution today: The three Justices of color on this Court graduated from elite universities and law schools with race-conscious admissions programs, and achieved successful legal careers, despite having different educational backgrounds than their peers. A discredited hypothesis that the Court previously rejected is no reason to overrule precedent.

Justice Thomas claims that the weight of this evidence is overcome by a single more recent article published in 2016. *Ante.* That article, however, explains that studies supporting the mismatch hypothesis "yield misleading conclusions," "overstate the amount of mismatch," "preclude one from drawing any concrete conclusions," and rely on methodologically flawed assumptions that "lea[d] to an upwardly-biased estimate of mismatch." P. Arcidiacono & M. Lovenheim, Affirmative Action and the Quality-Fit Trade-off, 54 J. Econ. Lit. 3, 17, 20 (2016); see *id.* ("economists should be very skeptical of the mismatch hypothesis"). Notably, this refutation of the mismatch theory was coauthored by one of SFFA's experts, as Justice Thomas seems to recognize.

Citing nothing but his own long-held belief, Justice Thomas also equates affirmative action in higher education with segregation, arguing that "racial preferences in college admissions 'stamp [Black and Latino students] with a badge of inferiority.' " *Ante.* Studies disprove this sentiment, which echoes "tropes of stigma" that "were employed to oppose Reconstruction policies." A. Onwuachi-Willig, E. Houh, & M. Campbell, Cracking the Egg: Which Came First—Stigma or Affirmative Action? 96 Cal. L. Rev. 1299, 1323 (2008). Indeed, equating state-sponsored segregation with race-conscious admissions policies that promote racial integration trivializes the harms of segregation and offends *Brown*'s transformative legacy. School segregation "has a detrimental effect" on Black students by "denoting the inferiority" of "their status in the community" and by "'depriv[ing] them of some of the benefits they would receive in a racial[ly] integrated school system.'" *Brown*. In sharp contrast, race-conscious college admissions ensure that higher education is "visibly open to" and "inclusive of talented and qualified individuals of every race and ethnicity." *Grutter*. These two uses of race are not created equal. They are not "equally objectionable." *Id*.

Relatedly, Justice Thomas suggests that race-conscious college admissions policies harm racial minorities by increasing affinity-based activities on college campuses. *Ante*, at 46. Not only is there no evidence of a causal connection between the use of race in college admissions and the supposed rise of those activities, but Justice Thomas points to no evidence that affinity groups cause any harm. Affinity-based activities actually help racial minorities improve their visibility on college campuses and "decreas[e] racial stigma and vulnerability to stereotypes" caused by "conditions of racial isolation" and "tokenization." U. Jayakumar, Why Are All Black Students *Still* Sitting Together in the Proverbial College Cafeteria?, Higher Education Research Institute at UCLA (Oct. 2015); see also Brief for Respondent-Students in No. 21–707, p. 42 (collecting student testimony demonstrating that "affinity groups beget important academic and social benefits" for racial minorities); 4 App. in No. 20–1199, at 1591 (Harvard Working Group on Diversity and Inclusion Report) (noting that concerns "that culturally specific spaces or affinity-themed housing will isolate" student minorities are misguided because those spaces allow students "to come together...to deal with intellectual, emotional, and social challenges").

Citing no evidence, Justice Thomas also suggests that race-conscious admissions programs discriminate against Asian American students. *Ante.* It is true that SFFA "allege[d]" that Harvard discriminates against Asian American students. *Ante.* Specifically, SFFA argued that Harvard discriminates against Asian American applicants vis--vis white applicants through the use of the personal rating, an allegedly "highly subjective" component of the admissions process that is "susceptible to stereotyping and bias." *Harvard II*, 980 F. 3d, at 196. It is also true, however, that there was a lengthy trial to test those allegations, which SFFA lost. Justice Thomas points to no legal or factual error below, precisely because there is none.

To begin, this part of SFFA's discrimination claim does not even fall under the strict scrutiny framework in *Grutter* and its progeny, which concerns the use of racial classifications. The personal rating is a facially race-*neutral* component of Harvard's admissions policy.[39] Therefore, even assuming for the sake of argument that Harvard engages in racial discrimination through the personal rating, there is no connection between that rating and the remedy that SFFA sought and that the majority grants today: ending the limited use of race in the entire admissions process. In any event, after assessing the credibility of fact witnesses and considering extensive documentary evidence and expert testimony, the courts below found "no discrimination against Asian Americans." *Harvard II*, 980 F. 3d, at 195.

There is no question that the Asian American community continues to struggle against potent and dehumanizing stereotypes in our society. It is precisely because racial discrimination persists in our society, however, that the use of race in college admissions to achieve racially diverse classes is critical to improving cross-racial understanding and breaking down racial stereotypes. See *supra*, at 16. Indeed, the record shows that some Asian American applicants are actually "advantaged by Harvard's use of race," *Harvard II*, 980 F. 3d, at 191, and "eliminating consideration of race would significantly disadvantage at least some Asian American applicants," *Harvard I*, 397 F. Supp. 3d, at 194. Race-conscious holistic admissions that contextualize the racial identity of each individual allow Asian American applicants "who would be less likely to be admitted without a comprehensive understanding of their background" to explain "the value of their unique background, heritage, and perspective." *Id.*. Because the Asian American community is not a monolith, race-conscious holistic admissions allow colleges and universities to "consider the vast differences within [that] community." Harvard's application files show that race-conscious holistic admissions allow Harvard to "valu[e] the diversity of Asian American applicants' experiences."

Moreover, the admission rates of Asian Americans at institutions with race-conscious admissions policies, including at Harvard, have "been steadily increasing for decades." By contrast, Asian American enrollment declined at elite universities that are prohibited by state law from considering race. At bottom, race-conscious admissions benefit all students, including racial minorities. That includes the Asian American community.

Finally, Justice Thomas belies reality by suggesting that "experts and elites" with views similar to those "that motivated *Dred Scott* and *Plessy*" are the ones who support race conscious admissions. *Ante*. The plethora of young students of color who testified in favor of race-consciousness proves otherwise. Not a single student—let alone any racial minority—affected by the Court's decision testified in favor of SFFA in these cases. …

Despite the Court's unjustified exercise of power, the opinion today will serve only to highlight the Court's own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, "the arc of the moral universe" will bend toward racial Justice despite the Court's efforts today to impede its progress. Martin Luther King "Our God is Marching On!" Speech (Mar. 25, 1965).

Justice Jackson, with whom Justice Sotomayor and Justice Kagan join, dissenting.

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal. Yet, today, the Court determines that holistic admissions programs like the one that the University of North Carolina (UNC) has operated,

consistent with *Grutter* v. *Bollinger* (2003), are a problem with respect to achievement of that aspiration, rather than a viable solution (as has long been evident to historians, sociologists, and policymakers alike).

Justice Sotomayor has persuasively established that nothing in the Constitution or Title VI prohibits institutions from taking race into account to ensure the racial diversity of admits in higher education. I join her opinion without qualification. I write separately to expound upon the universal benefits of considering race in this context, in response to a suggestion that has permeated this legal action from the start. Students for Fair Admissions (SFFA) has maintained, both subtly and overtly, that it is *unfair* for a college's admissions process to consider race as one factor in a holistic review of its applicants.

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

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

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

To answer that question, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). Many chapters of America's history appear necessary, given the opinions that my colleagues in the majority have issued in this case.

Justice Thurgood Marshall recounted the genesis:

> "Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave." *Regents of Univ. of Cal.* v. *Bakke* (1978).

Slavery should have been (and was to many) self-evidently dissonant with our avowed founding principles. When the time came to resolve that dissonance, eleven States chose slavery. With the Union's survival at stake, Frederick Douglass noted, Black Americans in the South "were almost the only reliable friends the nation had," and "but for their help...the Rebels might have succeeded in breaking up the Union." After the war, Senator John Sherman defended the proposed Fourteenth Amendment in a manner that encapsulated our Reconstruction Framers' highest sentiments: "We are bound by every obligation, by [Black Americans'] service on the battlefield, by their heroes who are buried in our cause, by their patriotism in the hours that tried our country, we are bound to protect them and all their natural rights."

To uphold that promise, the Framers repudiated this Court's holding in *Dred Scott* v. *Sandford* (1857), by crafting Reconstruction Amendments (and associated legislation) that

transformed our Constitution and society. Even after this Second Founding—when the need to right historical wrongs should have been clear beyond cavil—opponents insisted that vindicating equality in this manner slighted White Americans. So, when the Reconstruction Congress passed a bill to secure all citizens "the same [civil] right[s]" as "enjoyed by white citizens," 14 Stat. 27, President Andrew Johnson vetoed it because it "discriminat[ed]...in favor of the negro."

That attitude, and the Nation's associated retreat from Reconstruction, made prophesy out of Congressman Thaddeus Stevens's fear that "those States will all...keep up this discrimination, and crush to death the hated freedmen." And this Court facilitated that retrenchment.[8] Not just in *Plessy* v. *Ferguson* (1896), but "in almost every instance, the Court chose to restrict the scope of the second founding." Thus, thirteen years pre-*Plessy*, in the *Civil Rights Cases* (1883), our predecessors on this Court invalidated Congress's attempt to enforce the Reconstruction Amendments via the Civil Rights Act of 1875, lecturing that "there must be some stage...when [Black Americans] tak[e] the rank of a mere citizen, and ceas[e] to be the special favorite of the laws." *Id*. But Justice Harlan knew better. He responded: "What the nation, through Congress, has sought to accomplish in reference to [Black people] is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.* (dissenting opinion).

Justice Harlan dissented alone. And the betrayal that this Court enabled had concrete effects. Enslaved Black people had built great wealth, but only for enslavers. No surprise, then, that freedmen leapt at the chance to control their own labor and to build their own financial security. Still, White southerners often "simply refused to sell land to blacks," even when not selling was economically foolish. To bolster private exclusion, States sometimes passed laws forbidding such sales. The inability to build wealth through that most American of means forced Black people into sharecropping roles, where they somehow always tended to find themselves in debt to the landowner when the growing season closed, with no hope of recourse against the ever-present cooking of the books.

Sharecropping is but one example of race-linked obstacles that the law (and private parties) laid down to hinder the progress and prosperity of Black people. Vagrancy laws criminalized free Black men who failed to work for White landlords. Many States barred freedmen from hunting or fishing to ensure that they could not live without entering *de facto* re-enslavement as sharecroppers. A cornucopia of laws (*e.g.*, banning hitchhiking, prohibiting encouraging a laborer to leave his employer, and penalizing those who prompted Black southerners to migrate northward) ensured that Black people could not freely seek better lives elsewhere. And when statutes did not ensure compliance, state-sanctioned (and private) violence did.

Thus emerged Jim Crow—a system that was, as much as anything else, a comprehensive scheme of economic exploitation to replace the Black Codes, which themselves had replaced slavery's form of comprehensive economic exploitation. Meanwhile, as Jim Crow ossified, the Federal Government was "giving away land" on the western frontier, and with it "the opportunity for upward mobility and a more secure future," over the 1862 Homestead Act's three-quarter-century tenure. Black people were exceedingly unlikely to be allowed to share in those benefits, which by one calculation may have advantaged approximately 46 million Americans living today.

Despite these barriers, Black people persisted. Their so-called Great Migration northward accelerated during and after the First World War. Like clockwork, American cities responded with racially exclusionary zoning (and similar policies). As a result, Black migrants had to pay

disproportionately high prices for disproportionately subpar housing. Nor did migration make it more likely for Black people to access home ownership, as banks would not lend to Black people, and in the rare cases banks would fund home loans, exorbitant interest rates were charged. With Black people still locked out of the Homestead Act giveaway, it is no surprise that, when the Great Depression arrived, race-based wealth, health, and opportunity gaps were the norm.

Federal and State Governments' selective intervention further exacerbated the disparities. Consider, for example, the federal Home Owners' Loan Corporation (HOLC), created in 1933. HOLC purchased mortgages threatened with foreclosure and issued new, amortized mortgages in their place. Not only did this mean that recipients of these mortgages could gain equity while paying off the loan, successful full payment would make the recipient a homeowner.[29] Ostensibly to identify (and avoid) the riskiest recipients, the HOLC "created color-coded maps of every metropolitan area in the nation." Green meant safe; red meant risky. And, regardless of class, every neighborhood with Black people earned the red designation.

Similarly, consider the Federal Housing Administration (FHA), created in 1934, which insured highly desirable bank mortgages. Eligibility for this insurance required an FHA appraisal of the property to ensure a low default risk. But, nationwide, it was FHA's established policy to provide "no guarantees for mortgages to African Americans, or to whites who might lease to African Americans," irrespective of creditworthiness. No surprise, then, that "[b]etween 1934 and 1968, 98 percent of FHA loans went to white Americans," with whole cities (ones that had a disproportionately large number of Black people due to housing segregation) sometimes being deemed ineligible for FHA intervention on racial grounds. The Veterans Administration operated similarly.

One more example: the Federal Home Loan Bank Board "chartered, insured, and regulated savings and loan associations from the early years of the New Deal." But it did "not oppose the denial of mortgages to African Americans until 1961" (and even then opposed discrimination ineffectively).

The upshot of all this is that, due to government policy choices, "[i]n the suburban-shaping years between 1930 and 1960, fewer than one percent of all mortgages in the nation were issued to African Americans." Thus, based on their race, Black people were "[l]ocked out of the greatest mass-based opportunity for wealth accumulation in American history."

For present purposes, it is significant that, in so excluding Black people, government policies affirmatively operated—one could say, affirmatively acted—to dole out preferences to those who, if nothing else, were not Black. Those past preferences carried forward and are reinforced today by (among other things) the benefits that flow to homeowners and to the holders of other forms of capital that are hard to obtain unless one already has assets.

This discussion of how the existing gaps were formed is merely illustrative, not exhaustive. I will pass over Congress's repeated crafting of family-, worker-, and retiree-protective legislation to channel benefits to White people, thereby excluding Black Americans from what was otherwise "a revolution in the status of most working Americans." I will also skip how the G. I. Bill's "creation of...middle-class America" (by giving $95 billion to veterans and their families between 1944 and 1971) was "deliberately designed to accommodate Jim Crow." So, too, will I bypass how Black people were prevented from partaking in the consumer credit market—a market that helped White people who could access it build and protect wealth. Nor will time and space permit my elaborating how local officials' racial hostility meant that even those benefits that Black people could formally obtain were unequally distributed along racial

lines.[44] And I could not possibly discuss every way in which, in light of this history, facially race-blind policies *still* work race-based harms today (*e.g.*, racially disparate tax-system treatment; the disproportionate location of toxic-waste facilities in Black communities; or the deliberate action of governments at all levels in designing interstate highways to bisect and segregate Black urban communities).

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

We return to John and James now, with history in hand. It is hardly John's fault that he is the seventh generation to graduate from UNC. UNC should permit him to honor that legacy. Neither, however, was it James's (or his family's) fault that he would be the first. And UNC ought to be able to consider why.

Most likely, seven generations ago, when John's family was building its knowledge base and wealth potential on the university's campus, James's family was enslaved and laboring in North Carolina's fields. Six generations ago, the North Carolina "Redeemers" aimed to nullify the results of the Civil War through terror and violence, marauding in hopes of excluding all who looked like James from equal citizenship. Five generations ago, the North Carolina Red Shirts finished the job. Four (and three) generations ago, Jim Crow was so entrenched in the State of North Carolina that UNC "enforced its own Jim Crow regulations." Two generations ago, North Carolina's Governor still railed against " 'integration for integration's sake' "—and UNC Black enrollment was minuscule. So, at bare minimum, one generation ago, James's family was six generations behind because of their race, making John's six generations ahead. …

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems.

The Court has come to rest on the bottom-line conclusion that racial diversity in higher education is only worth potentially preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom (a particularly awkward place to land, in light of the history the majority opts to ignore).[107] It would be deeply unfortunate if the Equal Protection Clause actually demanded this perverse, ahistorical, and counterproductive outcome. To impose this result in that Clause's name when it requires no such thing, and to thereby obstruct our collective progress toward the full realization of the Clause's promise, is truly a tragedy for us all.

* * *

On February 20, 2024, the Court denied a petition for cert asking it to overrule a decision of the Fourth Circuit allowing a race neutral admissions plan to an academically elite public high school to stand. *Coalition for TJ v. Fairfax County School Board*, 68 F. 4th 864 (*2023*), petition for cert denied, https://www.supremecourt.gov/opinions/23pdf/23-170_7l48.pdf

Thomas Jefferson High School was a magnet school for academically elite students, often ranked as one of the best high schools in America. In order to diversify the student body, the School Board changed the admission policy to a race neutral method that allocated spots to high achievers at the various feeder schools. This change resulted in an increase in the percentage of

African-American and Hispanic students and a decrease in in the percentage of Asian and White students. The plaintiffs had won in District Court and lost 2-1 in the Fourth Circuit. Justices Thomas and Alito dissented from the denial of cert.

See, https://www.scotusblog.com/2024/02/justices-decline-to-intervene-in-another-dispute-over-race-and-school-admissions/

Part XI, Equal Protection and Fundamental Rights, Section A: The Right to Vote.
[*Insert Note on* Brnovich *on page 819 at end of current Note: Voting Rights Act of 1965*.]

Note: *Brnovich v. Democratic National Committee* (2021)

The Supreme Court's 6-3 decision in *Brnovich v. Democratic National Committee* (2021) rejected a challenge brought under Section 2 of the Voting Rights Act to Arizona's restriction on which third parties could assist individuals with turning in their completed absentee ballots (only certain related individuals may help) and the state's requirement that an individual vote within his assigned precinct for his ballot to count. *Brnovich* was the first case to consider how to apply a Section 2 challenge to state laws governing the time, place, or manner of an election (earlier cases had all involved redistricting). While the majority opinion did not set forth a test as such, it announced five factors lower courts should consider when evaluating such claims.

Justice Alito's approach, joined by all other five of the Court's conservative wing, makes the possibility of mounting a successful Section 2 challenge remote. *Brnovich*, when read together with the Court's elimination of the Act's Section 5 pre-clearance requirements in *Shelby County v Holder*, signals the demise of the 1965 Voting Rights Act as an effective vehicle to facilitate equal access in voting. The decision came down on July 1, 2021, while multiple states were in the midst of enacting new restrictions on voting access. (At least 165 such state bills were introduced between the 2020 election and the end of February 2021, with 28 laws successfully passed across 17 states by the time the Court issued its ruling.) These new statutes, enacted in conservative states in the aftermath of unsubstantiated fraud claims raised by supporters of losing candidate Donald Trump, will almost certainly withstand challenges evaluated under the *Brnovich* approach.

Section 2 as originally enacted stated,

> "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

It was amended in 1982 following *Mobile v. Bolden* (1980), where the Court held that a Section 2 challenger must prove that a statute limiting voting rights was enacted with racially discriminatory intent in order to prevail. The House almost immediately proposed the statute be re-written. The bill that was initially passed by the House included what is now §2(a). In place of the phrase

> "to deny or abridge the right…to vote on account of race or color," the amendment substituted "in a manner which results in a denial or abridgement of the right…to vote on account of race or color."

While the Senate accepted the House amendment, it added what is now §2(b), and that provision sets out what must be shown to prove a §2 violation. It requires consideration of

> "the totality of circumstances" in each case and demands proof that "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by members of a protected class "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

The majority opinion in *Brnovich* began with the assertion that "Arizona law generally makes it very easy to vote." The state gives its residents the ability to vote "by mail or in person for nearly a month before election day." The Court then held that Section 2(b) is violated only if the election process is not "equally open to participation" by a minority group "in that its members have less opportunity" than other voters to participate. Thus, the "touchstone" of Section 2 is the requirement that voting be "equally open," and the challengers failed to convince the majority that voting is not equally open to all of the residents of Arizona regardless of their race. The majority dismissed the "Report of the Senate Judiciary Committee accompanying the 1982 Amendment [that] stated that the amendment's purpose was to repudiate *Bolden* and establish a new vote-dilution test based on [disparate impact analysis]. The Court interpreted Section 2(b) to render Section 2(a) essentially irrelevant. Rather than consider the disparate impact of the specific challenged provisions and make the state justify the need for *those* provisions, the Court put the burden on the challengers to establish that the election framework *as a whole* denies equal access to minority voters.

The Court suggested that the totality of the circumstances could be determined by looking at five factors:

(1) The "size of the burden imposed by a challenged rule is highly relevant." Every voting rule imposes some burden on a voter since "voting takes time" and "some travel, even if only to a nearby mailbox." A voting system that is "equally open" and that provides everyone an "equal opportunity" to vote "must tolerate the 'usual burdens of voting,'" and "mere inconvenience cannot be enough to demonstrate a violation of §2."
(2) The "degree to which a voting rule departs from what was standard practice when §2 was amended in 1982 is a highly relevant decision." This factor should make many contemporary challenges extremely difficult to maintain because almost all of the rules governing the election process were much stricter in 1982, when no state had early voting, drop boxes, online voter registration, and as the Court says, states "allowed only narrow and tightly defined categories of voters to cast absentee ballots."

(3) The "size of any disparities in a rule's impact on members of different racial or ethnic groups is also an important factor to consider." However, all voting rules will have some "predictable disparities in rates of voting," no matter how neutral they are. The "mere fact [that] there is some disparity in impact does not necessarily mean a system is not equally open" and most importantly, "very small differences should not be artificially magnified."
(4) Courts "must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision." This means that "where a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without taking into account the other available means."
(5) "[T]he strength of the state interests served by a challenged voting rule is also an important factor that must be taken into account." A "strong and entirely legitimate state interest is the prevention of fraud" because it can change the outcome of a close election, dilute the votes of eligible citizens, and "undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome." States don't have to show evidence of past fraud to justify legislative actions intended to prevent future fraud.

Justice Kagan, joined by Justices Breyer and Sotomayor, accused the majority of re-writing to statute to achieve a result that nullifies the effectiveness of the Voting Rights Act to address contemporary problems. The majority continued to assume, as it had in *Shelby County*, that efforts to limit voting are a relic of an unfortunate past and are no longer a significant problem in contemporary America. Justice Kagan was particularly disturbed by Justice Alito's suggestion of a "safe harbor" if practices adopted by states were similar to those in place in 1982 and by the unquestioning acceptance of a state's claimed concern about fraud—even in the absence of evidence of fraud. Justice Kagan noted that the history of voter suppression laws is replete with examples of pretextual justifications of voter restrictions.

The validity of the majority's position comes down to one's analysis of this contemporary reality: under current law, efforts at *partisan* disenfranchisement of political opponents by a legislative majority—however narrow—are deemed nonactionable. If certain racial groups are over-represented in a particular political party—for example, African-Americans and the Democratic Party—then are efforts to reduce African-American voting *racially* motivated (invidious) or *politically* motivated (non-actionable)?

It was unquestioned that both challenged regulations in *Brnovich* had disparate impacts on minorities. The voter assistance restriction was aimed at stopping "ballot harvesting," a practice in which community activists collect ballots to boost voter turnout—particularly activists in minority communities, including Native American reservations where people can live many miles from a polling place. The precinct limitation nullified votes in national elections where precinct identity was irrelevant and the record showed that polling places were closed or moved in minority neighborhoods at a much greater rate than majority neighborhoods.

At oral argument, Justice Amy Coney Barrett asked the lawyer defending the GOP-backed laws, "What's the interest of the Arizona RNC here in keeping, say, the out-of-precinct ballot disqualification rules on the books?" "Because it puts us at a competitive disadvantage relative to Democrats," the lawyer, Michael Carvin, responded. "Politics is a zero-sum game." Six justices apparently had no problem with this answer.

Does 1) using a racially neutral criterion 2) that has a disparate impact on an identifiable racial group 3) that votes in a predictable way 4) as a way to reduce the total number of votes for their political group constitute *racial* discrimination? Is it1) not discriminatory at all, 2) discriminatory only because of its disparate impact, or is 3) it actually intentional discrimination given the irrefutable evidence that the legislature picks the neutral criteria because they know of the disparate impact? There is currently a 6-3 split on the Court regarding the answer to this question. The facts in any future Section 2 challenge to the recent voter suppression legislation are unlikely to affect the outcome, given the huge philosophical divide currently existing on the Court on these issues.

An excellent analysis of *Brnovich* is available on a podcast from the non-partisan National Constitution Center, https://constitutioncenter.org/interactive-constitution/podcast/brnovich-v-dnc-the-supreme-court-and-voting-rights.

[*Insert* Cooper v. Harris*, the note on* Covington v. North Carolina*, the note on* Gill v. Whitford*, and the note on* Rucho v. Common Cause *on p. 829 at the end of Part A (following the note on* Vieth v. Jubelirer.)

Cooper v. Harris **(2017): Background and Case**

After the 2010 election, North Carolina Republicans controlled the governor's office, and both branches of the state legislature. 2011 was a year in which redistricting was required, as it is in North Carolina every ten years. Since Republicans controlled the legislature, they were in charge of redistricting. They redistricted congressional districts and state legislative districts and in both cases, they maximized Republican control and severely minimized Democratic representation in Congress and in the state legislature. Voters challenged twenty-eight state legislative districts and two congressional districts (District 1 and District 12) as racial gerrymanders that violated the Equal Protection Clause of the 14th Amendment. In a somewhat complex series of judicial decisions, the federal decisions ended up stating the controlling law.

Ultimately, in three-judge court decisions that were affirmed by the Supreme Court, the federal courts had found racial considerations had predominated in drawing the districts and the justifications (under the Voting Rights Act) withered under strict scrutiny. Here we excerpt only the majority opinion in the case of District 1. As to District 12 the Court was divided with a majority finding no clear error in the three-judge court's finding of impermissible racial districting and dissenters claiming that instead the legislature that engaged in a presumably permissible political districting.

In Congressional District 1 and in the purported Voting Rights state legislative districting, the legislature's method was to use explicit racial quotas (euphemistically called targets) to require the districts have a black voting age population of at least 50%. Since typically black candidates preferred by black voters had been winning the prior districts—which were reconstituted-- packing more black voters into the "new" districts paid political dividends for Republicans—by wasting black and overwhelmingly Democratic votes. In less than majority black districts, often these votes had helped to elect white Democrats—just as votes of whites and other ethnic groups had help elect black candidates in districts that were less than 50%+ black voting age population. For those who sought to create the impression of a "white" Republican Party and a "black" Democratic Party, draining black Democratic votes from these districts, the quota paid additional dividends.

Cooper v. Harris was the federal court suit brought by registered voters in Congressional Districts 1 and 12. Excerpts are set out below.

Cooper v. Harris
581 U. S. __ (2017)

[Majority: Kagan, Thomas, Ginsburg, Breyer, and Sotomayor, JJ. Concurring: Thomas, J. Concurring in the judgment in part and dissenting in part, Alito, J., joined by Roberts (C.J.) and Kennedy, J. Gorsuch, J., took no part in the consideration or decision of the case.

Justice Kagan delivered the opinion of the Court.

The Constitution entrusts States with the job of designing congressional districts. But it also imposes an important constraint: A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason. In this case, a three-judge District Court ruled that North Carolina officials violated that bar when they created two districts whose voting-age populations were majority black. Applying a deferential standard of review to the factual findings underlying that decision, we affirm. …

I-A. The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans. It prevents a State, in the absence of ''sufficient justification,'' from ''separating its citizens into different voting districts on the basis of race.'' *Bethune–Hill v. Virginia State Bd. of Elections* (2017). When a voter sues state officials for drawing such race-based lines, our decisions call for a two-step analysis.

First, the plaintiff must prove that ''race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'' *Miller v. Johnson* (1995). That entails demonstrating that the legislature ''subordinated'' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to ''racial considerations.'' The plaintiff may make the required showing through ''direct evidence'' of legislative intent, ''circumstantial evidence of a district's shape and demographics,'' or a mix of both.

Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. … The burden thus shifts to the State to prove that its race-based sorting of voters serves a ‘‘compelling interest’’ and is ‘‘narrowly tailored’’ to that end. This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965 (VRA or Act). …

Two provisions of the VRA—§ 2 and § 5—are involved in this case. Section 2 prohibits any ‘‘standard, practice, or procedure’’ that ‘‘results in a denial or abridgement of the right … to vote on account of race.’’ We have construed that ban to extend to ‘‘vote dilution’’—brought about, most relevantly here, by the ‘‘dispersal of [a group’s members] into districts in which they constitute an ineffective minority of voters.’’ *Thornburg v. Gingles* (1986). Section 5, at the time of the districting in dispute, worked through a different mechanism. Before this Court invalidated its coverage formula, see *Shelby County v. Holder* (2013), that section required certain jurisdictions (including various North Carolina counties) to pre-clear voting changes with the Department of Justice, so as to forestall ‘‘retrogression’’ in the ability of racial minorities to elect their preferred candidates, *Beer v. United States* (1976).

When a State invokes the VRA to justify race-based districting, [as North Carolina did in the case of Congressional District 1 and in another case challenging state legislative districts] it must show (to meet the ‘‘narrow tailoring’’ requirement) that it had ‘‘a strong basis in evidence’’ for concluding that the statute required its action. *Alabama Legislative Black Caucus v. Alabama* (2015). Or said otherwise, the State must establish that it had ‘‘good reasons’’ to think that it would transgress the Act if it did *not* draw race-based district lines. That ‘‘strong basis’’ (or ‘‘good reasons’’) standard gives States ‘‘breathing room’’ to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed. *Bethune–Hill.*

A district court’s assessment of a districting plan, in accordance with the two-step inquiry just described, warrants significant deference on appeal to this Court. We of course retain full power to correct a court’s errors of law, at either stage of the analysis. But the court’s findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error. …

I-B. This case concerns North Carolina’s most recent redrawing of two congressional districts, both of which have long included substantial populations of black voters. …

Another census, in 2010, necessitated yet another congressional map—(finally) the one at issue in this case. State Senator Robert Rucho and State Representative David Lewis, both Republicans, chaired the two committees jointly responsible for preparing the revamped plan. They hired Dr. Thomas Hofeller, a veteran political mapmaker, to assist them in re-drawing district lines. Several hearings, drafts, and revisions later, both chambers of the State’s General Assembly adopted the scheme the three men proposed.

The new map (among other things) significantly altered both District 1 and District 12. The 2010 census had revealed District 1 to be substantially underpopulated: To comply with the

Constitution's one-person-one-vote principle, the State needed to place almost 100,000 new people within the district's boundaries. …

Rucho, Lewis, and Hofeller chose to take most of those people from heavily black areas of Durham, requiring a finger-like extension of the district's western line. … With that addition, District 1's BVAP rose from 48.6% to 52.7%. District 12, for its part, had no need for significant total-population changes: It was overpopulated by fewer than 3,000 people out of over 730,000. … Still, Rucho, Lewis, and Hofeller decided to reconfigure the district, further narrowing its already snakelike body while adding areas at either end—most relevantly here, in Guilford County. Those changes appreciably shifted the racial composition of District 12: As the district gained some 35,000 African– Americans of voting age and lost some 50,000 whites of that age, its BVAP increased from 43.8% to 50.7%. …

Registered voters in the two districts (David Harris and Christine Bowser, here called ''the plaintiffs'') brought this suit against North Carolina officials (collectively, ''the State'' or ''North Carolina''), complaining of impermissible racial gerrymanders. After a bench trial, a three-judge District Court held both districts unconstitutional. All the judges agreed that racial considerations predominated in the design of District 1. See *Harris v. McCrory* (2016). And in then applying strict scrutiny, all rejected the State's argument that it had a ''strong basis'' for thinking that the VRA compelled such a race-based drawing of District 1's lines. As for District 12, a majority of the panel held that ''race predominated'' over all other factors, including partisanship. And the court explained that the State had failed to put forward any reason, compelling or otherwise, for its attention to race in designing that district. Judge Osteen dissented from the conclusion that race, rather than politics, drove District 12's lines—yet still characterized the majority's view as ''[e]minently reasonble.'' …

[T]he court below found that race furnished the predominant rationale for that district's redesign. And it held that the State's interest in complying with the VRA could not justify that consideration of race. We uphold both conclusions. …

III-A. Uncontested evidence in the record shows that the State's mapmakers, in considering District 1, purposefully established a racial target: African–Americans should make up no less than a majority of the voting-age population. Senator Rucho and Representative Lewis were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. During a Senate debate, for example, Rucho explained that District 1 ''must include a sufficient number of African–Americans'' to make it ''a majority black district.'' Similarly, Lewis informed the House and Senate redistricting committees that the district must have ''a majority black voting age population.'' And that objective was communicated in no uncertain terms to the legislators' consultant. Dr. Hofeller testified multiple times at trial that Rucho and Lewis instructed him ''to draw [District 1] with a [BVAP] in excess of 50 percent. [As a result, Dr. Hofeller explained that he sometimes could not follow county or precinct lines because the most important thing was to reach the 50%+ target.] ...

[The Court noted that in light of evidence showing other criteria were subordinated to race, the district court could hardly avoid finding race predominated in drawing District 1.] Indeed, as all three judges recognized, the court could hardly have concluded anything but. … (calling District 1 a "textbook example" of racial districting.) [The Court noted that the question was whether District 1 could survive the strict scrutiny applied to race based districting. The Court has assumed that complying with the Voting Rights Act is a compelling interest. The second part of the test was whether the districting remedy applied was narrowly tailored to comply with that interest. On whether the remedy of a majority-minority district was required, the Court looked to the *Gingles* test, set out below.]

III-B. This Court identified, in *Thornburg v. Gingles,* three threshold conditions for proving vote dilution under § 2 of the VRA. First, a ''minority group'' must be ''sufficiently large and geographically compact to constitute a majority'' in some reasonably configured legislative district. Second, the minority group must be ''politically cohesive.'' And third, a district's white majority must ''vote[ ] sufficiently as a bloc'' to usually ''defeat the minority's preferred candidate.'' Those three showings, we have explained, are needed to establish that ''the minority [group] has the potential to elect a representative of its own choice'' in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is ''submerg[ed] in a larger white voting population.'' *Growe v. Emison* (1993). If a State has good reason to think that all the ''*Gingles* preconditions'' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. … But if not, then not. …

Here, electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite—effective white bloc-voting. For most of the twenty years prior to the new plan's adoption, African–Americans had made up less than a majority of District 1's voters; the district's BVAP usually hovered between 46% and 48%. … Yet throughout those two decades, as the District Court noted, District 1 was ''an extraordinarily safe district for African–American preferred candidates.'' In the *closest* election during that period, African–Americans' candidate of choice received 59% of the total vote; in other years, the share of the vote garnered by those candidates rose to as much as 70%. Those victories (indeed, landslides) occurred because the district's white population did *not* ''vote[ ] sufficiently as a bloc'' to thwart black voters' preference, *Gingles*; rather, a meaningful number of white voters joined a politically cohesive black community to elect that group's favored candidate. In the lingo of voting law, District 1 functioned, election year in and election year out, as a ''crossover'' district, in which members of the majority help a ''large enough'' minority to elect its candidate of choice. *Bartlett v. Strickland* (2009) (plurality opinion). When voters act in that way, ''[i]t is difficult to see how the majority-bloc-voting requirement could be met''—and hence how § 2 liability could be established. So experience gave the State no reason to think that the VRA required it to ramp up District 1's BVAP.

The State counters that, in this context, past performance is no guarantee of future results. Recall here that the State had to redraw its whole congressional map following the 2010 census. And in particular, the State had to add nearly 100,000 new people to District 1 to meet the one-

per-son-one-vote standard. That meant about 13% of the voters in the new district would never have voted there before. So, North Carolina contends, the question facing the state mapmakers was not whether the *then-existing* District 1 violated § 2. Rather, the question was whether the *future* District 1 would do so if drawn without regard to race. And that issue, the State claims, could not be resolved by ''focusing myopically on past elections.''

But that reasoning, taken alone, cannot justify North Carolina's race-based redesign of District 1. True enough, a legislature undertaking a redistricting must assess whether the new districts it contemplates (not the old ones it sheds) conform to the VRA's requirements. And true too, an inescapable influx of additional voters into a district may suggest the possibility that its former track record of compliance can continue only if the legislature intentionally adjusts its racial composition. Still, North Carolina too far downplays the significance of a longtime pattern of white crossover voting in the area that would form the core of the redrawn District 1. See *Gingles* (noting that longtime voting patterns are highly probative of racial polarization). And even more important, North Carolina can point to no meaningful legislative inquiry into what it now rightly identifies as the key issue: whether a new, enlarged District 1, created without a focus on race but however else the State would choose, could lead to § 2 liability. The prospect of a significant population increase in a district only raises—it does not answer— the question whether § 2 requires deliberate measures to augment the district's BVAP. (Indeed, such population growth could cut in either direction, depending on who comes into the district.) To have a strong basis in evidence to conclude that § 2 demands such race-based steps, the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures. We see nothing in the legislative record that fits that description.

And that absence is no accident: Rucho and Lewis proceeded under a wholly different theory—arising not from *Gingles* but from *Bartlett v. Strickland*—of what § 2 demanded in drawing District 1. *Strickland* involved a geographic area in which African–Americans could not form a majority of a reasonably compact district. The African–American community, however, was sizable enough to enable the formation of a crossover district, in which a substantial bloc of black voters, if receiving help from some white ones, could elect the candidates of their choice. A plurality of this Court, invoking the first *Gingles* precondition, held that § 2 did not require creating that district: When a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply. Over and over in the legislative record, Rucho and Lewis cited *Strickland* as mandating a 50%-plus BVAP in District 1. They apparently reasoned that if, as *Strickland* held, § 2 does not *require* crossover districts (for groups insufficiently large under *Gingles*), then § 2 also cannot be *satisfied by* crossover districts (for groups in fact meeting *Gingles*'s size condition). In effect, they concluded, whenever a legislature *can* draw a majority-minority district, it *must* do so—even if a crossover district would also allow the minority group to elect its favored candidates.

That idea, though, is at war with our § 2 jurisprudence—*Strickland* included. Under the State's view, the third *Gingles* condition is no condition at all, because even in the absence of effective white bloc-voting, a § 2 claim could succeed in a district (like the old District 1) with an under–50% BVAP. But this Court has made clear that unless *each* of the three *Gingles* prerequisites is established, ''there neither has been a wrong nor can be a remedy.'' And *Strickland,* far from supporting North Carolina's view, underscored the necessity of demonstrating effective white bloc-voting to prevail in a § 2 vote-dilution suit. The plurality explained that ''[i]n areas with substantial crossover voting,'' § 2 plaintiffs would not ''be able to establish the third *Gingles* precondition'' and so ''majority-minority districts would not be required.'' Thus, North Carolina's belief that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district rested not on a ''strong basis in evidence,'' but instead on a pure error of law. *Alabama*.

In sum: Although States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA, that latitude can-not rescue District 1. We by no means ''insist that a state legislature, when redistricting, determine *precisely* what percent minority population [§ 2 of the VRA] demands.'' But neither will we approve a racial gerrymander whose necessity is supported by no evidence and whose *raison d'être* is a legal mistake. Accordingly, we uphold the District Court's conclusion that North Carolina's use of race as the predominant factor in designing District 1 does not withstand strict scrutiny.

IV. [The Court proceeded to consider District 12. There the state argued that far from a racial gerrymander it had engaged in a political gerrymander. The trial court had found that race predominated and that the racial districting failed to survive the somewhat relaxed strict scrutiny used in this category of cases.]

We now look west to District 12, making its fifth(!) appearance before this Court. This time, the district's legality turns, and turns solely, on which of two possible reasons predominantly explains its most recent reconfiguration. [The trial court found that] that the General Assembly chose voters for District 12, as for District 1, because of their race; more particularly, they urged that the Assembly intentionally increased District 12's BVAP in the name of ensuring preclearance under the VRA's § 5. But North Carolina declined to mount any defense (similar to the one we have just considered for District 1) that § 5's requirements in fact justified race-based changes to District 12—perhaps because § 5 could not reasonably be understood to have done so. Instead, the State altogether denied that racial considerations accounted for (or, indeed, played the slightest role in) District 12's redesign. According to the State's version of events, Senator Rucho, Representative Lewis, and Dr. Hofeller moved voters in and out of the district as part of a ''strictly'' political gerrymander, without regard to race. The mapmakers drew their lines, in other words, to ''pack'' District 12 with Democrats, not African–Americans. After hearing evidence supporting both parties' accounts, the District Court accepted the plaintiffs'.

[In assessing a racial gerrymander claim a court] can make real headway by exploring the challenged district's conformity to traditional districting principles, such as compactness and

respect for county lines. In *Shaw II,* for example, this Court emphasized the ''highly irregular'' shape of then-District 12 in concluding that race predominated in its design. But such evidence loses much of its value when the State asserts partisanship as a defense, because a bizarre shape—as of the new District 12—can arise from a ''political motivation'' as well as a racial one. *Cromartie I*. And crucially, political and racial reasons are capable of yielding similar oddities in a district's boundaries. That is because, of course, ''racial identification is highly correlated with political affiliation.'' *Cromartie II*. As a result of those redistricting realities, a trial court has a formidable task: It must make ''a sensitive inquiry'' into all ''circumstantial and direct evidence of intent'' to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines. *Cromartie I*.

Our job is different—and generally easier. As described earlier, we review a district court's finding as to racial predominance only for clear error, except when the court made a legal mistake. Under that standard of review, we affirm the court's finding so long as it is ''plausible''; we reverse only when ''left with the definite and firm conviction that a mistake has been committed.'' *Anderson v. Bessemer City* (1985). And in deciding which side of that line to come down on, we give singular deference to a trial court's judgments about the credibility of witnesses. See Fed. Rule Civ. Proc. 52(a)(6). That is proper, we have explained, because the various cues that ''bear so heavily on the listener's understanding of and belief in what is said'' are lost on an appellate court later sifting through a paper record. *Anderson.*

In light of those principles, we uphold the District Court's finding of racial pre-dominance respecting District 12. The evidence offered at trial, including live witness testimony subject to credibility determinations, adequately supports the conclusion that race, not politics, accounted for the district's reconfiguration. And no error of law infected that judgment: Contrary to North Carolina's view, the District Court had no call to dismiss this challenge just because the plaintiffs did not proffer an alternative design for District 12 as circumstantial evidence of the legislature's intent.

IV-A. Begin with some facts and figures, showing how the redistricting of District 12 affected its racial composition. As explained above, District 12 (unlike District 1) was approximately the right size as it was: North Carolina did not—indeed, could not—much change its total population. See But by further slimming the district and adding a couple of knobs to its snakelike body (including in Guilford County), the General Assembly incorporated tens of thousands of new voters and pushed out tens of thousands of old ones. And those changes followed racial lines: To be specific, the new District 12 had 35,000 more African–Americans of voting age and 50,000 fewer whites of that age. (The difference was made up of voters from other racial categories.) [The majority proceeded to summarize evidence supporting the district court's decision.]

[In footnote 7 the Court explained that where race predominates the use of race for political purposes still triggers strict scrutiny. If the motive is political but the means are racial that still triggers heightened scrutiny. The footnote continues:] As earlier noted, that inquiry is satisfied

when legislators have ‘‘place[d] a significant number of voters within or without’’ a district predominantly because of their race, regardless of their ultimate objective in taking that step. So, for example, if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests— perhaps thinking that a proposed district is more ‘‘sellable’’ as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing— their action still triggers strict scrutiny. … In other words, the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics. See *Miller*.

The *Cooper* dissent by Justices Alito, Kennedy, and Chief Justice Roberts

[The dissenters argued that politics predominated and that the case was controlled by a prior decision about District 12, which had held that politics predominated. The following summary, including quotes from the Court, is largely from an Article by Michael Curtis, *North Carolina's Sick Democracy* © Michael Curtis].

The dissenters noted that finding a racial motive was to accuse the legislature of something really bad. By contrast a political gerrymander was "distasteful." "When a federal court says that race was a legislature's predominant purpose in drawing a district, it accuses the legislature of 'offensive and demeaning' conduct. Indeed, we have said that racial gerrymanders 'bea[r] an uncomfortable resemblance to political apartheid.'" That is a grave accusation to level against a state legislature.

In addition, the dissent continued "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions" because "[i]t is well settled that reapportionment is primarily the duty and responsibility of the State." The dissenters continued:

> When a federal court finds that race predominated in the redistricting process, it inserts itself into that process. That is appropriate—indeed, constitutionally required—if the legislature truly did draw district boundaries on the basis of race. But if a court mistakes a political gerrymander for a racial one, it illegitimately invades a traditional domain of state authority, usurping the role of a State's elected representatives. This does violence to both the proper role of the Judiciary and the powers reserved to the States under the Constitution. There is a final, often-unstated danger where race and politics correlate: that the federal courts will be transformed into weapons of political warfare. Unless courts "exercise extraordinary caution" in distinguishing race-based redistricting from politics-based redistricting, they will invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena. If the majority party draws districts to favor itself, the minority party can deny the majority its political victory by prevailing on a racial gerrymandering claim. Even if the minority party loses in court, it can exact a heavy price by using the judicial process to engage in political trench warfare for years on end.

The two dissenters cited *Cromartie II*, one of five challenges to District 12. The dissenters warned that unjustified success in a racial gerrymandering case, might rob the legislature of its *legitimate* political gains. "[C]aution 'is especially appropriate . . . where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated.'"

Cromartie II, like *Cooper*, involved the race versus politics conundrum. In *Cromartie II*, the Court reversed the district court's fact-finding of a racial motive—just the approach the dissenters thought the Court should follow in *Cooper v. Harris*. *Cromartie I* was reversed on the grounds that the challengers had failed to show "that the legislature could have achieved its legitimate political objectives in an alternative way" that was "consistent with traditional districting principles" and that the "alternatives would have brought about significantly greater racial balance." The argument about District 12 highlights the problem of separating the Siamese twin of racial and political gerrymanders as well as the dissenters less negative view of political gerrymanders.

Note: *Covington v. North Carolina*, 316 F.R.D. 117 (MDNC 2016)

In 2011, after their smashing win in the 2010 election, Republicans in control of the North Carolina General Assembly redistricted both houses of the state legislature. Among their objectives, two were not to be deviated from when possible. First, wherever a district could be constructed with 50%+ black voting age population, it should be created. Second, there should be blacks in the legislature in proportion to the black voting age population of the state. The Republican co-chairs of the redistricting committee justified these "targets" or quotas, as mandated by Sections 2 & 5 of the Voting Rights Act or at least as justified by the need to create a safe harbor against a successful Voting Rights Act suit.

The racial districting paid political dividends. In the prior districts which were redrawn, black candidates with support from whites and other ethnic groups often had been winning elections by landslide-like majorities—with less than 50% black voting age population in the districts. Packing more blacks into majority black districts wasted black votes, and the votes were most often Democratic. It also drained black voters out of other districts that had been won by white Democrats—undermining white incumbents—and making the parties in the legislature look more like a black and white party. The legislature also drew white state senator Linda Garrou out of her district which had a large but not majority black population, most of whom had supported Senator Garrou. The object expressed by Senator Rucho, the senate redistricting chair, was to increase the chances that a black candidate would win the seat instead of the white state senator. Other white Democrats were also drawn out of their districts or potential districts.

North Carolina voters challenged twenty-eight of the new State Senate and House of Representative districts as unconstitutional racial gerrymanders created "through the predominant and unjustified use of race" in violation of the Equal Protection Clause of the 14th Amendment. Defendants—the redistricting co-chairs—argued in response that race was not the primary consideration in the 2011 redistricting, and that, even if it was, the North Carolina General

Assembly's use of race was justified as to comply with its obligations under sections 2 and 5 of the Voting Rights Act or to protect against potential Voting Rights Acts suits.

The three-judge federal court found that race predominated in drawing the districts and that the legislature had failed to show a strong reason to believe the districts were narrowly tailored to achieve a compelling Voting Rights Act objective. That supposed objective would be to prevent white bloc voting from usually defeating candidates preferred by black voters in the newly created districts. Eventually, districts were redrawn, some by agreement of the parties to the suit and, where they failed to agree, some by court order. As to the purported voting rights districts, the decision in *Covington v. North Carolina* was summarily affirmed without opinion by the United States Supreme Court [*North Carolina v. Covington* (2017)], presumably on grounds similar to those in *Cooper v. Harris*, the congressional case—failure of the defendants to show that there were strong reasons to believe that the racial "targets" were reasonably necessary to serve the purported Voting Rights interest.

Note: *Gill v. Whitford* (2018)

In *Gill*, the Court invoked the doctrine of standing to bypass consideration of the extent to which political gerrymandering of state legislative districts might violate the First Amendment's right to association and the Fourteenth Amendment's right to equal protection. Roberts, C. J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan, JJ., joined, and in which Thomas and Gorsuch, JJ., joined except as to Part III.

The Court remanded the case to provide the plaintiffs with an opportunity to prove that they had suffered concrete and particularized injuries that burdened their individual votes. Although the Court's decision on standing was unanimous, Justice Kagan, joined by Ginsburg, Breyer, and Sotomayor, JJ., vigorously argued that "extreme partisan gerrymanders" are unconstitutional.

The plaintiffs alleged that the Wisconsin legislature, in which Republicans had majorities in both houses, had violated the constitutional rights of Democratic voters by "cracking" and "packing" such voters. The plaintiffs explained that "[c]racking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins." Such practices are used in apportioning seats in most of the states of the Union. The plaintiffs contended that "the degree to which packing and cracking has favored one party over another can be measured by a single calculation: an 'efficiency gap' that compares each party's respective 'wasted' votes across all legislative districts. 'Wasted' votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win." The plaintiffs contended that the legislature's apportionment of seats "resulted in an unusually large efficiency gap that favored Republicans."

A federal district court in Wisconsin held that the plaintiffs demonstrated a violation of the rights to association and equal protection. The court held that redistricting of legislative seats

is unconstitutional if it "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." Although the court found that Wisconsin Republicans enjoyed a modest natural advantage because Democratic votes tended to be concentrated in Milwaukee and Madison, it determined that "this inherent geographical disparity did not account for the magnitude of the Republican advantage." The court held that the plaintiffs had standing because the legislation prevented "Wisconsin Democrats from being able to translate their votes into seats as effectively as Wisconsin Republicans" and the "dilution of their votes is both personal and acute." A dissenting judge argued that the precedents of the U.S. Supreme Court demonstrated that "partisan intent" to benefit a particular party "is not illegal, but is simply the consequence of assigning the task of redistricting to the political branches."

On appeal, the Court acknowledged that its previous gerrymanding decisions had "few clear landmarks" and had "generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury." In the Court's most recent decision, *Vieth v. Jubelirer* (2004), a four-Justice plurality held that the political question doctrine barred adjudication because of the absence of any "judicially discernable and manageable standard" for a decision.

In determining that the plaintiffs lacked standing, the Court explained that their complaint of vote dilution needed to be specific to the district in which they resided rather than state-wide, in contrast with the plaintiffs in *Baker v. Carr* and *Reynolds v. Sims*, who had standing because they were able to assert that districts throughout the state had been malapportioned. The Court explained that "[h]ere, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted. That harm arises from the particular composition of the voter's own district, which causes his vote – having been packed or cracked – to carry less weight than it would carry in another, hypothetical district. Remedying the individual voter's harm, therefore, does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district – so that the voter may be unpacked or uncracked, as the case may be." The Court explained that a "citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable 'general interest common to all members of the public,'" *citing Ex parte Levitt* (1937).

The Court likewise explained that the plaintiffs lacked standing because they based their complaint on a theory of statewide injury to the Democratic party rather than attempting to provide that they lived in packed or cracked districts.

Accordingly, the Court remanded the case to the district court to provide plaintiffs with "an opportunity to prove concrete and particularized injuries using evidence – unlike the bulk of

the evidence presented thus far – that would tend to demonstrate a burden on their individual votes."

In a concurring opinion, Justice Kagan, joined by Ginsburg, Breyer, and Sotomayor, JJ., argued that the Court could declare partisan gerrymandering to be unconstitutional if the plaintiffs satisfied the Court's standing requirements. Kagan contended that the plaintiffs could also assert an associational claim under the First Amendment if they could demonstrate harm to their political party insofar as [m]embers of the 'disfavored party'…deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office."

Anticipating the merits of a political gerrymandering claim, Kagan declared that partisan gerrymandering "jeopardizes '[t]he ordered working of our Republic, and of the democratic process," *quoting Veith, supra* (concurring opinion of Justice Kennedy). Kagan contended that this "practice enables politicians to entrench themselves in power against the people's will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches." Kagan also argued that "the evils of gerrymandering seep into the legislative process itself," through ways including "indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation's problems." Although Kagan acknowledged that "partisan gerrymandering goes back to the Republic's earliest days," she asserted that "technology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like)…Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides. The 2010 redistricting cycle produced some of the worst partisan gerrymanders on record…The technology will only get better, so the 2020 cycle will only get worse."

Note: *Rucho v. Common Cause* (2019)

In a five-to-four decision, the Court held that adjudication of challenges to political gerrymandering is barred by the political question doctrine because of the lack of judicially manageable standards. The Court said some degree of partisanship is permissible in drawing legislative district lines but held there is no judicially manageable standard for establishing how much is too much.

The plaintiffs had objected to efforts by Republican state legislators in North Carolina and Democratic legislators in Maryland to draw congressional voting districts in a manner that would maximize the number of districts that would be likely to elect members of their own party.

The North Carolina plan resulted in the election of ten Republicans in the state's thirteen congressional districts in 2016, and the Maryland plan was designed to ensure the election of Democrats in seven of the state's eight congressional districts.

The plantiffs in both cases contended that the plans violated the First Amendment by retaliating against candidates on the basis of their political beliefs and that the plans usurped the right of the people to elect their preferred candidates for Congress, thereby violating the requirement in Article I, Section 2 of the Constitution that House members be selected "by the People of the several States." They also alleged that the plans transgressed the Elections Clause of Article I, Section 4 by exceeding the states' delegated authority to prescribe the "Times, Places, and Manner of holding Elections" for members of Congress. The plaintiffs in the North Carolina case also alleged that the North Carolina plan violated the Equal Protection Clause of the Fourteenth Amendment by diluting the electoral strength of Democratic voters. In particular, the plaintiffs contended that the dominant parties had unconstitutionally "packed" opposition voters into a small number of districts in order to dilute their strength in other districts and had unconstitutionally "cracked" such opponents by dividing them among multiple districts.

In an opinion delivered by Chief Justice Roberts, the Court asserted that "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." The Court explained, however, that the "Founders certainly did not think proportional representation was required" and that legislatures had been gerrymandered throughout the history of the Republic. The Court pointed out that many states elected representatives at large and sent single-party delegations to Congress until the enactment of federal legislation in 1842 that required single-member districts. The Court contended that the plaintiffs had resorted to fairness arguments because the Constitution does not require proportional representation, but that "federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so."

The Court observed that "it is not even clear what fairness looks like in this context." Although the Court explained that the creation of a greater number of competitive districts by undoing cracking and packing might benefit the disadvantaged party, such party might not be able to elect any representatives if all districts became competitive. The Court likewise explained that various other criteria for districting, such as contiguity and compactness, might create inequities of their own. Moreover, the Court remarked that "it is only after determining how to define fairness that you can even begin to answer the determinative question: 'How much is too much?' At what point does permissible partisanship become unconstitutional?"

The Court distinguished its "one-person, one-vote" cases on the ground that "the one-person, one-vote rule is relatively easy to administer as a matter of math." Moreover, the requirement of equal voting power in those cases, the Court explained, "does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters." The Court likewise distinguished its racial gerrymandering cases on the ground

that "a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship."

Similarly, the Court distinguished various other kinds of cases, particularly in antitrust law, in which courts have drawn lines involving "matters of degree." The Court explained that "those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion."

Acknowledging that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust" and are "incompatible with democratic principles," quoting *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2012), the Court emphasized that Congress, state legislatures, or state courts might provide remedies even though the political question doctrine tied the hands of the federal judiciary. The Court pointed out that some state legislatures already had restricted partisan gerrymandering and that dozens of bills were pending in Congress to do the same.

In a dissent joined by Justices Ginsburg, Breyer, and Sotomayor, Justice Kagan argued that the political question doctrine did not preclude adjudication of political gerrymandering cases because lower courts already had "coalesced around manageable judicial standards" that limited "courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process."

She explained that these courts had developed a three-part test that requires plaintiffs to prove that partisan advantage was the "predominant purpose" in devising a districting plan; that the district lines "substantially' dilute votes, and that the state must develop a "legitimate, non-partisan justification to save its map." Rejecting the majority's contention that these findings were mere "prognostications," Kagan countered that "the courts below did not gaze into crystal balls…Their findings... were evidence-based, data-based, statistics-based…The courts did what anyone would anyone would want a decisionmaker to do when so much hangs in the balance. They looked hard at the facts, and they went where the facts led them." Kagan contended that the district courts therefore "did not have to – and in fact did not – choose among competing visions of electoral fairness… because they did not try to compare the State's actual map to an 'ideally fair' one…Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn't been intent on partisan gain."

As an example of how a court could identify a district that was so heavily gerrymandered that it crossed a constitutional line, Kagan pointed to North Carolina's plan, which produced a greater chance of electing at least one more Republican House member than any of three thousand randomly generated maps that were prepared by an expert witness; 77% of the random maps would have elected three or four more [Democrats]." Three more would have been a

congressional delegation of seven Republicans and six Democratic and four more would have produced a delegation of seven Democrats and six Republicans.

Addressing the merits of the cases, Kagan contended that political gerrymandering violated equal protection, free speech, and the right of association. She complained that political gerrymandering is "anti-democratic in the most profound sense" and that the partisan gerrymanders in the cases before the Court "deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives." She alleged that these districting plans "debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction." Kagan warned that such gerrymanders, if left unchecked, "may irreparably damage our system of government."

Kagan contended that the problem of gerrymandering had become particularly urgent because modern technologies enabled politicians to devise particularly precise and sophisticated districting plans that mathematically maximized the marginalization of opposition parties. Such gerrymanders, she warned insulate "politicians against all but the most titanic shifts in the political tides. These are not your grandfather's – let alone the Framers' – gerrymanders."

Kagan denied that adjudication of political gerrymandering cases would necessarily lead to proportional representation and she declared that "contrary to the majority's suggestion…courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish…substantial portions of their docket."

Kagan also challenged the Court's contention that state legislators or Congress could provide relief. She explained "politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight." She similarly disparaged the Court's contention that state courts might provide relief, pointing out that they were no more competent than the Supreme Court to develop and apply "neutral and manageable standards to identify unconstitutional gerrymanders" that would avoid the political question obstacle upon which the Court had based its decision.

Note: *Alexander v. The South Carolina State Conference of the NAACP* (2024)

In *Alexander v. The South Carolina State Conference of the NAACP* the Court, in a 6-3 majority opinion reflecting the Court's current ideological divide, ruled that redistricting decisions that overwhelmingly involved African American voters were permissible if the districts were drawn because the African American voters *were Democrats*, and not because of

their race. Given the Supreme Court's refusal to regulate partisan political gerrymandering in *Rucho v. Common Cause* (2019), states are now free to openly engage in partisan gerrymandering. In *Alexander*, the Court has now provided states what could prove to be an insurmountable defense to racial gerrymandering claims, overruling a District Court decision that had found racial gerrymandering.

In an opinion by Justice Alito, joined by Chief Justice Roberts and Justices Thomas, Gorsuch, Kavanaugh, and Barret, Alito stressed the high bar that plaintiffs bringing a racial gerrymandering case must meet. The court had "repeatedly emphasized that federal courts must 'exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." "Such caution," he explained, "is necessary because "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions."

The majority further held that in such cases the good faith of the legislature *must be presumed* and that challengers must produce alternative maps showing that the legislature could have achieved its partisan goals in a way that would not have impacted racial groups. Justice Kagan in dissent, joined by Justices Sotomayor and Jackson, criticized both of these requirements as novel creations that will be unduly burdensome to future plaintiffs.

Chapter 10. Substantive Due Process

Part IV. The Origins of Substantive Protection for Non-Economic Rights

[Insert on page 913 before Part V, Liberty and Privacy.]

Note: *City of Grants Pass v. Johnson* (2024)

In *Robinson v. California* (1962), the Court overturned a conviction based an unusual statute that criminalized the status of *being* a narcotics addict:

> No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics." California Health and Safety Code § 11721.

The defendant was not under the influence of heroin and did not possess heroin or drug paraphernalia at the time of his arrest. He was arrested because he showed clear evidence of heroin use—i.e., he was arrested because of his *status* as a heroin user and not because of his commission of any criminal acts related to heroin use. *Robinson* was decided before *Griswold v. Connecticut* (1965), at a time when substantive due process analysis was shunned by the Court, so the majority invalidated the conviction based upon the 8th Amendment, holding that a conviction based upon one's status was "cruel and unusual." The holding was controversial because the historical background of the 8th Amendment focused on concerns about the nature of the punishment inflicted rather than upon the nature of the crime.

In *Powell v. Texas* (1968), a plurality of 5 justices upheld the conviction of an alcoholic for public drunkenness. The plurality distinguished *Robinson* on the basis of the fact that the crime was based on the conduct of being drunk in public, not on the fact that he had the status of being an alcoholic. For example, he could have been drunk at his home and not violated the statute. The 4 dissenters said that his drunkenness was inextricably linked to the fact that he suffered from the disease of alcoholism.

In 2019, the 9th Circuit held in *Martin v. Boise* that government could not criminalize homeless persons sleeping in public if there were not sufficient beds available in local shelters to accommodate the demand. Judge Marsha Berzon began her opinion by quoting Anatole France:

> The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.
> — Anatole France, *The Red Lily*

Her opinion held that cities cannot criminalize certain human activities, like sitting, sleeping, standing, and eating, if they are unavoidable consequences of homelessness. Thus, such statutes are more similar to the statute at issue in *Robinson* rather than *Powell*.

In *City of Grants Pass v. Johnson* (2024) the Supreme Court took a homelessness case from the 9th Circuit and rejected the *Martin* analysis. The Grants Pass statutes prevented public camping, but also criminalized sleeping in a car. The Court split 6-3, with justices falling in line with their current ideological divide. In an opinion by Justice Gorsuch, joined by Roberts, C.J., and Thomas, Alito, Kavanaugh, and Barrett, JJ., the majority said that since the statutes penalized *anyone* who camped or slept in a car, the statutes were similar to *Powell*, not *Robinson*. The majority contended that since homelessness was a national problem, in a federal system localities should be free to experiment with local solutions to local problems. The majority opinion also discussed the history of the 8th Amendment and noted that its origins focused on the nature of punishments rather than the nature of crimes. However, since none of the litigants had called for overruling *Robinson*, the Court did not pursue the matter. Justice Thomas, concurring, called for the overruling of *Robinson*.

Justice Sotomayor, joined by Kagan and Jackson, JJ., contended *Robinson* should control since the status of being homeless is inextricably linked to violating the statute as long as they are in the jurisdiction. While *some* non-homeless people could choose to violate the various statutes, *no* homeless person could avoid violating the statute:

> Sleep is a biological necessity, not a crime. For some people, sleeping outside is their only option. The City of Grants Pass jails and fines those people for sleeping anywhere in public at any time, including in their cars, if they use as little as a blanket to keep warm or a rolled-up shirt as a pillow. For people with no access to shelter, that punishes them for being homeless. That is unconscionable and unconstitutional. Punishing people for their status is "cruel and unusual" under the Eighth Amendment.

The dissent contended that since homelessness was a national problem, in a federal system homeless persons should have their rights protected regardless of where they were.

Part V. Liberty and Privacy.

[Insert on page 961 following *Whole Women's Health.*]

Note: *June Medical Services L.L.C. v. Russo* (2020)

In *June Medical Services L.L.C. v. Russo* (2020) the Court held that a Louisiana statute requiring physicians who perform abortions to have admitting privileges at a local hospital was "almost word-for-word" similar to the Texas statute that had been struck down in *Whole Woman's Health.* The trial court had found that the statute had had the same effect in Louisiana that the Texas statute had had in dramatically reducing the number of abortion providers. The Court held that it imposed an unconstitutional burden on a woman's right to obtain an abortion. Justice Breyer, joined by the current members of the Court who had been in the majority in *Whole Woman's Health* (Breyer, Sotomayor, and Kagan, JJ.), wrote the plurality opinion. Chief Justice John Roberts, who had dissented in *Whole Woman's Health,* provided the determining fifth vote. While not joining the plurality opinion, he said that stare decisis compelled his vote.

The remaining *Whole Woman's Health* dissenters (Thomas, Alito, and Gorsuch, JJ.) joined by Anthony Kennedy's replacement, Brett Kavanaugh, dissented.

Roberts did not join the plurality opinion because Justice Breyer considered the lack of meaningful benefits from the Louisiana statute as a factor to be considered when determining the extent of the burden the regulation placed on pregnant women. The lack of benefit from a statute is commonly considered as evidence of pretext in constitutional challenges. However, Roberts contended that the only issue to be considered under the *Casey* analysis was the extent of the burden.

While Roberts' position could conceivably be determinative in a given case, it is unlikely to decide the next abortion challenge. Amy Coney Barrett has replaced the late Ruth Bader Ginsburg and the *June Medical* dissenters (Thomas, Alito, Gorsuch, and Kavanaugh, JJ.) no longer need Roberts' vote to determine the outcome in an abortion case. On May 17, 2021, the Court granted a cert petition that had been filed by the state of Mississippi in *Dobbs v. Jackson Women's Health Organization.* In *Dobbs,* the Fifth Circuit had enjoined a Mississippi statute that banned all abortions after fifteen weeks unless necessary for the health of the mother or because of fetal abnormalities. (There is no exception for pregnancies that result from rape or incest.) The statute is unquestionably unconstitutional under *Roe* and *Casey* as it clearly covers non-viable fetuses.

The Court granted cert on the following issue: "Whether all pre-viability prohibitions on elective abortions are unconstitutional."

Mississippi had petitioned the Court to review the case on June 15, 2020. The Court did not schedule a discussion of the case until their Jan. 8, 2021, conference. The justices then considered the petition 12 more times before announcing that they had granted cert on May 17, 2021. In its brief, filed on July 22, 2021, Mississippi directly called for the overruling of *Roe* and *Casey*.

https://context-cdn.washingtonpost.com/notes/prod/default/documents/aaae645c-05b2-4550-bce1-e0774f0b667a/note/b5586957-d04f-4983-aaab-9765b3b93bfb.#page=1

Dobbs *v.* Jackson Women's Health Organization
597 U.S. __ (2022)

[Majority: Alito, Thomas, Gorsuch, Kavanaugh, and Barrett, JJ. Thomas, J., and Kavanaugh, J., filed concurring opinions. Roberts, C. J., filed an opinion concurring in the judgment. Breyer, Sotomayor, and Kagan, JJ., filed a dissenting opinion.]

Justice Alito delivered the opinion of the Court.

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that

abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

… For the first 185 years after the adoption of the Constitution, each State was permitted to address [abortion] with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade*. ...

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State. As Justice Byron White aptly put it in his dissent, the decision represented the "exercise of raw judicial power," and it sparked a national controversy that has embittered our political culture for a half century.

Eventually, in *Planned Parenthood of Southeastern Pa. v. Casey* (1992), the Court revisited *Roe*, but the Members of the Court split three ways. [T]he opinion concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*'s "central holding"—that a State may not constitutionally protect fetal life before "viability"—even if that holding was wrong. Anything less, the opinion claimed, would undermine respect for this Court and the rule of law. …

We hold that *Roe* and *Case*y must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the 14th Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg* (1997).

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. … *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."

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

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. …

I. The law at issue in this case, Mississippi's Gestational Age Act, see Miss. Code Ann. §41–41–191 (2018), contains this central provision: "Except in a medical emergency or in the

case of a severe fetal abnormality, a person shall not intentionally or knowingly perform…or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." §4(b).

To support this Act, the legislature made a series of factual findings [regarding fetal development and medical ethics]. …

Respondents are an abortion clinic, Jackson Women's Health Organization, and one of its doctors. On the day the Gestational Age Act was enacted, respondents filed suit in Federal District Court against various Mississippi officials, alleging that the Act violated this Court's precedents establishing a constitutional right to abortion [prior to viability]. Plaintiffs prevailed in the lower courts and defendants petitioned this Court for review.

We granted certiorari to resolve the question whether "all pre-viability prohibitions on elective abortions are unconstitutional." Petitioners' primary defense of the Mississippi Gestational Age Act is that *Roe* and *Casey* were wrongly decided and that "the Act is constitutional because it satisfies rational-basis review." Respondents answer that allowing Mississippi to ban pre-viability abortions "would be no different than overruling *Casey* and *Roe* entirely."

II. We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. Skipping over that question, the controlling opinion in *Casey* reaffirmed *Roe*'s "central holding" based solely on the doctrine of *stare decisis*, but as we will explain, proper application of *stare decisis* required an assessment of the strength of the grounds on which *Roe* was based.

We therefore turn to the question that the *Casey* plurality did not consider, and we address that question in three steps. First, we explain the standard that our cases have used in determining whether the 14th Amendment's reference to "liberty" protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.

II-A-1. Constitutional analysis must begin with "the language of the instrument," *Gibbons v. Ogden* (1824), which offers a "fixed standard" for ascertaining what our founding document means. The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.

Roe…held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the 1st, 4th, 5th, 9th, and 14th Amendments. …

Roe expressed the "feel[ing]" that the 14th Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance. The *Casey*

Court…grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the 14th Amendment's Due Process Clause.

We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents' *amici* have now offered as yet another potential home for the abortion right: the 14th Amendment's Equal Protection Clause. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other." *Geduldig v. Aiello* (1974). And as the Court has stated, the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women. *Bray v. Alexandria Women's Health Clinic* (1993). Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.

With this new theory addressed, we turn to *Casey*'s bold assertion that the abortion right is an aspect of the "liberty" protected by the Due Process Clause of the 14th Amendment.

II-A-2. The underlying theory on which this argument rests—that the 14th Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights.

The first consists of rights [incorporated from] the first eight Amendments. …The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

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

[Justice Alito discusses the methodology of *Timbs v. Indiana* (2019) and *McDonald v. Chicago* (2010).]

Timbs and *McDonald* concerned the question whether the 14th Amendment protects rights that are expressly set out in the Bill of Rights, and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution. Thus, in *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of "Anglo-American common law tradition," and made clear that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition."

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. …

On occasion, when the Court has ignored the "[a]ppropriate limits" imposed by "'respect for the teachings of history,'" *Moore,* it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York* (1905). The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the *14th Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the 14th Amendment does not protect the right to an abortion.

II-B-1. Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. …

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the 14th Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.

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

II-B-2-a. We begin with the common law, under which abortion was a crime at least after "quickening"—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.

[Justice Alito discusses the writings of "eminent common law authorities" Bracton [(1210-1268)], Coke [(1552-1634)], Hale [(1609-1676)], and Blackstone [(1723-1780)], who reported that abortion after quickening was a crime. He also discusses the common law "proto-felony-murder' rule that allowed for a murder prosecution of anyone who performed an abortion that resulted in the death of a pregnant woman at any stage of pregnancy.]

In sum, although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy.

II-B-2-c. The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear…[but] the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. …

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. …

II-B-2-d. The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. The Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: "Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice]."

II-B-3. Respondents and their *amici* have no persuasive answer to this historical evidence. …

There is ample evidence that the passage of these laws was spurred by a sincere belief that abortion kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point.

One may disagree with this belief (and our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests), but even *Roe* and *Casey* did not question the good faith of abortion opponents.

II-C-1. Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, and *Casey* described it as the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy." *Casey* elaborated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." …

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that Roe and Casey recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being." Miss. Code Ann. §41–41–191(4)(b).Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, *Loving v. Virginia* (1967); the right to marry while in prison, *Turner v. Safley* (1987); the right to obtain contraceptives, *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), *Carey v. Population Services Int'l* (1977); the right to reside with relatives, *Moore v. East Cleveland* (1977); the right to make decisions about the education of one's children, *Pierce v. Society of Sisters* (1925), *Meyer v. Nebraska* (1923); the right not to be sterilized without consent, *Skinner v. Oklahoma* (1942); and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, *Winston v. Lee* (1985), *Washington v. Harper* (1990), *Rochin v. California* (1952). Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence v. Texas* (2003) (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges* (2015) (right to marry a person of the same sex).

These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history.

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

destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

II-C-2. In drawing this critical distinction between the abortion right and other rights, it is not necessary to dispute *Casey*'s claim *(which we accept for the sake of argument)* (emphasis added by ed.) that "the specific practices of States at the time of the adoption of the 14th Amendment" do not "mar[k] the outer limits of the substantive sphere of liberty which the 14th Amendment protects." …

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

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

II-D-1. The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a "'deeply rooted'" one, "'in this Nation's history and tradition.'" *Glucksberg.* The dissent does not identify *any* pre-*Roe* authority that supports such a right….

The dissent's failure to engage with this long tradition is devastating to its position. …

II-D-2. Because the dissent cannot argue that the abortion right is rooted in this Nation's history and tradition, it contends that the "constitutional tradition" is "not captured whole at a single moment," and that its "meaning gains content from the long sweep of our history and from successive judicial precedents." This vague formulation imposes no clear restraints on what Justice White called the "exercise of raw judicial power," *Roe*, (dissenting opinion), and while the dissent claims that its standard "does not mean anything goes," any real restraints are hard to discern. …

II-D-3. The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. … The exercise of the rights at issue

in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a "potential life," but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear: The Constitution does not permit the States to regard the destruction of a "potential life" as a matter of any significance.

That view is evident throughout the dissent. The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a State's interest in protecting prenatal life. …

Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that "'theory of life.'"

III. We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. …

We have long recognized, however, that *stare decisis* is "not an inexorable command," and it "is at its weakest when we interpret the Constitution." … An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

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

In *West Coast Hotel Co. v. Parrish* (1937), the Court overruled *Adkins v. Children's Hospital of D. C.* (1923), which had held that a law setting minimum wages for women violated the "liberty" protected by the 5th Amendment's Due Process Clause. *West Coast Hotel* signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation. See *Lochner v. New York* (1905) (holding invalid a law setting maximum working hours)….

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

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

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

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

The infamous decision in *Plessy v. Ferguson*, was one such decision. It betrayed our commitment to "equality before the law." (Harlan, J., dissenting). It was "egregiously wrong" on the day it was decided, and as the Solicitor General agreed at oral argument, it should have been overruled at the earliest opportunity.

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

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

III-B-1-c. What *Roe* did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a woman's health? The Court's only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth. But the Court did not explain why mortality rates were the only factor that a State could legitimately consider. Many health and safety regulations aim to avoid adverse health consequences short of death. And the Court did not explain why it departed from the normal rule that courts defer to the judgments of legislatures "in areas fraught with medical and scientific uncertainties." *Marshall v. United States* (1974).

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

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

This arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. …

The viability line, which *Casey* termed *Roe*'s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line. The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy.

III-B-2. When *Casey* revisited *Roe* almost 20 years later, very little of *Roe*'s reasoning was defended or preserved. …

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

As discussed below, *Casey* also deployed a novel version of the doctrine of *stare decisis*. This new doctrine did not account for the profound wrongness of the decision in *Roe* and placed great weight on an intangible form of reliance with little if any basis in prior case law. *Stare decisis* does not command the preservation of such a decision.

III-C. *Workability*. Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. *Montejo v. Louisiana* (2009). *Casey*'s "undue burden" test has scored poorly on the workability scale.

III-C-1. Problems begin with the very concept of an "undue burden." As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is "due" or "undue" is "inherently standardless." …

Casey provided no clear answer to these questions. It said that a regulation is unconstitutional if it imposes a substantial obstacle "in a large fraction of cases in which [it] is relevant," but there is obviously no clear line between a fraction that is "large" and one that is not. Nor is it clear what the Court meant by "cases in which" a regulation is "relevant." These ambiguities have caused confusion and disagreement.

III-C-2. The difficulty of applying *Casey*'s new rules surfaced in that very case. The controlling opinion found that Pennsylvania's 24-hour waiting period requirement and its informed-consent provision did not impose "undue burden[s]," but Justice Stevens, applying the same test, reached the opposite result. That did not bode well, and then-Chief Justice Rehnquist aptly observed that "the undue burden standard presents nothing more workable than the trimester framework." …

This Court's experience applying *Casey* has confirmed Chief Justice Rehnquist's prescient diagnosis that the undue-burden standard was "not built to last."

III-C-3. The experience of the Courts of Appeals provides further evidence that *Casey*'s "line between" permissible and unconstitutional restrictions "has proved to be impossible to draw with precision." …

Casey's "undue burden" test has proved to be unworkable. Continued adherence to that standard would undermine, not advance, the "evenhanded, predictable, and consistent development of legal principles."

III-D. *Effect on other areas of law*. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. …

When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine "has failed to deliver the 'principled and intelligible' development of the law that *stare decisis* purports to secure."

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

III-E-1. Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned

activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." For these reasons, we agree with the *Casey* plurality that conventional, concrete reliance interests are not present here.

III-E-2. Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society...in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." But this Court is ill-equipped to assess "generalized assertions about the national psyche." *Casey*'s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in "cases involving property and contract rights."

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

III-E-3. Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." [T]o ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

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

The argument was cast in different terms, but stated simply, it was essentially as follows. … A decision overruling *Roe* would be perceived as having been made "under fire" and as a "surrender to political pressure," and therefore the preservation of public approval of the [integrity of the] Court weighs heavily in favor of retaining *Roe.*

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

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

V-A-1. The dissent argues that we have "abandon[ed]" *stare decisis*, but we have done no such thing, and it is the dissent's understanding of *stare decisis* that breaks with tradition. The dissent's foundational contention is that the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless the Court can "poin[t] to major legal or factual changes undermining [the] decision's original basis." … Recognition that the cases they overruled were egregiously wrong on the day they were handed down was not enough.

The Court has never adopted this strange new version of *stare decisis*—and with good reason. …

Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket. And indeed, the dissent eventually admits that a decision *could* "be overruled just because it is terribly wrong," though the dissent does not explain when that would be so.

V-A-2. Even if the dissent were correct in arguing that an egregiously wrong decision should (almost) never be overruled unless its mistake is later highlighted by "major legal or factual changes," reexamination of *Roe* and *Casey* would be amply justified. We have already mentioned a number of post-*Casey* developments, but the most profound change may be the failure of the *Casey* plurality's call for "the contending sides" in the controversy about abortion "to end their national division." That has not happened, and there is no reason to think that another decision sticking with *Roe* would achieve what *Casey* could not.

The dissent, however, is undeterred. It contends that the "very controversy surrounding *Roe* and *Casey*" is an important *stare decisis* consideration that requires upholding those precedents. The dissent characterizes *Casey* as a "precedent about precedent" that is permanently shielded from further evaluation under traditional *stare decisis* principles. But as we have explained, *Casey* broke new ground when it treated the national controversy provoked by *Roe* as a ground for refusing to reconsider that decision, and no subsequent case has relied on that factor. Our decision today simply applies longstanding *stare decisis* factors instead of applying a version of the doctrine that seems to apply only in abortion cases.

V-A-3. Finally, the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed "potential life." Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by "appeals to a broader right to autonomy." It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us

to consider like reliance and workability are different for these cases than for our abortion jurisprudence.

V-B-1. We now turn to the concurrence in the judgment, which reproves us for deciding whether *Roe* and *Casey* should be retained or overruled. …

V-A-3. The concurrence would "leave for another day whether to reject any right to an abortion at all," but "another day" would not be long in coming. …

[T]he concurrence's quest for a middle way would only put off the day when we would be forced to confront the question we now decide. The turmoil wrought by *Roe* and *Casey* would be prolonged. It is far better—for this Court and the country—to face up to the real issue without further delay.

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

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

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson v. Skrupa* (1963). That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance.

A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." *Heller v. Doe* (1993). It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability. …

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

The judgment of the 5th Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Thomas, concurring.

…As I have previously explained, "substantive due process" is an oxymoron that "lack[s] any basis in the Constitution." "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." [I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold v.*

Connecticut (1965), *Lawrence v. Texas* (2003), and *Obergefell v. Hodges* (2015). Because any substantive due process decision is "demonstrably erroneous," *Ramos v. Louisiana* (2020) (Thomas, J., concurring in judgment), we have a duty to "correct the error" established in those precedents, *Gamble v. United States*, (2019) (Thomas, J., concurring). After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the 14th Amendment. …

Justice Kavanaugh concurring.

… On the question of abortion, the Constitution is [] neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.

Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral. The nine unelected Members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States.

Instead of adhering to the Constitution's neutrality, the Court in *Roe* took sides on the issue and unilaterally decreed that abortion was legal throughout the United States up to the point of viability (about 24 weeks of pregnancy). The Court's decision today properly returns the Court to a position of neutrality and restores the people's authority to address the issue of abortion through the processes of democratic self-government established by the Constitution. …

[Today's decision raises] the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut* (1965); *Eisenstadt v. Baird* (1972); *Loving v. Virginia* (1967); and *Obergefell v. Hodges* (2015). I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents. …

[Further], as I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the Due Process Clause or the Ex Post Facto Clause. Cf. Bouie v. City of Columbia (1964).

Chief Justice Roberts, concurring in the judgment.

We granted certiorari to decide one question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." That question is directly implicated here: Mississippi's Gestational Age Act, Miss. Code Ann. §41–41–191 (2018), generally prohibits abortion after the fifteenth week of pregnancy—several weeks before a fetus is regarded as "viable" outside the

womb. In urging our review, Mississippi stated that its case was "an ideal vehicle" to "reconsider the bright-line viability rule," and that a judgment in its favor would "not require the Court to overturn" *Roe v. Wade* (1973), and *Planned Parenthood of Southeastern Pa. v. Casey* (1992).

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

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

Both the Court's opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after fifteen weeks. A thoughtful Member of this Court once counseled that the difficulty of a question "admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case." *Whitehouse v. Illinois Central R. Co.* 366 (1955). I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case.

I therefore concur only in the judgment.

Justice Breyer, Justice Sotomayor, and Justice Kagan, dissenting.

For half a century, *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pa. v. Casey* (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. …

Roe and Casey well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans hold profoundly different views about the "moral[ity]" of "terminating a pregnancy, even in its earliest stage." *Casey*. And the Court recognized that "the

State has legitimate interests from the outset of the pregnancy in protecting" the "life of the fetus that may become a child." Id. So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a "substantial obstacle" on a woman's "right to elect the procedure" as she (not the government) thought proper, in light of all the circumstances and complexities of her own life. *Ibid.*

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. …. Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child.

Enforcement of all these draconian restrictions will also be left largely to the States' devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion. …

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. … As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold v. Connecticut* (1965); *Eisenstadt v. Baird* (1972). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence v. Texas* (2003); *Obergefell v. Hodges* (2015). They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority [less Thomas, J.] is eager to tell us…that nothing it does "cast[s] doubt on precedents that do not concern abortion." But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until *Roe*, the majority

argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain [contraceptives]." So one of two things must be true: either the majority does not really believe in its own reasoning or, if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. … The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, "contributes to the actual and perceived integrity of the judicial process" by ensuring that decisions are "founded in the law rather than in the proclivities of individuals." *Payne v. Tennessee* (1991). Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

I. We start with *Roe* and *Casey*, and with their deep connections to a broad swath of this Court's precedents. … For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.

I-A. Some half-century ago, *Roe* struck down a state law making it a crime to perform an abortion unless its purpose was to save a woman's life. … [B]y a 7-to-2 vote, the Court held that in the earlier stages of pregnancy, that contested and contestable choice must belong to a woman, in consultation with her family and doctor. The Court explained that a long line of precedents, "founded in the 14th Amendment's concept of personal liberty," protected individual decisionmaking related to "marriage, procreation, contraception, family relationships, and child rearing and education." … State could not, "by adopting one theory of life," override all "rights of the pregnant woman."

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

The Court therefore struck a balance, turning on the stage of the pregnancy at which the abortion would occur. …

In the 20 years between *Roe* and *Casey*, the Court expressly reaffirmed *Roe* on two occasions, and applied it on many more. …

Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*'s core precepts. *Casey* is in significant measure a precedent about the doctrine of precedent—until today, one of the Court's most important….

Central to that conclusion was a full-throated restatement of a woman's right to choose. Like *Roe*, *Casey* grounded that right in the 14th Amendment's guarantee of "liberty." [T]he liberty clause protects the decision of a woman confronting an unplanned pregnancy. Her decision about abortion was central… to her capacity to chart her life's course.

In reaffirming the right *Roe* recognized, the Court took full account of the diversity of views on abortion, and the importance of various competing state interests. [T]he State had, as *Roe* had held, an exceptionally significant interest in disallowing abortions in the later phase of a pregnancy. And it had an ever-present interest in "ensur[ing] that the woman's choice is informed" and in presenting the case for "choos[ing] childbirth over abortion."

So *Casey* again struck a balance, differing from *Roe*'s in only incremental ways. It retained *Roe*'s "central holding" that the State could bar abortion only after viability. The viability line, *Casey* thought, was "more workable" than any other in marking the place where the woman's liberty interest gave way to a State's efforts to preserve potential life. At that point, a "second life" was capable of "independent existence." If the woman even by then had not acted, she lacked adequate grounds to object to "the State's intervention on [the developing child's] behalf." …

We make one initial point about this analysis in light of the majority's insistence that *Roe* and *Casey*, and we in defending them, are dismissive of a "State's interest in protecting prenatal life." Nothing could get those decisions more wrong. As just described, *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman's liberty after viability. … But what *Roe* and *Casey* also recognized—which today's majority does not—is that a woman's freedom and equality are likewise involved. … In some sense, that is the difference in a nutshell between our precedents and the majority opinion. The constitutional regime we have lived in for the last 50 years recognized competing interests and sought a balance between them. The constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's).

I-B. The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in "1868, the year when the 14th Amendment was ratified"? The majority says (and with this much we agree) that the answer to this question is no. In 1868, there was no nationwide right to end a pregnancy, and no thought that the 14th Amendment provided one. …

Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century. … Second—and embarrassingly for the majority—early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before "quickening"—the point when the fetus moved in the womb. And early American law followed the common-law rule. So the criminal law of that early time might be taken as roughly consonant with Roe's and Casey's different treatment of early and late abortions. Better, then, to move forward in time. On the other side of

1868, the majority occasionally notes that many States barred abortion up to the time of Roe. That is convenient for the majority, but it is window dressing. As the same majority (plus one) just informed us, "post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." New York State Rifle & Pistol Assn., Inc.. …

The majority's core legal postulate, then, is that we in the 21st century must read the 14th Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the 14th Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the 14th Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the 14th Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Those responsible for the original Constitution, including the 14th Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

Casey itself understood this point, as will become clear. It recollected with dismay a decision this Court issued just five years after the 14th Amendment's ratification, approving a State's decision to deny a law license to a woman and suggesting as well that a woman had no legal status apart from her husband. "There was a time," *Casey* explained, when the Constitution did not protect "men and women alike." But times had changed. … Now, "[t]he Constitution protects all individuals, male or female," from "the abuse of governmental power" or "unjustified state interference."

So how is it that, as *Casey* said, our Constitution, read now, grants rights to women, though it did not in 1868? …

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. "The Founders," we recently wrote, "knew they were writing a document designed to apply to ever-changing circumstances over centuries." *NLRB v. Noel Canning* (2014). Or in the words of the great Chief Justice John Marshall, our Constitution is "intended to endure for ages to come," and must adapt itself to a future "seen dimly," if at all. *McCulloch v. Maryland* (1819). … And over the course of our history, this Court has taken up the Framers' invitation. …

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the 14th Amendment—the guarantees of "liberty" and "equality" for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example *Obergefell* used a few years ago. The Court there confronted a claim, based on *Washington v. Glucksberg* (1997), that the 14th Amendment "must be defined in a most circumscribed manner, with central reference to specific historical practices"—exactly the view

today's majority follows. And the Court specifically rejected that view. … The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the 14th Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." At least, that idea is what the majority *sometimes* tries to convey. At other times, the majority (or, rather, most of it) tries to assure the public that it has no designs on rights (for example, to contraception) that arose only in the back half of the 20th century—in other words, that it is happy to pick and choose, in accord with individual preferences. … Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. *Ibid.* Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. …

All that is what *Casey* understood. *Casey* explicitly rejected the present majority's method. "[T]he specific practices of States at the time of the adoption of the 14th Amendment," *Casey* stated, do not "mark[ ] the outer limits of the substantive sphere of liberty which the 14th Amendment protects." To hold otherwise—as the majority does today—"would be inconsistent with our law." Why? Because the Court has "vindicated [the] principle" over and over that (no matter the sentiment in 1868) "there is a realm of personal liberty which the government may not enter"—especially relating to "bodily integrity" and "family life."

The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination.

And eliminating that right [to bodily autonomy and personal decision-making], we need to say before further describing our precedents, is not taking a "neutral" position, as Justice Kavanaugh tries to argue. His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being "scrupulously neutral" if it allowed New York and California to ban all the guns they want? … [T]he Court does not act "neutrally" when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers. …

So too, *Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children—and crucially, whether and when to have children. … So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of

liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays… But the sentiments of 1868 alone do not and cannot "rule the present."

Casey similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the 14th Amendment and wrote the state laws of the time did not view women as full and equal citizens. ... But that could not be true any longer: The State could not now insist on the historically dominant "vision of the woman's role." And equal citizenship, *Casey* realized, was inescapably connected to reproductive rights. …

For much that reason, *Casey* made clear that the precedents *Roe* most closely tracked were those involving contraception. [T]he views of others could not automatically prevail against a woman's right to control her own body and make her own choice about whether to bear, and probably to raise, a child. When an unplanned pregnancy is involved—because either contraception or abortion is outlawed—"the liberty of the woman is at stake in a sense unique to the human condition." *Id*. No State could undertake to resolve the moral questions raised "in such a definitive way" as to deprive a woman of all choice.

Faced with all these connections between *Roe/Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) … So the majority depicts today's decision as "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright* (1944) (Roberts, J., dissenting). Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

The first problem with the majority's account comes from Justice Thomas concurrence—which makes clear he is not with the program. … "[W]e have a duty" to "overrul[e] these demonstrably erroneous decisions." So at least one Justice is planning to use the ticket of today's decision again and again and again.

Even placing the concurrence to the side, the assurance in today's opinion still does not work. Or at least that is so if the majority is serious about its sole reason for overturning *Roe* and *Casey*: the legal status of abortion in the 19th century. Except in the places quoted above, the state interest in protecting fetal life plays no part in the majority's analysis. To the contrary, the majority takes pride in not expressing a view "about the status of the fetus." The majority's departure from *Roe* and *Casey* rests instead—and only—on whether a woman's decision to end a pregnancy involves any 14th Amendment liberty interest (against which *Roe* and *Casey* balanced the state interest in preserving fetal life). According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then [protect the rights recognized in *Griswold, Skinner v. Oklahoma* (1942)*, Lawrence, Obergefell,* and *Loving*.] So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its

opinion today does not threaten—does not even "undermine"—any number of other constitutional rights. …

… Even before we get to *stare decisis*, we dissent.

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

Stare decisis also "contributes to the integrity of our constitutional system of government" by ensuring that decisions "are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery* (1986). … That act personified an American tradition. Judges' personal preferences do not make law; rather, the law speaks through them.

That means the Court may not overrule a decision, even a constitutional one, without a "special justification." *Gamble v. United States* (2019). *Stare decisis* is, of course, not an "inexorable command"; it is sometimes appropriate to overrule an earlier decision. *Pearson v. Callahan* (2009). But the Court must have a good reason to do so over and above the belief "that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.* (2014). "[I]t is not alone sufficient that we would decide a case differently now than we did then." *Kimble v. Marvel Entertainment, LLC* (2015).

The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling *Roe* and *Casey*. But none does…. In some, the Court only partially modified or clarified a precedent. And in the rest, the Court relied on one or more of the traditional *stare decisis* factors in reaching its conclusion. The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. (The majority is wrong when it says that we insist on a test of changed law or fact alone, although that is present in most of the cases.) None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives…. The point of a right is to shield individual actions and decisions "from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette.* However divisive, a right is not at the people's mercy.

In any event "[w]hether or not we...agree" with a prior precedent is the beginning, not the end, of our analysis—and the remaining "principles of *stare decisis* weigh heavily against overruling" *Roe* and *Casey*. *Dickerson v. United States* (2000). *Casey* itself applied those principles, in one of this Court's most important precedents about precedent. After assessing the traditional *stare decisis* factors, *Casey* reached the only conclusion possible—that *stare decisis* operates powerfully here. It still does. …

The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

II-A. Contrary to the majority's view, there is nothing unworkable about *Casey*'s "undue burden" standard. Its primary focus on whether a State has placed a "substantial obstacle" on a

woman seeking an abortion is "the sort of inquiry familiar to judges across a variety of contexts." *June Medical Services L. L. C. v. Russo* (2020) (Roberts, C. J., concurring in judgment). And it has given rise to no more conflict in application than many standards this Court and others unhesitatingly apply every day.

General standards, like the undue burden standard, are ubiquitous in the law, and particularly in constitutional adjudication. When called on to give effect to the Constitution's broad principles, this Court often crafts flexible standards that can be applied case-by-case to a myriad of unforeseeable circumstances. See *Dickerson* ("No court laying down a general rule can possibly foresee the various circumstances" in which it must apply). …

Anyone concerned about workability should consider the majority's substitute standard. The majority says a law regulating or banning abortion "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." And the majority lists interests like "respect for and preservation of prenatal life," "protection of maternal health," elimination of certain "medical procedures," "mitigation of fetal pain," and others. This Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur, before the 14th Amendment's protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment's protection of liberty and equality? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? And how about the use of dilation and evacuation or medication for miscarriage management? …

In short, the majority does not save judges from unwieldy tests or extricate them from the sphere of controversy. To the contrary, it discards a known, workable, and predictable standard in favor of something novel and probably far more complicated. It forces the Court to wade further into hotly contested issues, including moral and philosophical ones, that the majority criticizes *Roe* and *Casey* for addressing.

II-B. When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision's original basis. … Most "successful proponent[s] of overruling precedent," this Court once said, have carried "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez*. Certainly, that was so of the main examples the majority cites: *Brown v. Board of Education* (1954) and *West Coast Hotel Co. v. Parrish* (1937). But it is not so today. …

II-B-1. Subsequent legal developments have only reinforced *Roe* and *Casey*. The Court has continued to embrace all the decisions *Roe* and *Casey* cited, decisions which recognize a constitutional right for an individual to make her own choices about "intimate relationships, the family," and contraception. … As discussed earlier, the Court relied on *Casey* to hold that the 14th Amendment protects same-sex intimate relationships. See *Lawrence.* The Court later

invoked the same set of precedents to accord constitutional recognition to same-sex marriage. See *Obergefell*. … While the majority might wish it otherwise, *Roe* and *Casey* are the very opposite of "'obsolete constitutional thinking.'" *Agostini v. Felton* (1997).

Moreover, no subsequent factual developments have undermined *Roe* and *Casey*. … Today, as noted earlier, the risks of carrying a pregnancy to term dwarf those of having an abortion. Experts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase. …

Mississippi's own record illustrates how little facts on the ground have changed since *Roe* and *Casey*, notwithstanding the majority's supposed "modern developments." [Dissent documents lack of medical care and social welfare services in Mississippi.] We do not say that every State is Mississippi, and we are sure some have made gains since Roe and Casey in providing support for women and children. But a state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in women's and children's health.

The only notable change we can see since *Roe* and *Casey* cuts in favor of adhering to precedent: It is that American abortion law has become more and more aligned with other nations. … In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today.

In sum, the majority can point to neither legal nor factual developments in support of its decision. Nothing that has happened in this country or the world in recent decades undermines the core insight of *Roe* and *Casey*. It continues to be true that, within the constraints those decisions established, a woman, not the government, should choose whether she will bear the burdens of pregnancy, childbirth, and parenting.

II-B-2. In support of its holding, the majority invokes two watershed cases overruling prior constitutional precedents: *West Coast Hotel Co. v. Parrish* and *Brown v. Board of Education*. But those decisions, unlike today's, responded to changed law and to changed facts and attitudes that had taken hold throughout society. As *Casey* recognized, the two cases are relevant only to show—by stark contrast—how unjustified overturning the right to choose is.

West Coast Hotel overruled *Adkins v. Children's Hospital of D. C* (1923), and a whole line of cases beginning with *Lochner v. New York* (1905). *Adkins* had found a state minimum-wage law unconstitutional because, in the Court's view, the law interfered with a constitutional right to contract. But then the Great Depression hit, bringing with it unparalleled economic despair. … The havoc the Depression had worked on ordinary Americans, the Court noted, was "common knowledge through the length and breadth of the land." … There was no escaping the need for *Adkins* to go.

Brown v. Board of Education overruled *Plessy v. Ferguson* (1896), along with its doctrine of "separate but equal." By 1954, decades of Jim Crow had made clear what *Plessy*'s turn of phrase actually meant: "inherent[ ] [in]equal[ity]." *Brown*. … By that point, too, the law had begun to reflect that understanding. In a series of decisions, the Court had held unconstitutional public graduate schools' exclusion of black students. See, *e.g.*, *Sweatt v. Painter*

(1950); *Sipuel v. Board of Regents of Univ. of Okla.* (1948) (*per curiam*); *Missouri ex rel. Gaines v. Canada* (1938). The logic of those cases, *Brown* held, "appl[ied] with added force to children in grade and high schools." Changed facts and changed law required *Plessy*'s end.

The majority says that in recognizing those changes, we are implicitly supporting the half-century interlude between *Plessy* and *Brown*. That is not so. First, if the *Brown* Court had used the majority's method of constitutional construction, it might not ever have overruled *Plessy*, whether 5 or 50 or 500 years later. *Brown* thought that whether the ratification-era history supported desegregation was "[a]t best...inconclusive." But even setting that aside, we are not saying that a decision can *never* be overruled just because it is terribly wrong. Take *West Virginia Bd. of Ed. v. Barnette*, which the majority also relies on. That overruling took place just three years after the initial decision, before any notable reliance interests had developed. It happened as well because individual Justices changed their minds, not because a new majority wanted to undo the decisions of their predecessors. Both *Barnette* and *Brown*, moreover, share another feature setting them apart from the Court's ruling today. They protected individual rights with a strong basis in the Constitution's most fundamental commitments; they did not, as the majority does here, take away a right that individuals have held, and relied on, for 50 years. To take *that* action based on a new and bare majority's declaration that two Courts got the result egregiously wrong? And to justify that action by reference to *Barnette*? Or to *Brown*—a case in which the Chief Justice also wrote an (11-page) opinion in which the entire Court could speak with one voice? These questions answer themselves.

Casey itself addressed both *West Coast Hotel* and *Brown* and found that neither supported *Roe*'s overruling. …

That is just as much so today, because *Roe* and *Casey* continue to reflect, not diverge from, broad trends in American society. It is, of course, true that many Americans, including many women, opposed those decisions when issued and do so now as well. Yet the fact remains: *Roe* and *Casey* were the product of a profound and ongoing change in women's roles in the latter part of the 20th century. … By 1992, when the Court decided *Casey*, the traditional view of a woman's role as only a wife and mother was "no longer consistent with our understanding of the family, the individual, or the Constitution." Under that charter, *Casey* understood, women must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions. Nothing since *Casey*—no changed law, no changed fact—has undermined that promise.

II-C. The reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests those decisions have created. The Court adheres to precedent not just for institutional reasons, but because it recognizes that stability in the law is "an essential thread in the mantle of protection that the law affords the individual." *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.* (1981) (Stevens, J., concurring). So, when overruling precedent "would dislodge [individuals'] settled rights and expectations," *stare decisis* has "added force." *Hilton v. South Carolina Public Railways Comm'n* (1991). *Casey* understood that to deny individuals' reliance on *Roe* was to "refuse to face the fact[s]." Today the majority refuses to face the facts. "The most striking feature of the [majority] is the absence

of any serious discussion" of how its ruling will affect women. By characterizing *Casey*'s reliance arguments as "generalized assertions about the national psyche," it reveals how little it knows or cares about women's lives or about the suffering its decision will cause.

In *Casey*, the Court observed that for two decades individuals "have organized intimate relationships and made" significant life choices "in reliance on the availability of abortion in the event that contraception should fail." Over another 30 years, that reliance has solidified. For half a century now, in *Casey*'s words, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*'s and *Casey*'s protections.

The disruption of overturning *Roe* and *Casey* will therefore be profound. Abortion is a common medical procedure and a familiar experience in women's lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of American women will have an abortion before the age of 45. Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. … Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life.

The majority's response to these obvious points exists far from the reality American women actually live. The majority proclaims that "'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.'" The facts are: 45 percent of pregnancies in the United States are unplanned. Even the most effective contraceptives fail, and effective contraceptives are not universally accessible. Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. The Mississippi law at issue here, for example, has no exception for rape or incest, even for underage women. Finally, the majority ignores, as explained above, that some women decide to have an abortion because their circumstances change during a pregnancy. Human bodies care little for hopes and plans. …

Finally, the expectation of reproductive control is integral to many women's identity and their place in the Nation. That expectation helps define a woman as an "equal citizen[ ]," with all the rights, privileges, and obligations that status entails. It reflects that she is an autonomous person, and that society and the law recognize her as such.…

The Court's failure to perceive the whole swath of expectations *Roe* and *Casey* created reflects an impoverished view of reliance. According to the majority, a reliance interest must be "very concrete," like those involving "property" or "contract." While many of this Court's cases addressing reliance have been in the "commercial context," none holds that interests must be analogous to commercial ones to warrant *stare decisis* protection. …

More broadly, the majority's approach to reliance cannot be reconciled with our Nation's understanding of constitutional rights. The majority's insistence on a "concrete," economic showing would preclude a finding of reliance on a wide variety of decisions recognizing

constitutional rights—such as the right to express opinions, or choose whom to marry, or decide how to educate children. …

All those rights, like the one here, also have a societal dimension, because of the role constitutional liberties play in our structure of government. See, *e.g.*, *Dickerson*, (recognizing that *Miranda* "warnings have become part of our national culture" in declining to overrule *Miranda v. Arizona* (1966)). Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight. …

After today, young women will come of age with fewer rights than their mothers and grandmothers had. The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away. The majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision.

II-D. One last consideration counsels against the majority's ruling: the very controversy surrounding *Roe* and *Casey*. The majority accuses *Casey* of acting outside the bounds of the law to quell the conflict over abortion—of imposing an unprincipled "settlement" of the issue in an effort to end "national division." But that is not what *Casey* did. As shown above, *Casey* applied traditional principles of *stare decisis*—which the majority today ignores—in reaffirming *Roe*. *Casey* carefully assessed changed circumstances (none) and reliance interests (profound).

… Here, more than anywhere, the Court needs to apply the law—particularly the law of *stare decisis*. Here, we know that citizens will continue to contest the Court's decision, because "[m]en and women of good conscience" deeply disagree about abortion. *Casey.* When that contestation takes place—but when there is no legal basis for reversing course—the Court needs to be steadfast, to stand its ground. That is what the rule of law requires. And that is what respect for this Court depends on. …

… And as *Casey* recognized, weakening *stare decisis* in a hotly contested case like this one calls into question this Court's commitment to legal principle. It makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, today's decision takes aim, we fear, at the rule of law.

III. "Power, not reason, is the new currency of this Court's decision making." *Payne* (Marshall, J., dissenting). … Since the right's recognition (and affirmation), nothing has changed to support what the majority does today. Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court.

Mississippi—and other States too—knew exactly what they were doing in ginning up new legal challenges to *Roe* and *Casey*. The 15-week ban at issue here was enacted in 2018. … The year after enacting the law under review, the State passed a 6-week restriction. A state senator who championed both Mississippi laws said the obvious out loud. "[A] lot of people thought," he explained, that "finally, we have" a conservative Court "and so now would be a good time to start testing the limits of *Roe*." In its petition for certiorari, the State had exercised a smidgen of restraint. It had urged the Court merely to roll back *Roe* and *Casey*, specifically

assuring the Court that "the questions presented in this petition do not require the Court to overturn" those precedents. But as Mississippi grew ever more confident in its prospects, it resolved to go all in. It urged the Court to overrule *Roe* and *Casey*. Nothing but everything would be enough. …

Casey itself made the last point in explaining why it would not overrule *Roe*—though some members of its majority might not have joined *Roe* in the first instance. Just as we did here, *Casey* explained the importance of *stare decisis*; the inappositeness of *West Coast Hotel* and *Brown*; the absence of any "changed circumstances" (or other reason) justifying the reversal of precedent. "[T]he Court," *Casey* explained, "could not pretend" that overruling *Roe* had any "justification beyond a present doctrinal disposition to come out differently from the Court of 1973." And to overrule for that reason? Quoting Justice Stewart, *Casey* explained that to do so—to reverse prior law "upon a ground no firmer than a change in [the Court's] membership"—would invite the view that "this institution is little different from the two political branches of the Government." No view, *Casey* thought, could do "more lasting injury to this Court and to the system of law which it is our abiding mission to serve." *Ibid.* For overruling *Roe*, *Casey* concluded, the Court would pay a "terrible price." …

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

Abortion Cases During the 2023-2024 Term

The Supreme Court did not address the merits of any cases regarding abortion during the 2023 Term. However, in the post-*Dobbs* world, litigation over continued efforts by states to restrict access to reproductive choice is certain to continue.

In *FDA v. Alliance for Hippocratic Medicine* (2024), the Court dismissed on standing grounds a challenge to the FDA regulations surrounding the use of mifepristone, the drug commonly used in first trimester medication abortions—by far the most common type of abortion in the United States. While the current case is dismissed, the organizations behind the challenge will continue to look for ways to challenge the regulations.

In *Moyle v. United States* (2024), the Court dismissed an appeal from an abortion case from Idaho as improvidently granted. The issue in the case is certain to return to the Court, either in this case itself or other subsequent litigation. The federal Emergency Medical Treatment and Labor Act (EMTALA) requires hospitals receiving Medicare funds to provide "necessary stabilizing treatment" for an "emergency medical condition." The Department of Health and Human Services issued guidance rulings stating that "stabilizing treatment" includes providing abortions to pregnant women who enter emergency rooms with serious, but not life threatening, medical conditions. Following *Dobbs*, Idaho enacted a statute banning abortions in all circumstances except when necessary to prevent the death of the pregnant woman, when the pregnancy resulted from rape or incest, or it was an ectopic or molar pregnancy.

The Biden administration sued to enjoin operation of the Idaho statute, claiming that it was preempted by the EMTALA. The District Court enjoined the statute and the state appealed. A panel of the 9th Circuit lifted the injunction, but the but the full 9th Circuit granted an en banc hearing, voiding the panel decision. The Supreme Court, in a highly controversial decision, agreed to review the case on an expedited basis by granting certiorari before judgment. The court also temporarily allowed Idaho to enforce its abortion ban.

The Court heard oral argument on the merits of the state's challenge to HHS's interpretation of EMTALA, but then issued a *per curiam* opinion dismissing its earlier decision to hear the case by certiorari before judgment as improvidently granted. The Court restored the lower-court order enjoining Idaho not to prevent hospitals from providing emergency abortions to protect against serious harm to the health of the mother. This case (or another challenging the HHS guidance) is virtually certain to return to the Supreme Court.

Part VIII. Constitutionality of Same-Sex Marriage; Section B. A Fundamental Right to Marry

[Insert following Amar note on page 1011.]

Note: *Bostock v. Clayton County* (2020)

In *Bostock v. Clayton County* (2020) the Supreme Court held that job discrimination against gay and transgender persons because of their sexual orientation constituted "sex" discrimination within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1). The majority opinion was written by Justice Gorsuch, joined by Chief Justice Roberts, and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Gorsuch employed a strict textual analysis. He concluded that the clear meaning of the word "sex" in the statute would dictate that employees who are treated differently because of their biological sex are covered by the statute—disregarding the fact that the legislative history of the statute is quite clear that no one in 1964 intended the statute to protect persons from discrimination on the basis of sexual orientation and subsequent legislative efforts to explicitly protect people from discrimination on the basis of sexual orientation had always failed. Justice Gorsuch can be expected to continue his rigid textualist approach and disregard of legislative history in future cases. Dissenting Justices Thomas, Alito, and Kavanaugh essentially accused the majority of re-writing the statute.

If gay and transgender persons are within the group protected against sex discrimination by this statute, the question immediately arises whether or not they are protected by the Equal Protection Clause as well. The Court has recognized sex as a quasi-suspect class and applied intermediate scrutiny to classifications that categorize on the basis of male or female. *Craig v. Boren* (1976). While the Court has struck down statutes that discriminate on the basis of sexual identity, see, e.g., *Romer v. Evans* (1996), the Court has been obscure in recognizing gay and transgender persons as members of a protected class and in identifying the level of scrutiny to be used when evaluating classifications that are alleged to discriminate against them. *Obergefell v. Hodges* (2015) relied primarily on a due process analysis of marriage as a fundamental right. It did not clearly resolve the status of sexual orientation under the Equal Protection Clause. *Bostock* is certain to lead to litigation seeking to clarify this unresolved issue.

Chapter 11. Freedom of Speech and Press

X Part II, Section V-A-5: Cases Finding Vagueness or Overbreadth or Both

[Insert on page 1134 before Vagueness and Overbreadth Hypothetical.]

Note: *Moody v. Netchoice, LLC* (2024)

In *Moody v. Netchoice, LLC*, the Court considered two cases making facial challenges to statutes that limited the ability of social media companies to regulate content posted on their platforms. The sponsors of the Florida and Texas legislation stated that they had introduced these statutes because of their beliefs that sites were penalizing conservative political views and therefore created statutory requirements to make it more difficult for sites to restrict user access:

> Facebook and YouTube [and others] make some of those decisions in conformity with content-moderation policies they call Community Standards and Community Guidelines. Those rules list the subjects or messages the platform prohibits or discourages—say, pornography, hate speech, or misinformation on select topics. The rules thus lead Facebook and YouTube to remove, disfavor, or label various posts based on their content…. The States' laws differ in the entities they cover and the activities they limit. But both contain content-moderation provisions, restricting covered platforms' choices about whether and how to display user-generated content to the public. And both include individualized-explanation provisions, requiring platforms to give reasons for particular content-moderation choices.

Trade associations representing the platforms brought facial challenges and District courts in both States entered preliminary injunctions, halting the laws' enforcement. The 11th Circuit affirmed, noting that governmental regulation of editorial discretion implicates the 1st Amendment. The 5th Circuit disagreed, holding that the platforms' content-moderation activities are "not speech" at all, and so do not implicate the First Amendment.

The Supreme Court was concerned about the request for a *facial* ban given the wide range of activities in which the social media sites engage. The bulk of the opinion was devoted to an explication of the law concerning facial challenges. It vacated the decisions of both circuits, holding that the district courts had not analyzed the propriety of granting a facial challenge and suggesting that applied challenges would have been more appropriate. However, it then clearly laid out the method of analysis to be employed in evaluating the applied challenges. The majority was clear in its instructions, specifically directed to the 5th Circuit, that there were in fact 1st Amendment implications arising from such statutes. Platforms like Facebook and YouTube engage in expression by making editorial choices about what third-party content to display and how to present it. In doing so, they create distinctive compilations of expression, similar to the decisions made by traditional print publishers and editors.

Justice Kagan wrote for a five person majority, joined by Roberts, C.J., and Sotomayor, Kavanaugh, and Barrett, JJ. Justice Jackson concurred and joined in part, while Thomas, Alito, and Gorsuch, JJ., concurred in judgment only. Justice Kagan noted, "[First Amendment]

principle[s] do[ ] not change because the curated compilation has gone from the physical to the virtual world." The platforms' editorial decisions—whether to include, exclude, prioritize, or label content—are expressive activities entitled to constitutional protection. "The editorial function itself is an aspect of speech." Thus, government efforts to alter editorial decisions of social media sites are subject to judicial review under the First Amendment.

The majority opinion left no doubt that certain aspects of the statutes violated the 1st Amendment: "a State may not interfere with private actors' speech to advance its own vision of ideological balance." The issue on remand is whether or not the statute was unconstitutional on its face or only as applied to certain of the sites' activities: "The question is whether "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."

Justices Thomas, Alito, and Gorsuch objected to the majority opinion in effect reaching the merits on some of the claims when all agreed that the case should be remanded for a detailed analysis of the propriety of a facial claim. Justice Kagan replied that it would be pointless to remand the case to the 5th Circuit if they were going to improperly apply the law again.

Part II, Section V-D: Content Discrimination

[*Insert on page 1152* after Note: Reed v. Town of Gilbert, Arizona*, before Section VI, Defamation and Infliction of Emotional Distress.*]

Note: *Shurtleff v. City of Boston* (2022)

The Court clarified the boundaries between government speech and private expression in *Shurtleff v. City of Boston* (2022), unanimously holding that a city could not refuse to permit a private organization to fly a Christian flag on city property when that organization was conducting an event there. The Court concluded that the flag did not convey a governmental message in the context of surrounding circumstances and that the city's refusal to permit the flag's display constituted viewpoint discrimination.

Seeking to avoid a violation of the Establishment Clause, the city of Boston had refused to allow the organization to fly the flag at City Hall Plaza even though it authorized that group to conduct a ceremony at the Plaza celebrating the civic and social contributions of Christians. The city previously had approved the display of fifty different types of flags for 284 private ceremonies at the Plaza and never had denied any request to raise a flag. The District Court and Court of Appeals had rejected the plaintiff's free speech claim, agreeing with the city that display of the flag would constitute an expression of governmental speech.

Acknowledging that the "boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program," the Court explained that it must mark the line with "a holistic inquiry…to determine whether the government intends to speak for itself or to regulate private expression." In making this inquiry, a court may consider "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government

has actively shaped or controlled the expression." Although the Court recognized that flags flown on public property usually convey a governmental message, the Court concluded that the city's long practice of permitting private organizations using public property for brief periods of time to fly their own flags tipped the scale, particularly since the city routinely approved such displays and lacked any "written policies or clear internal guidance…about what flags groups could fly and what those flags would communicate." Although most other flags had been flown by organizations whose values or views the city approved or even had endorsed, the Court explained that "we do not settle this dispute by counting noses –or, rather, counting flags" because the city had informed the public that it would "accommodate all applicants" who wanted to hold events on City Hall Plaza.

Since the display of the flag did not constitute government speech, the Court concluded that the city unconstitutionally discriminated on the basis of viewpoint by refusing to permit the display solely because the Christian flag promoted a particular religion.

Justice Alito, in a concurring opinion joined by Justices Thomas and Gorsuch, advocated a stricter test for identifying government speech, arguing that "government speech occurs if –but only if – a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech."

Justice Gorsuch, in a concurring opinion joined by Justice Thomas, explained why the city and the District Court erroneously relied on the *Lemon* test. Pointing out that no member of the Court had held that the Establishment Clause prevented the city from permitting display of the Christian flag, Gorsuch explained why he regarded *Lemon* lacked any remaining validity. Justice Gorsuch's concurring opinion is discussed more fully in the supplement to the religion chapter.

Part II, Section XI, Indecent Speech.
[*Insert on Page 1259, at end of* City of Los Angeles v. Alameda Books, Inc*., before Section XII, Fighting Words*.]

Note: *Iancu v. Brunetti* (2019)

Erik Brunetti, described by the Court as an "artist and entrepreneur," founded a clothing line that uses the trademark "FUCT." The Patent and Trademark Office (PTO), by statute, administers a federal registration system for trademarks. Brunetti sought to register "FUCT" for his clothing line with the PTO. He was denied registration because the Act instructs the PTO to refuse registration to certain marks, including those that "[c]onsist of or comprise[] immoral[] or scandalous matter." 15 USC s.1052(a). Owners of trademarks are not required to register them, but registration carries with it significant additional advantages, including prima facie evidence of the validity of the mark and "constructive notice of the registrant's claim of ownership."

Brunetti sued the director of the patent office, lost in the Federal Circuit, and petitioned for certiorari. Brunetti's challenge had been facial, claiming the statute was unconstitutional on

its face because the key terms were unconstitutionally overbroad—covering too much protected speech. The Supreme Court of the United States explained, perhaps apologetically: "As usual when a lower court has invalidated a federal statute, we granted certiorari."

Two terms before, in *Matal* v. *Tam,* the Court had considered another PTO ban under a related statute. In *Tam*, the Court struck down a PTO ban on marks that "'disparage any person[], living or dead.'" The Court divided 4 to 4. The eight Justices disagreed on whether the ban was an unconstitutional condition on a government benefit or a simple government restriction on speech. But they agreed on a core postulate of free speech law, which in turn the Court also applied to the FUCT denial: "The government may not discriminate against speech based on the ideas or opinions it conveys. See *Rosenbeger* v. *Rector and Visitors of Univ. of Va* (1995) (explaining that viewpoint discrimination is an "egregious form of content discrimination" and is "presumptively unconstitutional"). So, whatever the appropriate category, in the *Matal* v. *Tam* "disparagement" case or the new FUCT case, all the Justices agreed that the ban was an impermissible case of viewpoint discrimination and so was unconstitutional. "First, if a trademark registration bar is viewpoint-based, it is unconstitutional. … And second, the disparagement bar was viewpoint-based."

Following these rules and applying them to the FUCT case, the Court found the ban on immoral or scandalous expression was viewpoint based and unconstitutional. Justice Kagan, joined by Thomas, Ginsburg, Alito, Gorsuch and Kavanaugh, JJ., noted:

> The meanings of "immoral" and "scandalous" are not mysterious, but resort to some dictionaries still helps to lay bare the problem. When is expressive material "immoral"? According to a standard definition, when it is "inconsistent with rectitude, purity, or good morals"; "wicked"; or "vicious." Webster's New International Dictionary 1246 (2d ed. 1949). Or again, when it is "opposed to or violating morality"; or "morally evil." Shorter Oxford English Dictionary.

The 5-justice majority also found the term "scandalous" imposed an unconstitutional restriction on speech.

In addition to looking at the words and their definitions, the Court also looked at how the PTO had applied them to previous applications. Marks conveying approval of drug use (for example, "YOU CAN'T SPELL HEALTH CARE WITHOUT THC FOR PAIN-RELIEF MEDICATION"), had been denied approval, while antidrug messages had been approved ("DARE TO SAY NO TO DRUGS"). "BONG HITS FOR 4 JESUS" was denied because it connected Jesus with illegal drug use, while "PRAISE THE LORD" or "JESUS DIED FOR YOU" were approved.

Though all the Justices agreed "immoral" was clear and beyond repair, three dissenters suggested that "scandalous" was sufficiently ambiguous to quality for surgical repair by the

Court. The majority said this would in effect be writing a new statute, which was beyond their power.

The law on when the Court can and should interpret a statute to give it a saving construction is a mess. For a discussion of the possible statutory construction to save the "scandalous" provision statute from unconstitutionality see, e.g., the opinion of Justice Sotomayor. (It may be noted that when the Court held the constitutional test for obscenity needed changing, it applied the revised test to the unchanging federal obscenity statute at three different times, interpreting it to mean three different things.)

Justice Alito concurred. He noted that in many countries "with constitutions or legal traditions that claim to protect freedom of speech, serious viewpoint discrimination is now tolerated, and such discrimination has become increasingly prevalent in this country." Since free speech was under attack, the Court needed to remain firm. Still, Congress could draft a new statute to deal with scandalous speech. "Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas."

Chief Justice Roberts concurred as to the statute's ban on "immoral" marks, but dissented as to the ban on "scandalous" marks. He said that "standing alone, the term 'scandalous' need not be understood to reach marks that offend because of the ideas they convey; it can be read more narrowly to bar marks that offend because of their mode of expression…." For the Chief Justice, a ban on scandalous marks would not offend the First Amendment. Unregistered marks could still be used in commerce to identify goods. "No speech is being restricted; no one is being punished." The owners of the marks would only be denied certain benefits associated with registration. In addition, the Government "has an interest in not associating itself with trademarks whose content is obscene, vulgar, or profane."

Justice Breyer, concurring in part and dissenting in part, departed more than any other justice from First Amendment doctrine in its current incarnation. In his view, "a category-based approach to the First Amendment" could not "adequately resolve the problem before us." He would place less emphasis on trying to decide "if the statute at issue was 'content discrimination,' 'viewpoint discrimination,' 'commercial speech,' 'government speech,' etc.…After all, these rules are not absolute.…Even when we consider a regulation that is ostensibly 'viewpoint discriminatory,' we sometimes find the regulation to be constitutional after weighing the competing interests involved. See, *e.g., Morse v Frederick* (2007) [The "Bong Hits for Jesus" case]."

According to Breyer, the Court "has sometimes applied these rules—especially the category of 'content discrimination'—too rigidly. In a number of cases, the Court has struck down what I believe are ordinary, valid regulations that pose little or no threat to free speech

interests that the First Amendment protects. See, *Janus v. State, County, and Municipal Employees* (2018); *Sorrell v. IMS Health, Inc*. (2011) (Breyer, J., dissenting.)"

After considering categories, Justice Breyer concluded: "The trademark statute does not clearly fit within any of the existing outcome-determinative categories Why then should we rigidly adhere to these categories?" Justice Breyer suggested instead that "[w]e should focus on the interests the First Amendment protects and ask a more basic proportionality question: does 'the regulation at issue wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives'"? His was essentially a modified balancing test with a thumb on the scale in favor of protecting substantial First Amendment interests.

In considering the competing interests, Justice Breyer noted that businesses "were free to use highly vulgar or obscene works on their products, and even to use the words next to registered marks, provided [the owner of the mark] is willing to forgo the benefits of registration."

He considered, by way of contrast, the Government's interests:

1. Registering a mark tends to promote it. The government has an interest in not promoting "scandalous" words, as the narrowly defined.

2. Attention grabbing words may distract consumers and disrupt commerce.

3. They may lead to the creation of public spaces that many may find repellant. "(Just think about how you might react if you saw someone wearing a t-shirt or using a product emblazoned with an odious racial epithet.) The government thus has an interest in seeking to disincentivize the use of such words in commerce by denying the benefit of trademark registration."

4. Though some consumers may be attracted to products with highly vulgar or obscene words as their trademark, others may believe such words should not be displayed in public spaces where goods are sold and where children are likely to be present.

Justice Sotomayor's opinion, with which Justice Breyer joined to the extent it was consistent with his opinion, concurred in part and dissented in part. She would have given the word "scandalous" a limited meaning. Under the Court's decision, as she saw it, "Government will have no statutory basis to refuse (and thus no choice but to begin) registering marks containing the most vulgar, profane or obscene words and images imaginable."

As to "immoral" marks, Justice Sotomayor and Breyer agreed that there was no tenable way to read the statute to save it. But a limited construction of "scandalous" was, they believed, justified. For them, the majority's reading of "scandalous" was tenable but, not the only reasonable one. Instead, they would interpret "scandalous" in a non-redundant way—to cover only marks that are offensive only because of the mode in which they are expressed—a small

group of lewd words or "swear" words that cause a visceral reaction, that are not commonly used around children, and that are prohibited in comparable settings. These restrictions of particular modes of expression they said, "do not qualify as viewpoint discrimination" because "they are not by nature examples of 'government targeting … particular views taken by speakers on a subject.'"

Part II, Section XIV, Hate Speech

[*Insert on page 1286, after* Virginia v. Black *and before "*Understanding R.A.V.: Three Hypotheticals."]

Note: *Counterman v. Colorado* (2023)

In *Virginia v. Black* (2003) the Court makes reference to "true threats," which are outside the universe of protected speech. In *Counterman v. Colorado* (2023), the Court addressed the issue of when stalking and cyber-stalking can be considered the communication of a true threat. The case involved the male fan of a female musician who was obsessed with her and sent her hundreds of Facebook messages over a two-year period. Messages made reference to following her in public and included statements such as "You're not being good for human relations. Die. Don't need you," and "Staying in cyber life is going to kill you." She blocked him several times, but he created new accounts and continued sending messages. The victim was terrified and eventually went to the authorities.

Colorado charged Counterman under a statute that employed an *objective* standard to determine criminal liability. It is crime to

> "[r]epeatedly…make[ ] any form of communication with another person" **in "a manner that would cause a reasonable person to suffer serious emotional distress** and does cause that person…to suffer serious emotional distress." Colo. Rev. Stat. §18–3–602(1)(c) (2022). (Emphasis added.)

In contrast, other states employ a *subjective* standard. For example, the California stalking statute requires proof of *intent* on the part of the stalker to harm the victim:

> Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat **with the intent** to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking…. CA Penal Code 646.9(a)(2023). (Emphasis added.)

In *Counterman*, the Court ruled 7-2 that even though actual threats are unprotected, the determination of what constitutes an actual threat demands some heightened standard of proof:

> the State must prove in true-threats cases that the defendant had some understanding of his statements' threatening character. The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again guided by our precedent, we hold that a recklessness standard is enough. Given that a subjective standard here shields speech not independently entitled to protection—and indeed posing real dangers—we do not require that the State prove the defendant had any more specific intent to threaten the victim.

Under this recklessness standard, the state must prove that the person "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." The standard "involves insufficient concern with risk rather than awareness of impending harm…. [I]t means that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'"

Kagan, J., delivered the opinion of the Court, joined by Roberts, C. J., and Alito, Kavanaugh, and Jackson, JJ. Sotomayor, J., filed an opinion concurring in part and concurring in the judgment, in which Gorsuch, J., joined as to Parts I, II, III–A, and III–B. Thomas, J., filed a dissenting opinion. Barrett, J., filed a dissenting opinion, in which Thomas, J., joined.

Justice Kagan justified the ruling because of a fear of non-threatening speech possibly being chilled:

> The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs — all those may lead him to swallow words that are in fact not true threats.

Justice Sotomayor thought that adopting a recklessness standard in *this* case, which involved true threats *and* stalking was appropriate. However, she would not have adopted the recklessness standard for all true threats cases:

> I agree with the Court's conclusion that the First Amendment requires a subjective *mens rea* in true-threats cases, and I also agree that recklessness is amply sufficient for this case. Yet I would stop there, leaving for another day the question of the specific *mens rea* required to prosecute true threats generally….Especially in a climate of intense polarization, it is dangerous to allow criminal prosecutions for heated words based solely on an amorphous recklessness standard.

Given the facts of his case, Counterman can probably be convicted in a re-trial under the newly announced standard. However, some delusional stalkers may escape liability in spite of the unquestioned harm they to which they subject their victims. Justice Barrett addressed this issue directly:

> A delusional speaker may lack awareness of the threatening nature of her speech; a devious speaker may strategically disclaim such awareness; and a lucky speaker may leave behind no evidence of mental state for the government to use against her.

Justice Barrett noted that an objective standard was used to regulate commercial speech and that the *New York Times* rule only applied to public officials and issues of public concern. She noted, "A private person need only satisfy an objective standard to recover actual damages for defamation." There was no reason to provide increased protection for true threats, which she contended, "carry little value and impose great costs."

Justice Thomas joined Justice Barrett's dissent, but wrote separately to criticize the Court's use of the recklessness standard and its reliance on *New York Times v. Sullivan* (1964). He called for the Court to reconsider the *New York Times* standard, rather than "extend its flawed, policy-driven First Amendment analysis to true threats, a separate area of this Court's jurisprudence." Of the people he listed as formally criticizing *New York Times*, only Justice Gorsuch is currently on the Court.

Part II, Section XVII, Commercial Speech

[*Insert on page 1328 after* Sorrell v. IMS Health, Inc.]

National Institute of Family and Life Advocates v. Becerra
585 U.S. __ (2018)

[Majority: Thomas, J., Roberts (C.J.), Kennedy, Alito, and Gorsuch, JJ. Concurring: Kennedy, J., joined by Roberts (C.J.), Alito, and Gorsuch, JJ. Dissent: Breyer, joined by Ginsburg, Sotomayor, and Kagan, JJ.]

Justice Thomas delivered the opinion of the Court.

The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) requires clinics that primarily serve pregnant women to provide certain notices…. Licensed clinics must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call. Unlicensed clinics must notify women that California has not licensed the clinics to provide medical services. The question in this case is whether these notice requirements violate the First Amendment.

I-A. The California State Legislature enacted the FACT Act to regulate crisis pregnancy centers. Crisis pregnancy centers … are "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." … The author of the FACT Act observed that crisis pregnancy centers "are commonly affiliated with, or run by organizations whose stated goal" is to oppose abortion….

I-A-1. The first notice requirement applies to "licensed covered facilit[ies]." ... To fall under the definition of "licensed covered facility," a clinic must be a licensed primary care or specialty clinic or qualify as an intermittent clinic under California law…. A licensed covered facility also must have the "primary purpose" of "providing family planning or pregnancy-related services." And it must satisfy at least two of the following six requirements: "(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women; (2) The facility provides, or offers counseling about, contraception or contraceptive methods; (3) The facility offers pregnancy testing or pregnancy diagnosis; (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; (5) The facility offers abortion services; (6) The facility has staff or volunteers who collect health information from clients."

If a clinic is a licensed covered facility, the FACT Act requires it to disseminate a government-drafted notice on site … stat[ing] that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."...

I-A-2. The second notice requirement in the FACT Act applies to "unlicensed covered facilit[ies]." To fall under the definition of "unlicensed covered facility," a facility must not be licensed by the State, not have a licensed medical provider on staff or under contract, and have the "primary purpose" of "providing pregnancy-related services." An unlicensed covered facility also must satisfy at least two of the following four requirements: "(1) The facility offers obstetric

ultrasounds, obstetric sonograms, or prenatal care to pregnant women; (2) The facility offers pregnancy testing or pregnancy diagnosis; (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; (4) The facility has staff or volunteers who collect health information from clients."

Clinics operated by the United States and licensed primary care clinics enrolled in Medi-Cal and Family PACT are excluded [from both notice requirements].… Unlicensed covered facilities must provide a government-drafted notice stating that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." ...

I-B. Petitioners alleged that the licensed and unlicensed notices abridge the freedom of speech protected by the First Amendment. The District Court denied their motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed….

We reverse with respect to both notice requirements.

II. We first address the licensed notice.

II-A. The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations "target speech based on its communicative content." *Reed* v. *Town of Gilbert* (2015). As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." …

The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices "alte[r] the content of [their] speech." *Riley* v. *National Federation of Blind of N. C., Inc.* (1988). Here, for example, licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that petitioners are devoted to opposing….

II-B. Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates "professional speech." Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different rules…. But this Court has not recognized "professional speech" as a separate category of speech…. This Court's precedents do not permit governments to impose content-based restrictions on speech without "'persuasive evidence ... of a long (if heretofore unrecognized) tradition'" to that effect….

This Court's precedents do not recognize such a tradition for a category called

"professional speech." This Court has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech." See, *e.g., Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio* (1985). Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech. See, *e.g., Planned Parenthood of Southeastern Pa.* v. *Casey* (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.). But neither line of precedents is implicated here.

II-B-1. This Court's precedents have applied a lower level of scrutiny to laws that compel disclosures in certain contexts. In *Zauderer*, for example, this Court upheld a rule requiring lawyers who advertised their services on a contingency-fee basis to disclose that clients might be required to pay some fees and costs. Noting that the disclosure requirement governed only "commercial advertising" and required the disclosure of "purely factual and uncontroversial information about the terms under which ... services will be available," the Court explained that such requirements should be upheld unless they are "unjustified or unduly burdensome."

The *Zauderer* standard does not apply here. Most obviously, the licensed notice is not limited to "purely factual and uncontroversial information about the terms under which ... services will be available." The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an "uncontroversial" topic. Accordingly, *Zauderer* has no application here.

II-B-2. In addition to disclosure requirements under *Zauderer*, this Court has upheld regulations of professional conduct that incidentally burden speech… In *Planned Parenthood of Southeastern Pa.* v. *Casey*, for example, this Court upheld a law requiring physicians to obtain informed consent before they could perform an abortion…. The joint opinion in *Casey* ... described the Pennsylvania law as "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion," which "for constitutional purposes, [was] no different from a requirement that a doctor give certain specific information about any medical procedure." …

The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all.… Tellingly, many facilities that provide the exact same services as covered facilities … are not required to provide the licensed notice. The licensed notice regulates speech as speech.

II-B-3. Outside of the two contexts discussed above … this Court's precedents have long protected the First Amendment rights of professionals….

As with other kinds of speech, regulating the content of professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress

unpopular ideas or information." *Turner Broadcasting Sys. v. FCC* (1994)…. Further, when the government polices the content of professional speech, it can fail to "'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *McCullen* v. *Coakley* (2014)….

"Professional speech" is also a difficult category to define with precision…. As defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others…. But that gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement….

II-C. In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles….

California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services. Assuming that this is a substantial state interest, the licensed notice is not sufficiently drawn to achieve it.

If California's goal is to educate low-income women about the services it provides, then the licensed notice is "wildly underinclusive." *Brown v. Entertainment Merchants Assn.* (2011). The notice applies only to clinics that have a "primary purpose" of "providing family planning or pregnancy-related services" and that provide two of six categories of specific services. Other clinics that have another primary purpose, or that provide only one category of those services, also serve low-income women and could educate them about the State's services…. But most of those clinics are excluded from the licensed notice requirement without explanation….

Further, California could inform low-income women about its services "without burdening a speaker with unwanted speech." *Riley* v. *National Federation of Blind of N. C., Inc.* (1988). Most obviously, it could inform the women itself with a public-information campaign….

In short, petitioners are likely to succeed on the merits of their challenge to the licensed notice. Contrary to the suggestion in the dissent, *post* (opinion of BREYER, J.), we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.

III. We next address the unlicensed notice. The parties dispute whether the unlicensed notice is subject to deferential review under *Zauderer*. We need not decide whether the *Zauderer* standard applies to the unlicensed notice. Even under *Zauderer*, a disclosure requirement cannot be "unjustified or unduly burdensome." Our precedents require disclosures to remedy a harm that is "potentially real not purely hypothetical," *Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy* (1994)….

The only justification that the California Legislature put forward was ensuring that "pregnant women in California know when they are getting medical care from licensed professionals." [However,] California points to nothing suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals….

Even if California had presented a non-hypothetical justification for the unlicensed notice, the FACT Act unduly burdens protected speech. The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest…. The unlicensed notice applies only to facilities that primarily provide "pregnancy-related" services. Thus, a facility that advertises and provides pregnancy tests is covered by the unlicensed notice, but a facility across the street that advertises and provides nonprescription contraceptives is excluded—even though the latter is no less likely to make women think it is licensed….

The application of the unlicensed notice to advertisements demonstrates just how burdensome it is. The notice applies to all "print and digital advertising materials" by an unlicensed covered facility…. As California conceded at oral argument, a billboard for an unlicensed facility that says "Choose Life" would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages. In this way, the unlicensed notice drowns out the facility's own message….

For all these reasons, the unlicensed notice does not satisfy *Zauderer*, assuming that standard applies….

IV. We hold that petitioners are likely to succeed on the merits of their claim that the FACT Act violates the First Amendment. We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Kennedy, with whom the Chief Justice, Justice Alito, and Justice Gorsuch join, concurring.

[Justice Kennedy commented that, although the Court did not reach the issue, in his view there was strong evidence of viewpoint discrimination.]

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

The petitioners ask us to consider whether two sections of a California statute violate the First Amendment…. In my view both statutory sections are likely constitutional, and I dissent from the Court's contrary conclusions.

I-A. Before turning to the specific law before us, I focus upon the general interpretation of the First Amendment that the majority says it applies. It applies heightened scrutiny to the Act because the Act, in its view, is "content based." …

The majority recognizes exceptions to this general rule: It excepts laws that "require professionals to disclose factual, noncontroversial information in their 'commercial speech,'" *provided that* the disclosure "relates to the services that [the regulated entities] provide." It also excepts laws that "regulate professional conduct" *and* only "incidentally burden speech."

This constitutional approach threatens to create serious problems. Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation. Virtually every disclosure law could be considered "content based," for virtually every disclosure law requires individuals "to speak a particular message." … Thus, the majority's view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.

Many ordinary disclosure laws would fall outside the majority's exceptions for disclosures related to the professional's own services or conduct. These include numerous commonly found disclosure requirements relating to the medical profession. [Examples include: requiring hospitals to tell parents about child seat belts, to ask incoming patients if they would like the facility to give their family information about parents' rights and responsibilities, and to tell parents of newborns about pertussis disease and the available vaccine.] These also include numerous disclosure requirements found in other areas [such as requiring signs by elevators showing stair locations, or requiring property owners to inform tenants about garbage disposal procedures.]

The majority … perhaps recognizing this problem, adds a general disclaimer. It says that it does not "question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." But this generally phrased disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification….

[I]n saying the Act is not a longstanding health and safety law, the Court substitutes its own approach—without a defining standard—for an approach that was reasonably clear. Historically, the Court has been wary of claims that regulation of business activity, particularly health-related activity, violates the Constitution. Ever since this Court departed from the approach it set forth in *Lochner* v. *New York* (1905), ordinary economic and social legislation has been thought to raise little constitutional concern…. The Court has taken this same respectful approach to economic and social legislation when a First Amendment claim like the claim present here is at issue….

Even during the *Lochner* era, when this Court struck down numerous economic regulations concerning industry, this Court was careful to defer to state legislative judgments concerning the medical profession…. Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content of those reasonable conditions. See, *e.g.*, *Dent* v. *West Virginia* (1889) (upholding medical licensing requirements). In the name of the First Amendment, the majority today treads into territory where the pre-New Deal, as well as the post-New Deal, Court refused to go.

The Court, in justification, refers to widely accepted First Amendment goals, such as the need to protect the Nation from laws that "'suppress unpopular ideas or information'" or inhibit the "'marketplace of ideas in which truth will ultimately prevail.'" … And, in suggesting that heightened scrutiny applies to much economic and social legislation, the majority pays those First Amendment goals a serious disservice through dilution. Using the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact will, for the American public, obscure, not clarify, the true value of protecting freedom of speech.

I-B. Still, what about this specific case? The disclosure at issue here concerns speech related to abortion. It involves health, differing moral values, and differing points of view. Thus, rather than set forth broad, new, First Amendment principles, I believe that we should focus more directly upon precedent more closely related to the case at hand….

I begin with *Akron* v. *Akron Center for Reproductive Health, Inc.* (1983). In that case the Court considered a city ordinance requiring a doctor to tell a woman contemplating an abortion about the "status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth[, and] ... 'the particular risks associated with her own pregnancy and the abortion technique to be employed.'" … The ordinance further required a doctor to tell such a woman that "'the unborn child is a human life from the moment of conception.'"

The plaintiffs claimed that this ordinance violated a woman's constitutional right to obtain an abortion. And this Court agreed…. [T]he Court held that the law at issue went "beyond permissible limits" because "much of the information required [was] designed not to inform the woman's consent but rather to persuade her to withhold it altogether." … Several years later, in *Thornburgh* v. *American College of Obstetricians and Gynecologists* (1986), the Court considered a Pennsylvania statute that "prescribe[d] in detail the method for securing 'informed consent'" to an abortion [that required doctors to provide the opportunity to contact various agencies that provided medical and financial assistance before performing an abortion]…. The Court, as in *Akron*, held that the statute's information requirements violated the Constitution….

These cases, however, whatever support they may have given to the majority's view, are no longer good law. In *Planned Parenthood of Southeastern Pa.* v. *Casey* (1992), the Court again

considered a state law that required doctors to provide information to a woman deciding whether to proceed with an abortion. That law required the doctor to tell the woman about the nature of the abortion procedure, the health risks of abortion and of childbirth, the "'probable gestational age of the unborn child,'" and the availability of printed materials describing the fetus, medical assistance for childbirth, potential child support, and the agencies that would provide adoption services (or other alternatives to abortion).

This time a joint opinion of the Court, in judging whether the State could impose these informational requirements, asked whether doing so imposed an "undue burden" upon women seeking an abortion. It held that it did not. Hence the statute was constitutional…. And, it "overruled" portions of the two cases, *Akron* and *Thornburgh*, that might indicate the contrary.

The joint opinion … concluded that the statute did not violate the First Amendment. It wrote: … "to be sure, the physician's First Amendment rights not to speak are implicated … but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." …

I-C. Taking *Casey* as controlling, the law's demand for even-handedness requires a different answer than that perhaps suggested by *Akron* and *Thornburgh*. If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services? As the question suggests, there is no convincing reason to distinguish between information about adoption and information about abortion in this context….

I-C-1. The majority tries to distinguish *Casey* as … appl[ying] only when obtaining "informed consent" to a medical procedure is directly at issue. This distinction, however, lacks moral, practical, and legal force. The individuals at issue here are all medical personnel engaging in activities that directly affect a woman's health—not significantly different from the doctors at issue in *Casey*….

The majority contends that the disclosure here is unrelated to a "medical procedure," unlike that in *Casey*, and so the State has no reason to inform a woman about alternatives to childbirth (or, presumably, the health risks of childbirth). Really? No one doubts that choosing an abortion is a medical procedure that involves certain health risks…. But the same is true of carrying a child to term and giving birth…. Indeed, nationwide "childbirth is 14 times more likely than abortion to result in" the woman's death….

In any case, informed consent principles apply more broadly than only to discrete "medical procedures." [For example,] [p]rescription drug labels warn patients of risks even though taking prescription drugs may not be considered a "medical procedure." … If even these disclosures fall outside the majority's cramped view of *Casey* and informed consent, it undoubtedly would

invalidate the many other disclosures that are routine in the medical context as well.

The majority also finds it "[t]ellin[g]" that general practice clinics—*i.e.,* paid clinics—are not required to provide the licensed notice. But the lack-of-information problem that the statute seeks to ameliorate is a problem that the State explains is commonly found among low-income women. That those with low income might lack the time to become fully informed … is not intuitively surprising….

I-C-2. … The majority concludes that *Zauderer* does not apply because the disclosure "in no way relates to the services that licensed clinics provide." But information about state resources for family planning, prenatal care, and abortion *is* related to the services that licensed clinics provide…

I-D. It is particularly unfortunate that the majority, through application of so broad and obscure a standard, declines to reach remaining arguments that the Act discriminates on the basis of viewpoint…. Given the absence of evidence in the record before the lower courts, the "viewpoint discrimination" claim could not justify the issuance of a preliminary injunction.

II. [As to the statutory provision covering unlicensed facilities], the majority concludes that the State's interest is "purely hypothetical" because unlicensed clinics provide innocuous services that do not require a medical license. To do so, it applies a searching standard of review based on our precedents that deal with speech *restrictions*, not *disclosures*.... There is no basis for finding the State's interest "hypothetical." …

The majority also suggests that the Act applies too broadly, namely, to all unlicensed facilities "no matter what the facilities say on site or in their advertisements." But the Court has long held that a law is not unreasonable merely because it is overinclusive. [This sentence should be read in the context discussed, regulations dealing with business or health and safety.] For instance, in *Semler* the Court upheld as reasonable a state law that prohibited licensed dentists from advertising that their skills were superior to those of other dentists. …. [T]he Court held that … "[t]he legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement."

Relatedly, the majority suggests that the Act is suspect because it covers some speakers but not others. I agree that a law's exemptions can reveal viewpoint discrimination … [but] [t]here is no cause for such concern here…

Finally, the majority concludes that the Act is overly burdensome. I agree that "unduly burden- some disclosure requirements might offend the First Amendment." … But these and similar claims are claims that the statute could be applied unconstitutionally, not that it is

unconstitutional on its face….

For these reasons I would not hold the California statute unconstitutional on its face, I would not require the District Court to issue a preliminary injunction forbidding its enforcement, and I respectfully dissent from the majority's contrary conclusions.

Part II, Section XV. Symbols and Silence: Compelled Affirmation.
[*Insert on page 1305 before note on* Rumsfeld.]

Note: *Americans For Prosperity Foundation v. Bonta* (2021)

While *Boy Scouts of America v. Dale* dealt with a statute that directly implicated the right of association and used strict scrutiny review to invalidate it, *Americans for Prosperity Foundation v. Bonta* involved a related associational right: freedom from compelled disclosure. The Internal Revenue Service requires charities to file forms which list their major donors as part of the paperwork that allows them to maintain their tax exempt status. California required the charities to send a copy of this form to the California Attorney General as part of its fraud prevention activities. Two organizations filed suit to enjoin the operation of the statute following the accidental leaking of their documents and the subsequent harassment of the organization and some of their donors. They alleged their ability to raise funds would be compromised if donors knew their contributions could be disclosed. The Attorney General's office improved their procedures to maintain confidentiality following the disclosures. The District Court had enjoined the statute but the Ninth Circuit had reversed. The Supreme Court, voting 6-3 on the merits, reversed the Ninth Circuit.

The opinion, written by Chief Justice Roberts, is notable for two things. First, a plurality of the Court (Roberts, C.J., joined by Kavanaugh and Barrett, JJ.) held that compelled disclosure statutes should be evaluated under an "exacting scrutiny" standard rather than strict scrutiny. Justice Thomas concurred in the judgment, stating that strict scrutiny should be the standard. Justices Alito and Gorsuch also concurred in the judgment, stating that the proper standard for compelled disclosure cases remained an open question but that the California statute violated either standard.

Second, the Court with five votes granted a facial challenge to the statute rather than granting an applied challenge to the two named plaintiffs on the basis of their individualized complaints. Justice Thomas would only have granted an applied challenge.

In the portion of the opinion that failed to get five votes, Chief Justice Roberts said:

> [One of the plaintiffs] argues that we should apply strict scrutiny, not exacting scrutiny. Under strict scrutiny, the government must adopt "the least restrictive means of achieving a compelling state interest," *McCullen v. Coakley* (2014), rather than a means substantially related to a sufficiently important interest. The [plaintiff] contends that only strict scrutiny adequately protects the associational rights of charities. And although the [plaintiff] Law Center acknowledges that we have applied exacting scrutiny in prior disclosure cases, it argues that those cases arose in the electoral context, where the government's important interests justify less searching review.

> It is true that we first enunciated the exacting scrutiny standard in a campaign finance case. See *Buckley v. Valeo* (1976) (*per curiam*) And we have since invoked it in other election-related settings. See, *e.g.*, *Citizens United v. Federal Election Comm'n* (2010). But exacting scrutiny is not unique to electoral disclosure regimes. To the contrary, *Buckley* derived the test from *NAACP* v. *Alabama* (1958) itself, as well as other nonelection cases. As we explained in *NAACP* v. *Alabama*, "it is immaterial" to the level of scrutiny "whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny.

Roberts held that the statute failed the exacting standard test because while preventing fraud was a "sufficiently important interest," the mandatory disclosure of the charities' major donors was not a "substantially related" means to that end. While California maintained that having the material on had helped their anti-fraud efforts, the Court found the chilling effect to be too great given that the state failed to show how often they had used the material in actual fraud prosecutions: "In reality, then, California's interest is less in investigating fraud and more in ease of administration. This interest, however, cannot justify the disclosure requirement." This significant evidentiary burden on the state stands in marked contrast to the acceptance of a state's reliance on fraud prevention to justify voter restrictions in *Brnovich v. Democratic National Committee* (2021), given the absence of any evidence of previous fraud.

Roberts garnered five votes for his holding granting the facial invalidation of the statute:

> The foregoing discussion also makes clear why a facial challenge is appropriate in these cases. Normally, a plaintiff bringing a facial challenge must "establish that no set of circumstances exists under which the [law] would be valid," *United States v. Salerno* (1987), or show that the law lacks "a plainly legitimate sweep," *Washington State Grange v. Washington State Republican Party* (2008). In the First Amendment context, however, we have recognized "a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens* (2010). We have no trouble concluding here that the Attorney General's disclosure requirement is overbroad. The lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's interest in administrative convenience. Every demand that might chill association therefore fails exacting scrutiny.

Justice Sotomayor dissented, joined by Breyer and Kagan, JJ. She agreed that exacting scrutiny was the appropriate standard, but contended that California easily met it. She further contended that only an applied challenge should be granted in the event the Court found the statute lacking:

> Today's analysis marks reporting and disclosure requirements with a bull's-eye. Regulated entities who wish to avoid their obligations can do so by vaguely waving toward First Amendment "privacy concerns." It does not matter if not a single individual risks experiencing a single reprisal from disclosure, or if the vast majority of those affected would happily comply. That is all irrelevant to the Court's determination that

California's Schedule B requirement is facially unconstitutional. Neither precedent nor common sense supports such a result. I respectfully dissent.

The continuing significance of this case will depend on if the majority aggressively applies privacy analysis in the campaign finance arena, hindering efforts to control "dark money" contributions to political campaigns.

[*Insert on page 1305 after note on* Rumsfeld.]

Note: ***Janus v. AFSCME, Council 31*** **(2018)**

Illinois law permits public employees to unionize. If a majority of employees in a bargaining unit vote in favor of union representation, that union is designated as the exclusive bargaining representative of all employees, including those who choose not to join the union. Employees may not designate any other agent as their representative or bargain with the government employer directly. Public-sector unions were permitted to charge non-member employees an agency fee, *i.e.* a lesser percentage of the full union dues. Under *Abood v. Detroit Board of Education*, the agency fee was only permitted to cover expenditures germane to the union's collective-bargaining and representation of employees with the employer, for example, in bargaining, grievance procedures and arbitration of grievances. Political activities were not chargeable agency fees.

Mark Janus, a child support specialist employed by the Illinois Department of Healthcare and Family Services, was represented by the American Federation of State, County, and Municipal Employees, Council 31 ("AFSCME"). Janus refused to join AFSCME because he opposed many of the Union's positions and believed that the Union's conduct in bargaining contributed to the State's fiscal troubles. Janus challenged his required payment of agency fees on the grounds that the charge the fee to him violated his free speech rights under the First Amendment by requiring him to subsidize the Union's speech. The district court dismissed the lawsuit on the grounds that *Abood* foreclosed Janus's claim, and the Seventh Circuit affirmed.

In a 5-4 decision, the Supreme Court overruled *Abood* and held agency fees charged to non-consenting public employees were unconstitutional. Justice Alito, writing for the majority, was joined by Roberts, C. J., and Kennedy, Thomas, and Gorsuch, JJ. Justice Sotomayor filed a dissenting opinion. Justice Kagan also filed a dissenting opinion, in which Ginsburg, Breyer, and Sotomayor, JJ., joined. The Court found that agency fees violate the free speech rights of public employees who refuse union membership by forcing them to subsidize the speech of the union. The Court suggested that such a requirement may trigger strict scrutiny, but did not decide that issue as the agency-fee scheme did not survive the lesser "exacting" scrutiny applied to "the compulsory subsidization of commercial speech." To survive that scrutiny, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."

The Court rejected the primary defense of *Abood*: that the State's interest in maintaining "labor peace" justified agency fees. The Court observed that while unions were prohibited from collecting agency fees from federal employees, unions continued to effectively represent those employees as their exclusive bargaining representative. Therefore, the Court concluded that labor peace could be achieved by means less restrictive of employees' associational freedoms than the assessment of agency fees.

Since unions are obligated by law to fairly represent all employees, including nonmembers, *Abood* also reasoned that agency fees are necessary to prevent "free riders" from enjoying the benefits of union representation without contributing to the expenses of collective bargaining and representation of employees. To the majority, this was not a compelling state interest:

> "[P]rivate speech often furthers the interests of nonspeakers," but "that does not alone empower the state to compel the speech to be paid for." *Lehnert v. Ferris Faculty Assn.* (1991) (Scalia, J., concurring in judgment in part and dissenting in part). In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.

The majority said that even representing individual nonmember employees in grievance proceedings served the union's interests because "when a union controls the grievance process, it may, as a practical matter, effectively subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit." Further, the issue of union representation of individual employees in grievance proceedings could be addressed by less restrictive means, such as requiring employees who desire that service to then pay a fee.

Turning to the next defense of *Abood*, the Court rejected the Union's reliance on *Pickering v. Board of Education of Township High School District 205* and the line of cases that followed holding that "employee speech is largely unprotected if it is part of what the employee is paid to do... or if it involved a matter of only private concern" and that an employee's speech on a matter of public concern "is protected unless 'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees outweighs the interests of the employee, as a citizen, in commenting on matters of public concern."

The Court held that the *Pickering* framework did not apply to the challenge to the agency-fee scheme, observing that *Abood* did not rely on *Pickering* and that the framework did not fit the issues presented in *Abood*. First, the *Pickering* framework was developed only to analyze cases involving a single employee's speech and the impact on that employee's duties, not "a blanket requirement that all employees subsidize speech with which they do not agree." Second, the framework fit less well where the government compelled speech or required employees to subsidize a third party's speech. Finally, *Pickering* and *Abood* required different categorizations of speech that were incompatible.

Even if *Pickering* did apply, the agency-fee scheme still would not survive.

> When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees,* not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions. That is not what anybody understands to be happening.

The Court found the wages, hours, and terms of employment of public employees to be matters of significant public importance. Therefore, requiring an employee to subsidize even the Union's contract negotiations violated the free speech rights of employees who opposed the Union's bargaining positions. The Court continued:

> In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondent's own *amici* show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few.... What unions have to say on these matters in the context of collective bargaining is of great public importance.

The supposed state interest in bargaining with an adequately funded exclusive bargaining representative did not justify this intrusion into employees' free speech rights regarding matters of public concern.

> We readily acknowledge, as *Pickering* did, that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Our analysis is consistent with that principle. The exacting scrutiny standard we apply in this case was developed in the context of commercial speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech…. It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views. Nothing in the *Pickering* line of cases requires us to uphold every speech restriction the government imposes as an employer.

Finally, the Court concluded that *stare decisis* did not counsel against overruling *Abood* on the grounds that *Abood* was poorly reasoned, unworkable, and no longer suited to the legal and economic environment that had arisen since it was decided.

Dissenting, Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, argued that the Court overruled *Abood* with "little regard for the usual principles of *stare decisis*, and predicted:

> [The Court's] decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.

Justice Kagan argued that *Abood* struck an appropriate balance between the government employer's interests in maintaining labor peace and preventing free riders, and public employees' free speech interests by prohibiting the assessment of fees to nonmembers that accounted for the union's overtly political activities. Without agency fees from nonmembers, Kagan wrote:

> Everyone—not just those who opposed the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services. And so emerged *Abood*'s rule allowing fair-share agreements: That rule ensured that a union would receive sufficient funds, … to effectively carry out its duties as exclusive representative of the government's employees.

For the dissenters, the Court's decision represented an expansion of First Amendment protections that intruded upon the general rule that government employers enjoyed "substantial latitude... in recognition of its significant interests in managing its workforce so as to best serve the public." Justice Kagan continued:

> Indeed, [the Court's] reversal today creates a significant anomaly—an exception, applying to union fees alone, from the usual rules governing public employee's speech. "Time and again our cases have recognized that the Government has a much freer hand" in dealing with its employees than with "citizens at large." *NASA v. Nelson* (2011). The government, we have stated, needs to run "as effectively and efficiently as possible." *Engquist v. Oregon Dept. of Agriculture* (2008). That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. A public employee thus must submit to "certain limitations on his or her freedom." *Garcetti v. Ceballos* (2006). Government workers, of course, do not wholly "lose their constitutional rights when they accept their positions." *Engquist*. But under our precedent, their rights often yield when weighed "against the realities of the employment context." If it were otherwise—if every employment decision were to "bec[o]me a constitutional matter"—"the

Government could not function." *NASA*.

Justice Kagan concluded that with its decision, the majority:

> [P]revents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

Comment: The effect of the decision, by reducing revenue unions have to fund their collective bargaining and legally required representation duties, can reduce other funds available to unions to support progressive causes. For one article suggesting this effect, see, Noam Scheiber, *Curbs on Unions Likely to Starve Activist Groups*, N.Y. TIMES, July 2, 2018, at A1. As the *Times* article noted:

> The Supreme Court decision striking down mandatory union fees for government workers was not only a blow to unions. It will also hit hard at a vast network of groups dedicated to advancing liberal policies and candidates. Some of these groups work for immigrants and civil rights; others produce economic research; still others turn out voters or run ads in Democratic campaigns. Together, they have benefited from tens of millions of dollars a year from public-sector unions -- funding now in jeopardy because of the prospective decline in union revenue.
>
> Liberal activists argue that closing that pipeline was a crucial goal of the conservative groups that helped bring the case, known as Janus v. American Federation of State, County and Municipal Employees. …
>
> Conservatives have acknowledged as much. In a fund-raising solicitation in December, John Tillman, the chief executive of the free-market group that found the plaintiff in the case, cited the objective of depriving unions of revenue by helping workers abandon them. "The union bosses would use that money to advance their big-government agenda," Mr. Tillman wrote.
>
> Even President Trump took notice of the justices' ruling, declaring on Twitter that it was a "big loss for the coffers of the Democrats!"

In contrast, corporate executives may direct corporate treasury funds to assist Republican and "conservative" groups. Stock holders have no practical remedy. They could sell stock or sell index funds, but that is a costly alternative. Decisions that seem facially neutral, including campaign finance decisions, often have hugely disproportional effects on groups access to the system of freedom of expression. While not overt viewpoint discrimination, such decisions may have in fact a viewpoint discriminatory effect.

Note: *303 Creative LLC v. Elenis* (2023)

The conflict between a state's desire to end discrimination in commerce and in the provision of public services and individuals' claims that the state cannot force them to act in a manner inconsistent with their religious beliefs has been inherent since the beginning of the Civil Rights movement. Resistance to racial integration was often grounded in claims of religious necessity. The expansion of civil rights protections to include sexual orientation has triggered a new flurry of litigation, where courts must balance the rights of members of a protected class against the religious claims of those who seek to avoid the mandate of otherwise generally applicable law,

Because statutes of general application currently receive only low-level rational basis review under the holding of *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), many challenges are based on the compelled speech doctrine of the First Amendment rather than the Free Exercise Clause. (Many challenges also include free exercise claims and call for the overruling of *Smith*. Litigation involving challenges of both varieties is certain to continue as religious public interest groups aggressively litigate these issues.)

In *303 Creative LLC v. Elenis* (2023) the Court upheld a compelled speech challenge to a Colorado anti-discrimination law brought by a website designer who said she would take jobs from LGBTQ customers on many subjects but would not design websites for same sex weddings. She alleged that to do so would violate her religious values.

The Court addressed this claim solely as implicating an issue of First Amendment compelled speech rather than the free exercise of religion. Justice Gorsuch wrote the majority opinion, joined by Roberts, C.J., and Thomas, Alito, Kavanaugh, and Barrett, JJ. Gorsuch acknowledged that most anti-discrimination statues are certainly permissible to regulate commercial conduct:

> States may "protect gay persons, just as [they] can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment.

However, the majority concluded that dictating the content of a creative endeavor did implicate the First Amendment: "In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance." The Court noted that "determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity. And the Tenth Circuit has recognized her services involve 'pure speech.'"

The Court was not clear on what level of scrutiny it was applying. The dissent argued the case should receive intermediate scrutiny because the case primarily involved conduct, not pure speech (disagreeing with the Tenth Circuit and the majority). Implicit in the Court's analysis is the fact that they were employing strict scrutiny.

Justice Sotomayor, joined by Kagan and Jackson, JJ., dissented:

> Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class. Specifically, the Court holds that the First Amendment exempts a website-design company from a state law that prohibits the company from denying wedding websites to same-sex couples if the company chooses to sell those websites to the public. The Court also holds that the

company has a right to post a notice that says, "'no [wedding websites] will be sold if they will be used for gay marriages.'"

… Around the country, there has been a backlash to the movement for liberty and equality for gender and sexual minorities. New forms of inclusion have been met with reactionary exclusion. This is heartbreaking. Sadly, it is also familiar. When the civil rights and women's rights movements sought equality in public life, some public establishments refused. Some even claimed, based on sincere religious beliefs, constitutional rights to discriminate. The brave Justices who once sat on this Court decisively rejected those claims.

Now the Court faces a similar test. A business open to the public seeks to deny gay and lesbian customers the full and equal enjoyment of its services based on the owner's religious belief that same-sex marriages are "false." The business argues, and a majority of the Court agrees, that because the business offers services that are customized and expressive, the Free Speech Clause of the First Amendment shields the business from a generally applicable law that prohibits discrimination in the sale of publicly available goods and services. That is wrong. Profoundly wrong. As I will explain, the law in question targets conduct, not speech, for regulation, and the *act* of discrimination has never constituted protected expression under the First Amendment. Our Constitution contains no right to refuse service to a disfavored group. I dissent.

Part III, Section II, Regulating Streets, Parks, and Sidewalks

[*Insert on page 1344 after Note on* Christian Legal Society v. Martinez.]

Note: *Packingham v. North Carolina* (2017)

In *Packingham v. North Carolina* (2017), the Court struck down as overbroad a North Carolina statute that prohibited registered sex offenders from using extensive portions of the Internet. The statute made it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N. C. Gen. Stat. Ann. §§14–202.5(a), (e) (2015). The Court noted that while this prohibition would apply to social networking sites like Facebook, LinkedIn, and Twitter, it could also apply to such sites as Amazon.com, Washingtonpost.com, and Webmd.com.

Justice Kennedy, joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ., noted that, "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general…and social media in particular. … Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand. In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest."… In other words, the law must not "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen* v. *Coakley* (2014)

While narrowly drawn statutes that target communication associated with predatory behavior could be constitutional, blanket prohibitions are not. (Packingham had gone on Facebook to express his happiness over the dismissal of a traffic ticket, a communication not remotely linked to his prior criminal conduct—having sex with a 13 year old girl when he was 21.)

Justice Alito filed an opinion concurring in the judgment, in which Roberts, C. J., and Thomas, J., joined. (Justice Gorsuch did not participate in the case.) Alito emphasized the right of the government to regulate communications that are linked to predatory behavior: "I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks. And this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers. I am troubled by the implications of the Court's unnecessary rhetoric."

Part III, Section III, The Non-public Forum
[*Insert on page 1355 before* Watchtower Bible and Tract Society of New York.]

Note: *Minnesota Voters Alliance v. Mansky* (2018)

Minnesota Voters Alliance ("MVA"), an organization advocating for election reforms, challenged Minnesota's "political apparel ban," which provided that a "political badge, political button, or other political insignia may not be worn at or about the polling place" on Election Day. The political apparel ban applied only within the polling place and was enforced by Minnesota election judges with the authority to decide whether a particular item was prohibited under the statute. The statute did not define the word "political", but for clarification the State distributed to election judges an "Election Day Policy" that provided examples of apparel that fell within the ban. These included any item "including the name of a political party," "including the name of a candidate," "in support of or opposition to a ballot question," including "[i]ssue oriented material designed to influence or impact voting," or "promoting a group with recognizable political views." Elections judges could not prevent individuals from voting, but requested anyone wearing apparel they judged to be in violation to remove or conceal the item. If a voter refused to do so, election judges were to report the incident. Each incident was referred to the Minnesota Office of Administrative Hearings which, upon finding a violation, held authority to issue a reprimand or impose civil penalties.

MVA and other plaintiffs argued that the statute was unconstitutional on its face and as applied to voters' political apparel. The district court granted the State's motion to dismiss as to the facial challenge and later the State's motion for summary judgment as to the as-applied challenge. The Eighth Circuit affirmed both holdings. MVA petitioned for certiorari only in regard to the facial challenge.

The Supreme Court held 7-2 that Minnesota's political apparel ban violated the First Amendment's free speech clause. Writing for the majority, Chief Justice Roberts (joined by Kennedy, Thomas, Ginsburg, Alito, Kagan and Gorsuch, JJ.) explained that, while the political apparel ban pursued the permissible objective of setting aside the polling place as "an island of calm in which voters can peacefully contemplate their choices," the statute and State-issued guidance offered little clarity as to what apparel was covered, and therefore the ban was not "a law capable of reasoned application."

First holding that the political apparel ban plainly restricted expression protected by the First Amendment, the Court applied its forum-based approach to speech restrictions. Traditional public forums, such as parks, streets, and sidewalks, may be subject to "reasonable time, place and manner restrictions on public speech." A content-based restriction in a traditional public forum must satisfy strict scrutiny, and viewpoint discrimination is entirely prohibited. Restrictions on speech in designated public forums, "which the government has 'intentionally opened up for that purpose'" are subject to the same limitations as restrictions applied to traditional public forums. On the other hand, speech in nonpublic forums—spaces "not by tradition or designation a forum for public communication"—may be subject to a restriction so long as it is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

Because a polling place is, at least on Election Day, a "government-controlled property set aside for the sole purpose of voting," the Court held that a polling place qualifies as a nonpublic forum. Under the applicable test, the Court would uphold content-based restrictions on speech in the polling places so long as they were "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Finding nothing in the facts to indicate viewpoint discrimination, the issue was whether the apparel ban was "reasonable in light of the purpose served by the forum."

Applying the nonpublic forum standard, the Court first considered whether Minnesota pursued "a permissible objective in prohibiting voters from wearing particular kinds of expressive apparel or accessories while inside the polling place." Looking to *Burson v. Freeman* (1992), in which the Court upheld a 100-foot "campaign-free zone" around polling place entrances, the Court held that Minnesota's political apparel ban served the permissible objective of "designating an area for the voters as 'their own,'" particularly inside the polling place itself. The Court explained:

> [W]e see no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place, to set it aside as "an island of calm in which voters can peacefully contemplate their choices." Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction….

> Members of the public are brought together at that place, at the end of what may have been a divisive election season, to reach considered decisions about their government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations.

The Court then turned to whether the State had "articulate[d] some sensible basis for distinguishing what may come in from what must stay out." The Court held that the restriction failed this test because the statute did not define what constituted "political" apparel, and the State failed to offer a construction of the statute that provided adequate clarity. The statute was, therefore, "not capable of reasoned application" by election law judges or the Office of Administrative Hearings. A literal reading of the statute would ban a broad range of political expression, including "a button or T-shirt merely imploring others to "Vote!" The Court rejected the State's argument against such a broad reading:

> According to the State, the statute does not prohibit "any conceivably 'political' message" or cover "all 'political' speech, broadly construed." Instead, the State interprets the ban to proscribe "only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place." …
>
> We consider a State's "authoritative constructions" in interpreting a state law. *Forsyth County v. Nationalist Movement* (1992). But far from clarifying the indeterminate scope of the political apparel provision, the State's "electoral choices" construction introduces confusing line-drawing problems.

The 2010 Election Day Policy, considered to be authoritative guidance to the application of the statute, did little to clarify the statute. For example, the Policy specifically prohibited "[i]ssue oriented material designed to influence or impact voting." The State considered this to be limited to "any subject on which a political candidate or party has taken a stance." This included buttons that stated "Please I.D. Me," the State explained, because Republican candidates for office had promoted voter I.D. requirements. Finding this standard unworkable, the Court noted:

> A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import. Would a "Support Our Troops" shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a "#MeToo" shirt, referencing the movement to increase awareness of sexual

> harassment and assault? At oral argument, the State indicated that the ban would cover such an item if a candidate had "brought up" the topic.

Similarly, the prohibition on items "promoting a group with recognizable political views" failed to provide consistent guidance to election judges or adequate notice to voters as to what apparel was prohibited. Unclear standards posed risks to voter's free speech rights, the Court said:

> It is "self-evident" that an indeterminate prohibition carries with it "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." … Election judges "have the authority to decide what is political" when screening individuals at the entrance to the polls. We do not doubt that the vast majority of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as "political." And if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it.

The Court, in a footnote, declined to certify the case to the Minnesota Supreme Court, on the grounds that the State's request came late in the litigation, and the Court's decision would not change even if the Minnesota Supreme Court adopted the State's interpretation of the statute.

Dissenting, Justice Sotomayor, joined by Justice Breyer, argued that the political apparel ban not be declared unconstitutional on its face before the Minnesota Supreme Court was first afforded the opportunity to construe the statute. Justice Sotomayor would have certified the case to the Minnesota Supreme Court "for a definitive interpretation of the political apparel ban … which likely would obviate the hypothetical line-drawing problems that form the basis of the Court's decision."

Part III, Section V, Speech in Limited Environments
[*Page 1378: Replace current* Note: More on Limited Environments.]

Note: More on Limited Environments

In *Mahanoy Area School District v. B. L.* (2021) the Court considered the constitutionality of a public school's attempt to regulate true off-premises student speech. All previous cases had concerned speech at school (*Tinker*, *Fraser*, *Kuhlmeier*) or in an environment that could be considered school related (*Morse*). While ruling for the student, the Court recognized that the school's educational mission could justify punishing off campus speech in some circumstances.

B.L. involved a ninth grade student who expressed her disappointment at not being selected to the varsity cheerleading squad by posting a photo on Snapchat of herself and a friend with their

middle fingers raised on one hand. The photo had a caption reading, "Fuck school fuck softball fuck cheer fuck everything." The photo was posted on a Saturday to her Snapchat "friend" group (B. L. had about 250 "friends"). The photo could be viewed for a 24 hour period before being automatically deleted. However, someone took a screenshot of the photo and it quickly circulated among students, faculty, and administrators at her school. Her school then determined that since the posts used profanity in connection with a school extracurricular activity that they violated team and school rules and suspended her from cheerleading for one year.

Justice Breyer, writing for eight members of the Court (Thomas, J., dissented), did not announce a test but listed various factors that lower courts should consider when evaluating future claims concerning off-campus speech. He first stated that such speech deserves protection because:

1) Schools have broad authority to regulate on-campus speech because they stand *in loco parentis* when students are in their charge. When students are off campus, their parents are in fact responsible for monitoring their behavior.
2) Since students are always on campus or off campus, their behavior could theoretically be subject to school regulation 24 hours a day. "When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention."
3) Schools should serve as role models for their students, teaching respect for the way in which the First Amendment advances the "marketplace of ideas."

He then rejected the school's justifications for the punishment:

1) The school's interest in teaching good manners is not sufficient, in this case, to overcome B. L.'s interest in free expression, particularly because they could not be seen to be acting *in loco parentis*.
2) The evidence offered to show the speech caused disruption at school the following week was de minimis. "The alleged disturbance here does not meet *Tinker*'s demanding standard."
3) The evidence offered to show the speech affected team morale amongst the cheerleaders was de minimis. "'[U]ndifferentiated fear or apprehension ... is not enough to overcome the right to freedom of expression.' *Tinker*."

Justice Breyer did note several types of off-campus speech that would present a greater justification for school regulation:

> [S]everal types of off-campus behavior…may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

The Court essentially engaged in a balancing test. While recognizing that B.L.'s speech was protected by the First Amendment, there was no language indicating that the Court was applying a recognized level of scrutiny.

The Supreme Court relaxes constitutional safeguards in certain limited environments, and often does so dramatically. We have seen this process at work in the case of speech in schools. Similar results occur in other in other places—such as prisons, jails, and in the military—and in doctrinal areas—such as 4th Amendment guarantees.

[A fuller version of this note is available on conlawincontext.com. It discusses Court decisions upholding strip searches and body cavity searches of pretrial detainees and of people arrested for minor infractions. In the military context, it discusses immunity for government agents who gave soldiers LSD without their knowledge or consent.]

Part III, Section VI, Government as the Speaker, Not as a Regulator
[*Insert on page 1381 after Note on* Walker.]

Note: *Matal v. Tam* (2017)

In *Matal v. Tam* the Court struck down a portion of the federal Trademark Act that allowed the Patent and Trademark Office (PTO) to deny trademark applications that may "disparage…or bring…into contemp[t] or disrepute" any "persons, living or dead." 15 U.S.C. 1052(a). This "disparagement" provision had most famously been at the center of a recent lawsuit brought by Native American activists to force the PTO to de-register the trademark of the NFL's Washington Redskins.

In *Matal*, the PTO had refused to register the name of an Asian rock band, "The Slants." The band had chosen the name *because* it is a derogatory term applied to Asians and they wished to dilute the term's denigrating force. In a case heard before Justice Goresuch joined the Court, the Court ruled unanimously that the provision was unconstitutional, but split 4-4 on its reasoning. While the statute is now defunct, there is no binding opinion as to the analysis to be applied to such challenges.

All of the justices did agree that issuing a trademark did *not* constitute government speech. The government speech analysis of *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.* (2015), accordingly did not apply. The government had argued that trademarks constituted commercial speech and the statute should therefore be subjected only to intermediate scrutiny. Justice Alito, joined by Chief Justice Roberts and Breyer and Thomas, JJ., viewed the case through the lens of commercial speech. However, he said that the government's justifications for the statute failed even the intermediate scrutiny test set out in *Central Hudson Gas & Elect.* v. *Public Serv. Comm'n of N. Y.* (1980): "Under *Central Hudson*, a restriction of speech must serve "a substantial interest," and it must be "narrowly drawn." This means, among other things, that "[t]he regulatory technique may extend only as far as the interest it serves." The disparagement clause fails this requirement."

Justice Kennedy, joined by Ginsburg, Sotomayor, and Kagan, JJ., contended that the statute allowed viewpoint discrimination and must be subjected to strict scrutiny: "The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or

perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive….” This opinion did not mention commercial speech at all.

Justice Thomas joined the Alito opinion, but concurred to say that he rejects the *Central Hudson* test and believes that statutes that restrict commercial speech should be subjected to strict scrutiny. Some commentators speculated that the Alito/Kennedy split may reflect a disagreement on whether or not to adopt the Thomas perspective on commercial speech should a proper case arise.

The *Matal* decision effectively ended the Washington Redskin litigation. The team’s trademark is now secure.

Chaper 12. Freedom of Religion.

Part III, Section A-5. Establishment and the 14th Amendment: Transformation
[*Insert on page 1397 after #5.*]

Note: *Kennedy v. Bremerton School District* (2022)

The Court finally formally rejected the *Lemon* test and its endorsement offshoot in its 6-3 decision in *Kennedy v. Bremerton School District*. The Court held that courts in all cases must apply the "historical practices and understandings" test that it had invoked in its decisions in *Town of Greece v. Galloway* and *American Legion v. American Humanist Association*.

In *Kennedy*, the Court held that a school district would not violate the Establishment Clause by permitting a high school football coach to publicly pray on a football field after games even while he was performing his duties of employment since there was no evidence that he had coerced anyone to join him in prayer. The Court, in an opinion delivered by Justice Gorsuch, held that the district violated the coach's free exercise and free speech rights by suspending him for praying because the district regarded the prayers as an endorsement of religion by the school district. The Court overturned decisions of the District Court and the Ninth Circuit in favor of the school district.

In applying the *Smith* test to the coach's free exercise claim, the Court held that the school district's prohibition of the prayers was not neutral because it was directed against a religious practice and was not generally applicable because it "was a bespoke requirement specifically addressed to Mr. Kennedy's religious exercise."

In holding that the district violated the coach's free speech rights, the Court explained that "his speech was private speech, not government speech" since his speech did not involve his duties as a coach. "He did not speak pursuant to government policy. He was not seeking to convey a government-created message." The Court explained that the "timing and circumstances of Mr. Kennedy's prayers confirm the point" because he offered the prayers when his students were engaged in various post-game activities such as singing the school fight song.

In rejecting the school district's contention that it needed to suspend Kennedy to avoid violating the Establishment Clause even if they were protected exercises of religion and speech, the Court declared the three "Clauses have 'complementary' purposes, not warring ones where

one Clause is always sure to prevail over the others." In particular, the Court rejected the school district's apprehension that Kennedy's prayer would appear as an endorsement of religion.

In asserting that the school district's reliance on the *Lemon* test was misplaced, the Court cited *Town of Greece* in support of its declaration that "this Court long ago abandoned *Lemon* and its endorsement test offshoot." The Court claimed that "these tests 'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators," citing *Capitol Square Review and Advisory Board v. Pinette* (1995) (plurality opinion) (emphasis deleted). The Court likewise reiterated that "the Establishment Clause does not include anything like a 'modified heckler's veto, in which…religious activity can be proscribed' based on 'perceptions' or 'discomfort,'" *quoting Good News Club v. Milford Central School* (2001). An Establishment Clause violation, the Court averred, does not necessarily occur when a public school fails to censor private religious speech , and neither does the Clause compel a state to ban any kind of activity that even an objective observer could infer constituted an endorsement. According to the Court, the test of *Town of Greece*, an "analysis focused on original meaning and history," is more consistent with the Court's long-term interpretation of the Establishment Clause.

The Court also rejected the school district's "backup argument" that Kennedy's prayer coerced students to pray because it found no evidence of this in the record. Although the Court acknowledged that some persons might have seen or heard Kennedy pray, the Court did not believe that such observers would feel coerced to pray with him. The Court also pointed out that the coach's prayers, unlike the rabbi's prayer in *Lee v. Weisman*, "were not publicly broadcast or recited to a captive audience. Students were required or expected to participate." The Court remarked that "learning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society,' a trait which is "essential to tolerant citizenry," *citing Lee v. Weisman*.

The Court likewise rejected the school district's contention that the prayer was coercive even if there were no evidence of actual coercion because any visible religious conduct by a teacher or coach is inherently coercive. "Such a rule," the Court declared, "would be a sure sign that our Establishment Clause jurisprudence had gone off the rails. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First

Amendment's double protection for religious expression, it would have us preference secular activity." This, the Court warned, would permit schools to "fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be *required* to do so." (emphasis in original).

The Court concluded that:

"Respect for religious expressions is indispensable to life in a free and diverse Republic – whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates not tolerates that kind of discrimination."

Justice Sotomayor's dissent, joined by Justices Breyer and Kagan, declared that the Court was "wrong" to overrule Lemon "entirely and in all contexts." Sotomayor pointed out that the Court's overruling of *Lemon* "calls into question decades of subsequent precedents…In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new 'history and tradition' test" that the dissent claimed the Court did not fully embrace in *Town of Greece* or *American Legion*. The dissent explained that "while the Court has long referred to historical practice as one element of the analysis in specific Establishment Clause cases, the Court has never announced this as a general test or exclusive focus." The dissent complained that the "Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in *Lemon*…Both of these moves are erroneous and, despite the Court's assurances, novel." Even though *Lemon* does not resolve every Establishment Clause issue, "that does not mean that the test has no value."

The dissent alleged that "the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and

argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt?" Complaining that the Court's decision "provides little in the way of answers," the dissent predicted that "the Court simply sets the stage" for future legal problems.

The dissent argued that "this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched."

Rejecting as "a strawman" the majority's characterization of the endorsement test as a "modified heckler's veto," the dissent argued that "endorsement concerns under the Establishment Clause…bear no relation to 'heckler's veto.'" The dissent explained that "[t]he endorsement inquiry considers the perspective not of just any hypothetical or uninformed observer experiencing subjective discomfort, but of the 'the reasonable observer' who 'aware of the history and context of the community and forum in which the religious [speech takes place],'" *quoting Good News Club v. Milford Central School* (2001). "That is because 'the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from…discomfort' but concern 'with the political community writ large,'" *quoting Milford*.

Sotomayor also declared that "Kennedy's tradition of a 50-yard line prayer… strikes at the heart of the Establishment Clause's concerns about endorsement. For students and community members at the game, Coach Kennedy was the face and the voice of the District during football games." She explained that "Kennedy spoke from the playing field, which was accessible only to students and school employees, not to the general public. Although the football game itself had ended, the football game events had not; Kennedy himself acknowledged that his responsibilities continued until the players went home." She emphasized that a ruling against Kennedy would not necessarily preclude public school teacher or coaches from engaging in any kind of personal prayer while performing their duties.

The dissent also contended that the prayer was coercive. Sotomayor explained that schools are more vulnerable to unconstitutional religious coercion than are other government institutions since schools have a high level of coercive power over vulnerable and impressionable children. She expressed particular concern that football players might perceive that praying with their coach "may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting." She also pointed out that players might feel peer pressure to join other players in prayer with the coach. Even though Kennedy never required players to join him, Sotomayor explained that "existing precedents do not require coercion to be explicit, particularly when children are involved." She complained that "nowhere does the Court engage with the unique coercive power of a coach's actions on his adolescent players."

Regarding Kennedy's free speech claim, Sotomayor explained that "Kennedy's speech, formally integrated into the center of a District event, was speech in his official capacity as an employee that is not entitled to First Amendment protections at all." She concluded that it was "unnecessary to resolve this question, however, because even assuming that Kennedy's speech was in his capacity as a private citizen, the District's responsibilities under the Establishment Clause provided 'adequate justification' for restricting it," *quoting Garcetti v. Ceballos* (2006).

Sotomayor similarly rejected Kennedy's free exercise claim, explaining that it was "not absolute" and that the school district's prohibition was "narrowly tailored to avoid an Establishment Clause violation…Because the District's valid Establishment Clause concerns satisfy strict scrutiny, Kennedy's free exercise claim fails as well."

The dissent also contended that the Court had overemphasized the complementary nature of the religion clauses, understated the degree to which they may come into conflict, and elevated the importance of the Free Exercise Clause at the expense of the Establishment Clause. The dissent argued that the Court ought to have more carefully balanced the interests represented by the clauses in this case, which would have led "to the conclusion that permitting Kennedy's desired religious practice at the time and place of his choosing without regard to the legitimate needs of his employer, violates the Establishment Clause in the particular context at issue here."

Note: Justice Gorsuch's Critique of The *Lemon* Test in *Shurtleff v. City of Boston* (2022)

Shortly before the Court interred the *Lemon* test in *Kennedy*, the test was severely criticized and pronounced dead by Justice Gorsuch in his concurring opinion in *Shurtleff v. City of Boston* (2022), which is included in the Free Speech section of this supplement. Gorsuch, joined by Justice Thomas, expressed dismay that the City of Boston had relied upon *Lemon* in concluding that a temporary display of a Christian flag by a private organization on public property would violate the Establishment Clause. Gorsuch also expressed concern that lower courts may be continuing to invoke *Lemon.* None of the Justices relied on *Lemon* in *Shurtleff*, which was decided on the basis of free speech, and Gorsuch pointed out the Court had not applied the test in nearly two decades.

Gorsuch's critique remains useful even after *Kennedy* because it offers insights into why the Court rejected the *Lemon* test and how the Court will apply its "historical practices and understandings" test.

Gorsuch contended that "from the start, this seemingly simple test produced more questions than answers. How much religion-promoting purpose is too much? Are laws that serve both religious and secular purposes problematic? How much of a religion-advancing effect is tolerable? What does 'excessive entanglement' even mean, and what (if anything) does it add to the analysis? Putting it all together, too, what is a court to do when *Lemon*'s three inquiries point in conflicting directions? … The only sure thing *Lemon* yielded was new business for lawyers and judges." According to Gorsuch, *Lemon* "devolved into a kind of children's game" in which the constitutionality of various conduct was evaluated on highly subjective and emotional factors. He alleged that *Lemon* was "guaranteed to spit out results more hostile to religion than anything a careful inquiry into the original understanding of the Constitution could sustain."

In calling for a return to an original understanding of the Establishment Clause, Gorsuch explained that the Framers understood an establishment of religion to include a formal declaration that a particular denomination was the established church; government-mandated attendance at the established church, with punishment for those persons who did not attend; punishment of dissenting denominations and their members; restrictions on political participation by dissenters; financial support for the established church; and use of the established church to carry out various civil functions. Gorsuch hailed a number of recent decisions, including *Espinoza v. Department of Revenue* (2020) and *Trinity Lutheran Church v. Comer* (2017), for relying on "the historical hallmarks of an establishment of religion – government control over religion offends the Constitution, but treating a church on par with secular entities and other churches does not."

Part III, Section B-1: Government Sponsorship of Religious Speech

[*Insert on page 1412 after* Note: The 2005 Ten Commandments Cases.]

Note: *American Legion v. American Humanist Association* (2019)

The Supreme Court explicitly criticized and bypassed the *Lemon* test, but did not overrule it, in a seven-to-two decision that the display of a thirty-two foot high cross on public property does not violate the establishment clause. The Court ruled that the cross, which was erected in Maryland in 1925 to honor forty-nine local soldiers who died in the First World War and is owned and maintained by a state parks commission, commemorates sacrifice for the ideals of democracy rather than serving as a symbol of Christianity. The Court found no evidence of any discrimination against non-Christians in the construction or maintenance of the cross and explained that the removal or radical alteration" of this "prominent community landmark" after nearly a century "would be seen by many not as a neutral act but as the manifestation of" hostility toward religion.

In determining that the cross symbolized secular. ideals rather than the Christian religion, Justice Alito's opinion for the Court, emphasized that "the Cross has served as the site of patriotic events honoring veterans, including gatherings on Veterans Day, Memorial Day, and Independence Day." The Court also pointed out that memorials honoring veterans of other military conflicts have been placed nearby. The Court stated that the cross's original use as a Christian symbol and the fact that it "retains that meaning in many contexts does not change the fact the symbol took on an added secular meaning when used in World War I memorials." The cross, the Court explained, reminds people "of the deeds of their predecessors and of the sacrifices they made in a war fought in the name of democracy."

The Court also found no evidence that the use of the cross in the memorial was intended to disparage non-Christians, including the 3,500 American Jewish soldiers who died in the First World War. The Court likewise pointed out that the cross's memorial plaque includes the name of both white and black soldiers and that the dedication ceremony began with an invocation from a Roman Catholic priest and ended with a benediction from a Baptist minister at a time when ecumenical ceremonies were rare. "We can never know for certain what was in the minds of those responsible for the memorial," the Court remarked, "but in light of what we know about this ceremony, we can perhaps make out a picture of a community that, at least for the moment, was united by grief and patriotism and rose above the divisions of the day."

The lower courts in the case had applied the *Lemon* test, with the District Court holding the cross satisfied all three prongs and the Court of Appeals finding that it failed the "effects" prong because a reasonable person would regard it as an endorsement of Christianity.

In criticizing the *Lemon* test, the Court explained that the test has been unable to resolve establishment clause issues involving a "great array of laws and practices." The Court pointed out that in many cases it "has either expressly declined to apply the test or has simply ignored it." The test, the Court observed, "has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars." The Court declared that "[w]hile the *Lemon* Court ambitiously attempted to find a grand unified theory of the

Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance." As examples, the Court cited its decisions allowing legislative prayer in *Marsh v. Chambers* (1983) and *Town of Greece v. Galloway* (2014).

The Court identified four reasons why "the *Lemon* test presents particularly daunting problems in cases, involving the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations." The Court declared that "[t]ogether, these considerations counsel against efforts to evaluate such cases under *Lemon* and support "application of a presumption of constitutionality for longstanding monuments, symbols, and practices."

The first problem, according to the Court, is that the secular purpose prong of *Lemon* is difficult to apply in cases involving "monuments, symbols, or practices that were first established long ago" since the intentions of long-deceased persons often cannot be discerned.

Second, the Court explained that "as time goes by, the purposes associated with an established monument, symbol, or practice often multiply." The Court used the Ten Commandments as an example of a religious precept that also has come to have secular connotations. As American society becomes increasingly diverse, the Court explained, the passage of time may obscure the original religious purpose of monuments, symbols, or practices and communities may preserve them "for the sake of their historical significance or their place in a common cultural heritage."

Similarly, the Court found that a third reason why the *Lemon* test may be difficult to apply is that the messages conveyed by such monuments, symbols, or practices may change over time. As an example, the Court pointed out that religion motivated the naming of cities such as Providence, Rhode Island, Bethlehem, Pennsylvania, and Corpus Christi, Texas, but that "few would argue that this history requires that these names be erased from the map."

Fourth, the Court explained that "when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on a particular meaning. A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion." Such removals, Alito warned, could be "evocative, disturbing, and divisive."

In a brief concurring opinion joined by Justice Kagan, Justice Breyer maintained that "there is no single formula for resolving Establishment Clause challenges…The Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish" in its separate sphere. In a separate concurring opinion, Kagan wrote that while "rigid application of the *Lemon*

test does not solve every Establishment Clause problem…that test's focus on purposes and effects is crucial in evaluating government action in this sphere – as this very suit shows."

Justices Kavanaugh was sharply critical of the *Lemon* test in a separate concurring opinion. Kavanaugh argued that the Court had not faithfully applied *Lemon* to the five major categories of Establishment Clause cases: "(1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums." Kavanagh explained that the Court in the first category of cases "has relied on history and tradition and upheld various religious symbols on government property and speech at government events." In the second category, the "Court has allowed legislative accommodations for religious activity and upheld legislatively granted religious exemptions from generally applicable laws." In the third category, "the Court likewise has upheld government benefits and tax exemptions that go to religious organizations, even though those policies have the effect of advancing or endorsing religion." The Court in the fourth category, Kavanagh argued, has prohibited prayer in public schools "not because of *Lemon,* but because the Court concluded that government-sponsored prayer in public schools posed a risk of coercion of students." Kavanaugh likewise concluded that the Court had bypassed *Lemon* in the fifth category of cases by allowing "private religious speech in public forums on an equal basis with secular speech."

Although Kavanaugh explained that he was concurring in the Court's ruling because the "practice of displaying religious memorials, particularly religious war memorials, on public land is not coercive and is rooted in history and tradition," he described the case as "difficult because it represents a clash of genuine and important interests." In particular, he acknowledged that he understood "the deeply religious nature of the cross" and remarked that "[i]t would demean both believers and nonbelievers to say that the cross is not religious, or not all that religious." Kavanaugh likewise expressed "great respect for the Jewish war veterans who in an *amicus* brief say that the cross on public land sends a message of exclusion."

Kavanaugh also pointed out that states may provide stricter barriers between religion and the state than the Establishment Clause requires. "The Court's ruling *allows* the State to maintain the cross on public land," he stated. "The Court's ruling does not *require* the State to maintain the cross on public land… This Court is not the *only* guardian of individual rights in America." (emphases in original). Kavanaugh observed that the federal Constitution's floor for individual rights "is sturdy and often high, but it is a floor. Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution."

Justice Thomas's concurring opinion urged the Court to "take the logical next step and overrule the *Lemon* test in all contexts." Thomas argued that the test lacked any basis in the

original Constitution, that the Court had manipulated the test to achieve predetermined results, and that it had caused "enormous confusion in the States and the lower courts."

With regard to the merits of the case, Thomas argued that the display of the cross did not share "any of the historical characteristics of an establishment of religion. The local commission has not attempted to control religious doctrine or personnel, compel religious observance, single out a particular religious denomination for exclusive state subsidization, or punish dissenting worship. Instead, the commission has done something that the founding generation, as well as the generation that ratified the Fourteenth Amendment, would have found commonplace: displaying a religious symbol on government property." Thomas also reiterated his belief that the text and history of the Establishment Clause "suggest that it should not be incorporated against the States."

In his concurring opinion, Justice Gorsuch contended that the Court ought to have dismissed the case for lack of standing by the American Humanist Association. He contended that the Association's "offended observer" theory of standing had "no basis in law," and conflicted with the doctrine that a plaintiff must demonstrate injury-in-fact, causation, and redressability, and that injury-in-fact requires "an invasion of a legally protected interest which is (a) concrete and particularized…and (b) actual or imminent, not conjectural or hypothetical," quoting *Lujan v. Defenders of Wildlife* (1992). Gorsuch warned that "[i]f individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the judiciary's limited constitutional mandate and infringing on powers committed to other branches of government." He argued that abandonment of the theory "will mean only a return to the usual demands of Article III, requiring a real controversy with real impact on real persons to make a federal case out of it." Gorsuch contended that this also would generate "the welcome side effect of rescuing the federal judiciary from the sordid business of having to pass aesthetic judgment, one by one, on every public display in this country for its perceived capacity to give offense. It's a business that has consumed volumes of the federal reports, invited erratic results, frustrated generations of judges, and fomented 'the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid,'" quoting *Van Orden v.* Perry (2005) (Breyer, J., concurring in the judgment). Gorsuch claimed that lower courts had invented "offended observer" standing in response to *Lemon;* he denounced *Lemon* as "a misadventure" that failed to provide a coherent theory of the Establishment Clause and "left us only a mess." Gorsuch expressed his belief that "[w]ith *Lemon* now shelved, little excuse will remain for the anomaly of offended observer standing, and the gaping hole it tore in standing doctrine in the courts of appeal should now begin to close."

In a dissent joined by Justice Sotomayor, Justice Ginsburg did not invoke or discuss the *Lemon* test. She contended that the state commission's maintenance of a cross on public land "elevates Christianity over other faiths, and religion over nonreligion." Ginsburg's dissent emphasized the role of the cross as "the foremost symbol of the Christian faith" and the central Christian doctrine that the son of God was crucified, died, resurrected, and offers eternal life to

believers. She contended that "using the cross as a war memorial does not transform it into a secular symbol." Rather, the cross "affirms that, thanks to the soldier's embrace of Christianity, he will be rewarded with eternal life." Justice Ginsburg explained that the many monuments that were erected in memory of soldiers who died in the First World War during the decade after the conflict generally avoided the use of the cross out of respect to the many Jews who fought and died in the war. Ginsburg contended that the removal of the Maryland cross would not compel the removal of crosses from the graves of military veterans in public cemeteries, including Arlington Cemetery, because those crosses reflect the private speech of the veterans and "do not suggest government endorsement of those faith and beliefs."

Part III. The Establishment Clause, Section C: Church Property Disputes
[Insert on page 1428, after Church Property Disputes and before Part IV, The Free Exercise of Religion.]

Note: *Walz v. Tax Commission* (1970)

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), the U.S. Supreme Court sustained the constitutionality of tax exemptions for religious organizations for property used solely for religious worship. Anticipating the test that the Court would formulate the following year in *Lemon*, the Court held such exemptions did not violate the establishment clause because they were not intended to establish, sponsor, or support religion. The Court emphasized that a broad array of secular non-profit organizations received the same kind of tax exemption. The Court also found that tax exemption created only a minimal and remote involvement between religion and the state, and that taxation could generate more entanglement. The Court also relied heavily upon the long history of such tax exemptions. "Few concepts," the Court explained, "are more deeply embedded in the fabric of our national life." The Court observed that "two centuries of uninterrupted freedom from taxation" had failed to provide even "the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief." The Court did not consider the possibility that denial of tax exemption for churches could constitute a denial of equal protection insofar as other non-profit organizations are exempt. Justice Douglas, the only dissenter, contended that a "tax exemption is a subsidy."

Part IV, Free Exercise of Religion, Section A: The Development of the Required Accommodation Doctrine
[*Insert on page 1442 after note on* Hosanna-Tabor Evangelical Lutheran Church and School *and before* Hobby Lobby.]

Note: *Our Lady of Guadalupe School v. Morrissey-Berru* (2020)

The Court by a seven to two vote held that the Free Exercise Clause immunized the Roman Catholic Church from liability under federal employment discrimination laws in two cases involving the firing of teachers at Catholic elementary schools. The Court expanded the

"ministerial exception" that it had announced in *Hosanna-Tabor* to a broader range of employees of religious institutions.

The Court declared that while religious institutions do not "enjoy a general immunity from secular laws," the Free Exercise Clause "does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission." Although the teachers in this case had less religious training than did the teacher in *Hosanna-Tabor* and lacked any kind of ecclesiastical title, the Court explained that "[w]hat matters, at bottom, is what an employee does." Applying this standard, the Court found there was abundant evidence that both teachers "performed vital religious duties" by helping to educate children in the Roman Catholic faith and assist children in worship.

Justice Sotomayor, in a dissent joined by Justice Ginsburg, emphasized that "the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not necessarily required even to be Catholic." Urging a "context-specific" and "well-rounded" application of the ministerial exception, the dissent warned against according undue deference to a religious institution's own self-serving characterization of the religious duties of an employee. Justice Sotomayor explained that "[a]lthough certain religious functions may be important to a church, a person's performance of some of those functions does not mechanically trigger a categorical exemption from generally applicable antidiscrimination laws."

Note: *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)

The Court in this case held that the Colorado Civil Rights Commission violated the free exercise clause of the First Amendment by disparaging the religious views of a baker who had refused on religious grounds to bake a wedding cake for a same-sex marriage. The Court therefore reversed a decision of the Colorado Court of Appeals ruling that the baker had violated the Colorado Anti-Discrimination Act (CADA) and rejecting his claims under the First Amendment's free exercise and free speech clauses. By basing its decision on the comments of members of the Commission, the Court bypassed the underlying issue of whether the free exercise and free speech clauses provided a defense to the baker's failure to comply with the statute. Seven Justices concurred in the judgment, while Justices Ginsburg and Kagan in a dissenting opinion favored the affirmation of the decision of the Colorado Court of Appeals.

The CADA prohibits discrimination based on sexual orientation in a "place of business engaged in any sales to the public and any place offering services…to the public." After the baker refused to bake their wedding cake, a same-gender couple filed a complaint with the Colorado Civil Rights Commission alleging violation of the Act. Pursuant to the provisions of the statute, the Colorado Civil Rights Division investigated the claim in order to determine whether there was probable cause for finding that the Act had been violated. After finding probable cause, the Division referred the complaint to the Commission, which exercised its discretion in deciding to initiate a formal hearing before a state administrative law judge, who ruled that CADA is a "valid and neutral law of general applicability" within the meaning of

Employment Div., Department of Human Resources of Oregon v. Smith (1990) and that the free exercise clause therefore did not excuse the baker's compliance with the statute. The administrative law judge also determined that preparation of a wedding cake is not a form of protected speech. The seven-member Commission affirmed this decision in full and ordered the baker to cease and desist from discrimination and to prepare quarterly reports for two years documenting the reasons for any refusal to deny service to customers. The Colorado Court of Appeals affirmed the Commission's legal determinations and its order, concluding that the Commission's order did not violate the baker's free exercise rights.

In concluding that commissioners violated the baker's rights, Justice Kennedy's opinion for the Court, joined by (Roberts, C.J., and Breyer, Alito, Kagan, and Gorsuch, JJ.), identified various comments made by commissioners without objection from other commissioners, including one commissioner's remark that "it is one of the most despicable pieces of rhetoric that people can use to – to use their religion to hurt others." The Court observed that "[t]o describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical – something insubstantial and even insincere." The Court found that this commissioner also compared the baker's "invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust." The Court explained that endorsement of the commissioners of "the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain" implied "that religious beliefs and persons are less than fully welcome in Colorado's business community" and might demonstrate "lack of due consideration" for the baker's "free exercise rights and the dilemma he faced." The Court concluded that "the record here demonstrates that the Commission's consideration of [appellant's] case was neither tolerant nor respectful of [appellant's] religious beliefs."

Even though Kennedy's opinion did not reach the merits of the case, the Court, in an apparent reference to *Smith*, observed that "[t]he Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws." The Court added that "[s]till, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach."

Justice Ginsburg, in a dissent joined by Justice Sotomayor, argued that wedding cakes are not speech or expression entitled to First Amendment protection because there was no evidence that an objective observer would believe that a wedding cake conveys a message, "much less that the observer understands the message to be the baker's, rather than the marrying couple's." Her dissent for the most part did not address the baker's free exercise claim although she suggested that it lacked merit.

Ginsburg also denied that "the comments of one or two Commissioners" constituted the kind of anti-religious bias that "should be taken to overcome" the baker's "refusal to sell a wedding cake" to the same-gender couple. She explained that "[t]he proceedings involved several layers of independent decisionmaking, of which the Commission was but one." She pointed out that the Court failed to identify any prejudice infecting "the determinations of the adjudicators in the case before and after the Commission."

In a concurring opinion, Justice Thomas contended that the cake was expressive conduct and that the state's suppression of his conduct could not withstand strict scrutiny under the free speech clause of the First Amendment. He stated that "[s]tates cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified." Thomas explained that he failed to see how the baker's refusal to bake the cake "stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say "God Hates Fags," all of which this Court has deemed protected by the First Amendment," *citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995); *Boy Scouts of America v. Dale* (2000); and *Snyder v. Phelps* (2011). Thomas also said he could not understand how the baker's "statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions," citing*, inter alia, Brandenburg v. Ohio* (1969).

In *Fulton v. City of Philadelphia* (2021) the Court again avoided a substantive decision on the issue of the conflict between religious free exercise rights and the right of the government to enforce statutes to protect persons from discrimination on the basis of sexual orientation. Philadelphia had refused to fund a Catholic foster care agency that refused to provide services to same sex married couples. While ruling for the Catholic agency, the Court avoided reaching the merits of the underlying conflict by interpreting the Philadelphia ordinance in a way that limited the significance of the case to its facts.

[*Insert on page 1443 after Note on* Hobby Lobby.]

Note: *South Bay United Pentecostal Church v. Newsom #1* (2020)

and *Calvary Chapel Dayton Valley v. Sisolak* (2020).

By votes of five to four, the Court in two cases refused to grant injunctions against orders by the governors of California and Nevada limiting attendance at places of worship on account of the corona flu. California's governor limited attendance at places of worship to 25 percent of building capacity or a maximum of one hundred attendees, while the governor of Nevada decreed that no more than fifty persons could attend a worship service.

The Court provided no opinion in support of its decisions, but Chief Justice Roberts wrote a concurring opinion in the California case rejecting a church's contention that the order violated the Free Exercise Clause of the First Amendment. Roberts expressed strong deference to the manner in which the state chose to exercise its police power to protect public health, which

he described as "a dynamic and fact-intensive matter subject to reasonable disagreement." Roberts explained that state officials "should not be subject to second-guessing by an 'unelected federal judiciary'" in "areas fraught with medical and scientific uncertainties." He contended that the restrictions appeared consistent with the free exercise clause because "[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." Roberts observed that the order exempted or treated more leniently "only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods."

Justice Kavanaugh, in a dissent joined by Justices Thomas and Gorsuch, contended that the California order violated the free exercise clause because it discriminated against religious worship services. Kavanaugh explained that "comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries." In applying the strict scrutiny test, Kavanaugh found that California had a compelling interest in protecting the health of its citizens, but that the order was not narrowly enough tailored to serve that interest because the state could have imposed less restrictive alternatives such as social distancing. In arguing in favor of the injunction, the dissent concluded that the church "would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities."

In the Nevada case, no member of the majority wrote any opinion, but Justices Alito, Gorsuch and Kavanaugh wrote dissents deploring Nevada's restriction of worship attendance to fifty persons even though the state permitted casinos, bowling alleys, fitness centers, and various other entertainment businesses to admit fifty percent of their maximum capacity. Alito contended that such "blatant" discrimination was indefensible and violated the Free Exercise Clause, particularly because the church that sought the injunction strictly required masks, social distancing, and other health measures and had reduced the length of its services to forty-five minutes and was willing to limit attendance to ninety persons (half its fire-code capacity), while casinos were allowed to operate at fifty percent of capacity, which often brought in thousands of patrons, many of whom reportedly were not wearing masks or social distancing. Alito likewise pointed out that casinos serve alcohol "which is well known to induce risk taking,and drinking generally requires at least the temporary removal of masks." Alito declared that it was "hard to swallow" the argument that the church presented a greater public health risk than a casino, and he rejected the state's argument that it could treat churches less favorably than casinos because the state also accorded less favorable treatment to museums, art galleries, and zoos, and various other institutions. Alito also rejected the state's contention that the state was in a better position to enforce compliance by the highly regulated casino industry, contending that enforcement of a

fifty percent attendance rate would be no more difficult to enforce than would a fifty person limit.

Alito also argued that the Nevada order violated the First Amendment's Free Speech Clause because the state's preference for "the secular expression in casino shows over the religious expression in houses of worship" constituted viewpoint discrimination, which is presumptively unconstitutional.

Alito concluded that an injunction was warranted insofar as the church's claims were "very likely to succeed;" prevention of worship would cause irreparable harm to congregants; and the state had "made no effort to show that Calvary Chapel's plans would create a serious public health risk."

Justice Gorsuch, who joined Justice Alito's dissent, added that nothing in the Constitution "permits Nevada to favor Ceasar's Palace over Calvary Chapel."

In a separate dissent, Justice Kavanaugh wrote that "Nevada undoubtedly has a compelling interest in…protecting the health of its citizens. But it does not have a persuasive public health reason for treating churches differently from restaurants, bars, casinos, and gyms." Kavanagh explained that "it is evident that people interact with others" at such entertainment venues "at least as closely as they do at religious services." Although Kavanaugh acknowledged that it was "understandable for the State to balance public health concerns against individual economic hardship," he declared that "no precedent suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide." Kavanaugh warned that the virus was "not a blank check for a State to discriminate against religious people, religious organizations, and religious services. There are certain constitutional red lines that a State may not cross even in a crisis."

Although Alito and Kavanaugh in their dissents in the Nevada case re-affirmed their opposition to Court's denial of the injunction in the California case, they contended that the Nevada edict presented even more compelling reasons for an injunction because the public health justifications for discrimination between places of worship and entertainment venues were even weaker than were the justifications for discrimination between places of worship and grocery stores and restaurants.

Note: *Roman Catholic Diocese of Brooklyn v. Cuomo (2020)*

and Agudath Israel of America v. Cuomo (2020)

In its first ruling against coronavirus containment measures, the Court invoked the First Amendment's guarantee of free exercise of religion to enjoin an executive order by New York's governor limiting attendance at religious services to 10 or 25 persons in areas classified as having a high risk for infections. The Court's joint 5-4 decision in two cases, *Roman Catholic*

Diocese of Brooklyn v. Cuomo and *Agudath Israel of America v. Cuomo*, involved restrictions that were similar in many ways to limitations on religious services in California and Nevada that the Supreme Court refused to enjoin in its two 5-4 decisions six month earlier, *South Bay United Pentecostal Church v. Newsom* and *Calvary Chapel Dayton Valley v. Sisolek*.

Although New York's restrictions may have been at least somewhat more extensive and arguably were more discriminatory than were those in the California and Nevada cases, it seems very likely that the Court's decision ultimately was the result of the departure of Ruth Bader Ginsburg, who voted against the injunction in the California and Nevada cases, and her replacement by Amy Coney Barrett, who voted in favor of the injunction in the New York case, because all of the other eight Justices voted the same way in both sets of cases. Justices Clarence Thomas, Samuel A. Alito, Neil Gorsuch, and Brett M. Kavanaugh voted to grant all of the requested injunctions, while Chief Justice John G. Roberts and Justices Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan voted against the injunctions in both sets of cases. This provides a dramatic example of how Supreme Court decisions may be altered by the appointment of a single Justice, even during a short period of time.

In *Cuomo*, the Court found that the restrictions on religious worship were not "neutral" and of "general applicability" since religious institutions were restricted more heavily than various secular businesses, including acupuncture facilities, camp grounds, and garages. In the absence of neutrality and general applicability, the restrictions needed to satisfy the "strict scrutiny" standard of judicial review, which requires government restriction of First Amendment rights to be "narrowly tailored" to satisfy a "compelling state interest." Although the Court found that stemming the spread of the virus was a compelling interest, the Court held that the restrictions were not narrowly tailored because they were "far more restrictive" than other virus-related measures that the Court had reviewed, particularly those in the California and Nevada cases; they were "much tighter than those adopted by many other jurisdictions hard-hit" by the virus; and they were "far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services."

The Court also determined that there were "many other less restrictive rules that could be adopted to minimize the risks to those attending religious services," particularly correlating maximum attendance "to the size of a church or synagogue." The Court pointed out that nearly all of the 26 churches in the Brooklyn diocese of the Roman Catholic Church that were immediately affected by the order could accommodate at least 500 persons, about 14 could seat at least 700, and two could seat more than a thousand. Likewise, one synagogue in the affected area could seat as many as four hundred.

In determining that the restrictions caused "irreparable harm," an essential criterion for the issuance of an injunction, the Court declared that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm," *quoting Elrod v. Burns* (1976). The Court pointed out that the limitation of attendance to ten persons would

exclude "the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat." The Court explained that watching services remotely "is not the same as personal attendance" because "there are important religious traditions in the Orthodox Jewish faith that require personal attendance." The Court likewise explained that "Catholics who watch a Mass at home cannot receive communion." If the challenges had not been brought only by Roman Catholics and Orthodox Jews, the Court also might have pointed out that communal worship is an important element of most religious traditions and that inability to receive Communion is a critical spiritual deprivation not only for Roman Catholics but also for Orthodox Christians and for most Protestants.

The Court also held that the injunction would not harm the public, another showing required for an injunction, because the state had not claimed that attendance at the religious services had resulted in the spread of the virus and because "the State has not shown that public health would be imperiled if less restrictive measures were imposed."

While the Court acknowledged that the Justices "are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area," the Court declared that "even in a pandemic, the Constitution cannot be put away and forgotten," especially since these restrictions "strike at the very heart of the First Amendment's guarantee of religious liberty." The Court therefore explained that it had "a duty to conduct a serious examination of the need for such a drastic measure."

Although the governor by the time of the Court's decision had re-classified the areas in question to permit services at 50 percent of occupancy, the Court held that the matter was not moot because "the applicants remain under a constant threat that the area in question will be reclassified," particularly since the "Governor regularly changes the classification of particular areas without prior notice."

In a sharply worded concurrence, Justice Gorsuch complained that the governor had severely restricted religious worship even though hardware stores, liquor stores, bicycle repair shops, acupuncturists, lawyers, accountants, and insurance agents were not so limited. "So, at least according to the Governor," Gorsuch wrote, "it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?" Gorsuch observed that "[t]he only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces…*That* is exactly the kind of discrimination the First Amendment forbids." Pointing out that "certain other Governors have issued similar edicts" asserting "the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples," Gorsuch remarked that "[i]n far too many places, for far too long, our first freedom has fallen on deaf ears."

Gorsuch's concurrence distinguished *Jacobson v. Massachusetts* (1905), the Supreme Court decision that advocates of lockdown measures often have cited in opposition to constitutional objections to such measures. In *Jacobson*, the Court sustained the constitutionality of a state law enacted during a smallpox epidemic that required persons to receive a vaccine unless they qualified for an exemption or paid a five dollar fine ($140 in 2020 dollars). Gorsuch pointed out that "Jacobson's claimed right to bodily integrity…was avoidable and relatively modest" and was sustained under a rational basis standard of review although it "might even have survived strict scrutiny, given the opt-outs available to certain objectors." Gorsuch pointed out that *Jacobson* provided no authority for sweeping deprivation of religious liberty. Expressing puzzlement about why some persons have "mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic," Gorsuch surmised that "much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do."

In a dissenting opinion, Chief Justice Roberts acknowledged that "[n]umerical capacity limits of 10 and 25 people, depending on the applicable zone, do seem unduly restrictive," but he explained that the Court did not need to rule on the issue at the present time because the governor had now removed the restrictions in the affected areas to permit the applicants to hold services with up to 50 percent of capacity. "The Governor might reinstate the restrictions," Roberts acknowledged. But he also might not."

Justice Breyer's dissent likewise contended that the revisions eliminated the need for an injunction. Regarding the merits of the case, Breyer acknowledged that the 10 and 25 numbers "are indeed low," but that "whether…those low numbers violate the Constitution's Free Exercise Clause is far from clear" because the number of deaths and illnesses caused by the virus provided the state with "countervailing arguments based upon health, safety, and administrative considerations that must be balanced against Applicants' First Amendment challenges."

In another dissent, Justice Sotomayor expressed deference toward medical experts who claim that the virus is spread by "large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time," which, as she pointed out, does not generally occur in bike repair shops and liquor stores. She warned that "Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus…spreads most easily."

Note: *South Bay United Pentecostal Church v. Newsom* #2 (2021)

Nine months after its five-to-four decision upholding California's restrictions on religious worship in its first *South Bay Pentecostal Church* decision, the Court in a six-to-three decision in February 2021 enjoined California's subsequent total ban on indoor religious worship.

Although the Court acknowledged that state officials have broad authority pursuant to the police power to protect public health, the Court found that California had failed to demonstrate that its draconian prohibition on indoor worship of any kind was justified as an emergency measure. Chief Justice Roberts observed that "Deference, though broad, has its limits." Similarly, Justice Gorsuch explained that "[i]t has never been enough for the State to insist on deference or demand that individual rights give way to collective interests. Of course, we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty." Gorsuch remarked that "[e]ven in times of crisis – perhaps *especially* in times of crisis – we have a duty to hold governments to the Constitution." (emphasis in original).

Gorsuch contended that one of the principal infirmities of the ban was that "California singles out religion for worse treatment than many secular activities." Although the state tried to justify it on the grounds that religious exercises involve the mixing of large numbers of persons from different households in close proximity for extended periods, the Court pointed out that the state permitted various businesses, including hairstylists, manicurists, buses, and retail stores, to continue operations event though they brought unrelated people into close and prolonged physical contact. Gorsuch also found that California had failed to explain "why the less restrictive option of limiting the number of people who may gather at one time is insufficient for houses of worship."

Six Justices, however, upheld California's prohibition on singing in public worship services. Justices Thomas and Gorsuch favored an injunction against this ban, and Justice Alito would have stayed the request for an injunction against the ban on singing for thirty days to allow the state to offer more sufficient scientific justifications for it.

In a dissent joined by Justices Breyer and Sotomayor, Justice Kagan warned that "Justices of this Court are not scientists" and she accused the Court of displacing "the judgments of experts about how to respond to a raging pandemic," which she decried as "alarming."

Kagan disputed the Court's contention that California had imposed singular restrictions on religious worship, pointing out that the same ban applied to other communal gatherings, including political meetings and concerts. She also agreed with California's contention that retail stores were different from religious services because people are in less proximity with one another and for less time in stores.

Section B: Permissible Accommodations

[*Insert after the second full paragraph on p. 1444, immediately preceding Subsection C.*]

Congress and state legislatures may enact statutes for the protection of free exercise of religion and other personal liberties since the U.S. Constitution is a floor rather than a ceiling for personal liberties. Courts often interpret those statutes without the need to reach constitutional issues. A recent example is *Groff v. DeJoy* (2023), in which the Supreme Court interpreted a provision of Title VII of the Civil Rights Act of 1964 which requires employers to accommodate

the religious practices of their employees unless doing so would impose an "undue hardship on the conduct of the employer's business."

In *Groff*, the Court unanimously held that such hardship needed to be more than *de minimis*, which was the standard many lower courts had used because of a one-line reference to such a standard in *Trans World Airlines, Inc. v. Hardison* (1977). The Court explained that this standard had been taken out of context since *Hardison* repeatedly referred to "substantial" burdens, a formulation that the Court concluded "better explains the decision" and was more consistent with the statutory language, "undue hardship." The Court concluded that "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business," a test that the Court believed could be evaluated "in the context of an employer's business in [a] common-sense manner." Accordingly, the Court reversed a decision of the Third Circuit affirming summary judgment for the United States Postal Service in action by a postal employee who was disciplined for refusing to work on Sunday for religious reasons. The Court remanded the case to for further proceedings consistent with its opinion.

Section C: Purposeful Discrimination

[*Insert on page 1445* after L*ocke v. Davey*]

Note: *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017)

In what is widely regarded as a landmark case on law and religion, the U.S. Supreme Court by a vote of seven to two held that the free exercise clause barred a state from excluding a church sponsored daycare center from eligibility to receive public funding for the re-surfacing of its gravel playground.

Trinity Lutheran Church in Columbia, Missouri had applied for a grant from a state program that permitting qualifying nonprofit institutions to receive funds to re-surface playgrounds with rubber made from re-cycled tires. Although the church ranked fifth among forty-four applicants in a year in which the state awarded fourteen grants, the state denied funding to the church pursuant to a provision of the Missouri constitution, dating from the late nineteenth century, which prohibited the direct or indirect use of public funds "in aid of any church, sect, or denomination of religion." The state contended that its denial of funds did not prohibit the church from engaging in religious conduct or otherwise meaningfully burden the church's free exercise of religion. The district court agreed, holding that while the free exercise clause prohibits the government from prohibiting or restricting a religious practice, it does not bar a state from withholding an affirmative benefit. The district court relied heavily upon *Locke v. Davey* (2004), in which the U.S. Supreme Court held that a state did not violate the free exercise clause by denying a state scholarship to a student who wanted to use his degree in theology to become a minister. In affirming the lower court's decision, the Court of Appeals determined that the free exercise clause did not compel the state to disregard its state constitution's antiestablishment principle, even though the state could have awarded the grant without violating the establishment clause.

In reversing the appellate court, the Supreme Court, in an opinion delivered by Chief Justice Roberts, held that the state's "policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." The Court distinguished *Locke v. Davey* on the ground that "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed to *do* – use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is – a church." (emphasis in original). Although the Court acknowledged that the state had "not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel," and that the state's policy was not likely to have any consequences beyond "a few extra scraped knees," the Court declared that "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions,'" *quoting Lyng v. Northwest Indian Cemetery Protective Association* (1988) (upholding federal timber harvesting and road construction even though this would obstruct Native American religious practices on the land, which the tribes regarded as sacred). The Court explained that "Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character." Such discrimination, the Court contended, would inevitably deter or discourage its free exercise of religion.

In applying what it described as "the strictest scrutiny" and requiring the state to adduce an interest of "the highest order," the Court found that the state's only justification was its "policy preference for skating as far as possible from religious establishment concerns." The Court held that this interest was not sufficiently compelling because the state's interest in achieving greater separation of church and state than was already ensured under the establishment Clause of the federal constitution was limited by the free exercise clause.

The Court explained that its disposition of the case on free exercise grounds precluded any need to determine whether the state had violated the equal protection clause.

Justice Thomas, in a brief concurrence joined by Justice Gorsuch, and Justice Gorsuch, in a brief concurrence joined by Justice Thomas, expressed concern that the Court had not gone far enough in protecting the free exercise of religion.

Justice Breyer wrote a short concurrence emphasizing that the state had prevented the church from participating "in a general program designed to secure or to improve the health and safety of children" and that he would defer consideration of the application of the free exercise clause to other forms of public benefits.

In a long dissent joined by Justice Ginsburg, Justice Sotomayor declared that the Court's decision "profoundly changes" the relationship between religious institutions and the government "by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church." She alleged that the Court's silence about the

establishment clause "signals either its misunderstanding of the facts of this case or a startling departure from our precedents."

In contending that the state would have violated the establishment clause by permitting the church to receive funds for its playground, Sotomayor explained that the church sought state funds to improve its daycare center, which the church acknowledged to be "used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers. The Church's playground surface – like a Sunday School room's walls or the sanctuary's pews – are integrated with and integral to its religious mission. The conclusion that the funding the Church seeks would impermissibly advance religion is inescapable."

Sotomayor also contended that the state's denial of funding would not violate the free exercise clause even if it would not violate the establishment clause. Sotomayor averred that the Court's precedents permitted the government to have greater freedom to limit the free exercise of religion in order to protect the interests of the establishment clause, and vice versa. In *Locke*, for example, the Court held that the establishment clause did not require the state to deny the scholarship to the ministerial student, but that the state's interest in preventing the establishment of religion took precedence over the student's free exercise of religion. Surveying the process by which states withdrew public funding for favored religious denominations during the late eighteenth and early nineteenth centuries, she concluded that the Missouri constitutional provision barring public support of religion had "deep roots in our Nation's history" and reflected "a reasonable and constitutional judgment." Sotomayor pointed out that thirty-eight states had analogous provisions in their state constitutions. She contended that a state's refusal "to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns." She also pointed out that the religion clauses do not protect religion but rather freedom of conscience, *citing Wallace v. Jaffree* (1985).

Although Sotomayor acknowledged that denial of public benefits such as police or fire protection would violate the free exercise clause, she explained that the Missouri program "offers not a generally available benefit but a selective benefit for a few recipients each year."

Responding to the Court's contention that Missouri's only justification was its "preference for skating as far as possible from religious establishment concerns," Sotomayor declared that "[t]he constitutional provisions of thirty-nine States – all but invalidated today – the weighty interests they protect, and the history they draw on deserve more than this judicial brush aside. Today's decision discounts centuries of history and jeopardizes the government's ability to remain secular." She concluded that the Court's decision "dismantles a core protection for religious freedom" by holding "not just that a government may support houses of worship with taxpayer funds, but that at least in this case and perhaps in others…it must do so whenever it decides to create a funding program. History shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that

benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship."

Note: *Espinoza v. Montana Department of Revenue* (2020)

The Court in another five-to-four decision broadened the scope of *Trinity Lutheran*, holding that the Montana Constitution's prohibition of aid to religiously affiliated schools violated the free exercise clause when it was applied to bar such schools from participating in a state scholarship program for students attending private schools. The program granted tax credits up to $150 for donations to organizations awarding scholarships for private school tuition. The Montana Department of Revenue contended that the state constitution's "no aid" provision prohibited credits for donations used for tuition at religiously affiliated schools.

Applying a strict scrutiny test, the Court held that the application of Montana's "no aid" provision, like the Missouri constitution's "no aid" provision in *Trinity Lutheran*, violated free exercise because it barred religious institutions from a public benefit solely on the basis of their religious character. The Court distinguished *Locke v. Davey* on the ground that Locke was denied a scholarship because of what he wanted to *do* with the money (prepare for the ministry), while the schools in this case and *Trinity Lutheran* were denied funds because of what they *were* (religiously affiliated institutions). According, the Court explained that the case turned "expressly on religious status and not religious use."

The Court explained that the application of the "no aid" provision was particularly objectionable because the infringement burdened "not only religious schools but also the families whose children attend or hope to attend them." In rejecting the Department's contention that the no-aid provision protected public education by preventing diversion of funds to religiously affiliated schools, the Court declared that such an interest did not justify requiring only religious private schools to bear its weight. The parties did not dispute that the scholarship program was permissible under the Establishment Clause and the plaintiffs did not facially challenge the no-aid provision.

Justice Thomas, in a concurrence joined by Justice Gorsuch, reiterated his belief that the Establishment Clause applies only against the federal government and that the incorporation of the Establishment Clause into state law has hindered the free exercise of religion.

Justice Alito observed in a concurrence that Montana's "no aid" provision, like similar so-called "Blaine amendments" in sixteen other states, appears to have been influenced by the widespread animus against Roman Catholicism during the 19th century. He contended that parents today often send children to religiously affiliated schools for secular reasons.

In a dissent joined by Justice Sotomayor, Justice Ginsburg contended that the application of the no-aid provision did not place an undue burden on religious liberty because it did not

significantly interfere with the ability of parents to send their children to religiously affiliated schools.

Justice Breyer, in a dissent joined by Justice Kagan, argued that the case was more like *Locke* than *Trinity Lutheran* because the state was not discriminating on the basis of status but rather was refusing to fund what *Locke* called "an essentially religious endeavor" designed to "induce religious faith." Breyer also complained that the majority had replaced "the flexible, content-specific approach" of earlier free exercise cases with a more rigorous strict scrutiny test that was unduly rigid and was inconsistent with the Court's tradition of usually according a presumption of constitutionality in cases involving government benefits.

Justice Sotomayor complained in her dissent that "[w]ithout any need or power to do so, the Court appears to require a State to reinstate a tax-credit program that the Constitution did not demand in the first place."

Note: *Carson v. Makin* (2022)

In a 6-3 decision, *Carson v. Makin* (2022), the Court expanded the doctrine of *Trinity Lutheran* and *Espinoza*, holding that a state was compelled to subsidize tuition at religiously affiliated schools if the state provided comparable subsidies for tuition at private nonsectarian schools. The Court found that discrimination between nonsectarian and religiously affiliated schools violated the Free Exercise Clause.

The Court rejected the distinction between "status-based" discrimination and "use-based" discrimination. The Court held that the state was required to provide the tuition funds even though they were used for instruction that sometimes was distinctly religious. In his opinion for the Court, Chief Justice Roberts contended that *Trinity Lutheran* and *Espinoza* "never suggested that use-based discrimination is any less offensive to the Free Exercise Clause" than is status-based discrimination. He warned that any "attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism." Roberts declared that a "State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."

Relying on *Zelman*, the Court held that requiring the state to provide tuition for religiously affiliated schools would not violate the Establishment Cause because a state may create "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients."

The Court distinguished *Locke v. Davey* on the ground that there was a "historic and substantial state interest" against using tax funds for the education of clergy.

Carson arose out of a Maine statute requiring school districts that were too sparsely populated to support a public secondary school to arrange for the education of children in other school districts. The districts without high schools could make contracts with public or private schools in other districts or pay the tuition for children whose parents selected a public or private nonsectarian school in another district.

In his dissent, Justice Breyer accused the Court of emphasizing the Free Exercise at the expense of the Establishment Clause. Breyer argued that the Court had ignored the "play in the joints" between the clauses, which "gives States some degree of legislative leeway," sometimes allowing "a State to further antiestablishment interests by withholding aid from religious institutions without violating the Constitution's protections for the free exercise of religion."

Breyer warned that "to interpret the two Clauses as if they were joined at the hip" could cause "serious risk of religion-based social divisions" in a nation that has so many different religions. He pointed out that some citizens might perceive that the state was favoring particular religions or was favoring religion over nonreligion. He also expressed concern that "[m]embers of minority religions, with too few adherents to establish schools, may see injustice in the face that only those belonging to more popular religions can use state money for religious education. Taxpayers may be upset at having to finance the propagation of religious beliefs that they do not share and with which they disagree."

This also was "a situation ripe for conflict," Breyer warned, because the decision would force Maine to evaluate the religious curricula of the schools to make certain that they did not violate state standards for schools that received public funds. He pointed out the ruling similarly could impede religious instruction in sectarian schools, which now will need to make sure that their curriculum is consistent with such standards.

Breyer pointed out that while the Court sometimes in the past had held that states may provide funding to religious schools through a general funding program, the Court until now had never held "that a State *must* (not *may*) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education." (emphasis in original).

Distinguishing *Trinity Lutheran* and *Espinoza* on the ground that the statutes in those cases discriminated against the status of the religiously based schools, he explained that Maine "excludes schools from its tuition program not because of the schools' religious character but because the schools will use the funds to teach and promote religious ideals." Breyer pointed out that, until now, the Court had "consistently required public school education to be free from religious affiliation or indoctrination."

Breyer was unconvinced by the majority's contention that the state would not violate the Establishment Clause by making private schools eligible for funding if private individuals (usually parents), rather than the state, chose to spend state money on sectarian schools. Breyer

contended that this "simply *permits* Maine to route funds to religious schools…It does not *require* Maine to spend its money in that way." (emphasis in original).

In a separate dissent, Justice Sotomayor alleged that the Court's decision made separation of church and state "a constitutional violation." Reiterating points from the dissent in *Trinity Lutheran*, she lamented that "in just a few short years, the Court has upended constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars."

In his opinion for the Court, Roberts declared that the dissents were "wrong to say that under our decision today Maine '*must*' fund religious education. The Court explained the state retained alternative options. "[I]t could expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or even operate boarding schools of its own." Roberts therefore concluded that while the state did not need to subsidize private education, it could not disqualify schools because of their religious affiliation once it started to provide subsidies to non-public schools.

Chapter 13. Governmental Actors, Private Actors, and the Scope of the 13th and 14th Amendments.

Part III, The Scope of Congressional Power to Enforce the 14th Amendment: The Modern View

[Place on page 1474 after paragraph on *Tennessee v. Lane*.]

Note: *Allen v. Cooper* (2020)

A recent case provides an excellent review of the concepts at work in *City of Boerne.* In *Allen v. Cooper* (2020) the Court invalidated the Copyright Remedy Clarification Act (CRCA), 17 USC 511(a), which was a congressional attempt to abrogate state sovereign immunity for copyright infringement. The statute read:

> In general. Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal Court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 122, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.

In essence, the Court applied the congruence and proportionality test from *City of Boerne* and held that while the statute was congruent with existing law (one could not violate copyrights), the

Court considered the congressional remedy to be excessive—concluding that it was not proportional to the extent that states were actually violating copyrights.

The Court considered itself bound to rule against the copyright holder because of stare decisis. An earlier decision had rejected the claim of a patent holder against state infringement in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* (1999). Congressional power to issue copyrights and patents is found is the same provision, Art. I, s.8, cl.8: "[The Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Allen* and *Florida Prepaid* illustrate the principle that Congress cannot use its Article I powers to overcome state sovereign immunity because the 11th Amendment, as an amendment, supercedes any Article I powers. However, section 5 of the 14th Amendment—amending state power under the 11th Amendment—is available to overcome state sovereign immunity. See, e.g., *Nevada Department of Human Resources v. Hibbs* (2003), *Tennessee v. Lane* (2004). Nonetheless, in *Florida Prepaid* the Court ruled 5-4 that while a taking of property is certainly a violation of section 1 of the Fourteenth Amendment, the statutory remedy was not proportional to the amount of patent infringements engaged in by states. The Court's aggressive analysis of a statute's proportional response to the degree of harm posed by the regulated activity under *Boerne* stands in sharp contrast to the Court's usual rational basis deference to the fit between legislative ends and means.

Note: *Trump v. Anderson* (2024)

In *Trump v. Anderson*, the Court considered the question of whether Donald Trump could be kept off the presidential primary ballot in Colorado because of his involvement with the insurrection at the United States capitol on January 6, 2021.

Section 3 of the 14th Amendment reads as follows:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

The Colorado Supreme Court had concluded that Trump was an officer of the United States, that he had participated in an insurrection, that Colorado had the authority to execute the provisions of Section 3, and that he was therefore ineligible to run for the office of President in Colorado.

The appeal raised many issues: whether the president is an "officer of the United States" within the meaning of Section 3; whether the January 6, 2021, attack on the Capitol qualified as an "insurrection;" whether Trump "engaged" in it; whether Trump received adequate due process

in the Colorado courts; and whether any of his actions were protected by the First Amendment. The Supreme Court did not address any of these issues. In a *per curiam* opinion echoing the emphasis on the need for uniformity in federal elections seen in *U.S. Term Limits, Inc. v. Thornton* (1995), all nine justices agreed that states had no authority to enforce Section 3 against candidates for *federal* office. In a far more controversial holding, five justices went on to hold that Section 3 was not self-executing and the prohibitions of Section 3 could only be implemented through federal legislation passed pursuant to Section 5 of the 14th Amendment. Justices Barrett, Jackson, Kagan, and Sotomayor dissented to this holding. The precedential value of the second holding will likely be contested in the future, as the first holding completely disposed of the case and the second holding could therefore be considered dicta.

The *per curiam* opinion stated the issue in the case as follows:

> This case raises the question whether the States, in addition to Congress, may also enforce Section 3. We conclude that States may disqualify persons holding or attempting to hold *state* office. But States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency.

The reasoning focused on the need for uniformity in a presidential election:

> [S]tate-by-state resolution of the question whether Section 3 bars a particular candidate for President from serving would be quite unlikely to yield a uniform answer consistent with the basic principle that "the President ... represent[s] *all* the voters in the Nation."
>
> Conflicting state outcomes concerning the same candidate could result not just from differing views of the merits, but from variations in state law governing the proceedings that are necessary to make Section 3 disqualification determinations.…The result could well be that a single candidate would be declared ineligible in some States, but not others, based on the same conduct (and perhaps even the same factual record).
>
> The "patchwork" that would likely result from state enforcement would "sever the direct link that the Framers found so critical between the National Government and the people of the United States" as a whole. *U. S. Term Limits v. Thornton* (1995). But in a Presidential election "the impact of the votes cast in each State is affected by the votes cast"—or, in this case, the votes not allowed to be cast—"for the various candidates in other States." *Anderson v. Celebrezze* (1983). An evolving electoral map could dramatically change the behavior of voters, parties, and States across the country, in different ways and at different times. The disruption would be all the more acute—and could nullify the votes of millions and change the election result—if Section 3 enforcement were attempted after the Nation has voted. Nothing in the Constitution requires that we endure such chaos—arriving at any time or different times, up to and perhaps beyond the Inauguration.

Five members then held that Section 3 was inoperative until Congress passes a statute to implement a ban. In spite of the fact that the other sections of the 14th Amendment are

recognized as being self-executing in both federal and state courts, Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh ruled that Section 3 was different: "The Constitution empowers Congress to prescribe how those determinations should be made. The relevant provision is Section 5, which enables Congress, subject of course to judicial review, to pass "appropriate legislation" to "enforce" the Fourteenth Amendment. See *City of Boerne v. Flores* (1997)."

Section 5 of the 14th Amendment states that "*The Congress shall have power to enforce, by* appropriate legislation, the provisions of this article." The problem with the reference to *City of Boerne* is that the Court has made clear there that Section 5 only allows Congress to pass *remedial* legislation, consistent with the *Court's* interpretation of the substantive protections of Section 1. If Section 3 has no meaning until Congress passes a statute effectuating its provisions, there is nothing for Congress to "remedy." The Court created a new definition of "appropriate legislation" unique to Section 3.

Justices Sotomayor, Kagan, and Jackson found no basis for such an approach, concurring in the judgment only. They first cited Chief Justice Roberts' admonition in *Dobbs v. Jackson Women's Health Organization* (2022) (concurring in judgment) that "If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." The concurrence continued:

> To allow Colorado to take a presidential candidate off the ballot under Section 3 would imperil the Framers' vision of "a Federal Government directly responsible to the people." *U. S. Term Limits*. The Court should have started and ended its opinion with this conclusion.
>
> II. Yet the Court continues on to resolve questions not before us. In a case involving no *federal* (emphasis added) action whatsoever, the Court opines on how federal enforcement of Section 3 must proceed. Congress, the majority says, must enact legislation under Section 5 prescribing the procedures to " ' "ascertain[ ] what particular individuals" ' " should be disqualified. (quoting *Griffin's Case*, 11 F.Cas. 7, 26 (No. 5,815) (CC Va. 1869) (Chase, Circuit Justice)). These musings are as inadequately supported as they are gratuitous.

It then criticized the notion that Section 3 is not self-executing, given the fact that the other sections, as well as other provisions regarding qualifications, are:

> All the Reconstruction Amendments (including the due process and equal protection guarantees and prohibition of slavery) "are self-executing," meaning that they do not depend on legislation. *City of Boerne v. Flores* (1997); see *Civil Rights Cases* (1883). Similarly, other constitutional rules of disqualification, like the two-term limit on the Presidency, do not require implementing legislation. See, *e.g.*, Art. II, § 1, cl. 5 (Presidential Qualifications); Amdt. 22 (Presidential Term Limits). Nor does the majority suggest otherwise. It simply creates a special rule for the insurrection disability in Section

3.

> [U]nder the guise of providing a more "complete explanation for the judgment," the majority resolves many unsettled questions about Section 3. It forecloses [federal] judicial enforcement of that provision, such as might occur when a party is prosecuted by an insurrectionist and raises a defense on that score. The majority further holds that any legislation to enforce this provision must prescribe certain procedures " 'tailor[ed]' " to Section 3, ruling out enforcement under general federal statutes requiring the government to comply with the law. By resolving these and other questions, the majority attempts to insulate all alleged insurrectionists from future challenges to their holding federal office.

Justice Barrett concurred in judgment only in a separate opinion:

> I join Parts I and II–B of the Court's opinion. I agree that States lack the power to enforce Section 3 against Presidential candidates. That principle is sufficient to resolve this case, and I would decide no more than that. This suit was brought by Colorado voters under *state* law in *state* court. It does not require us to address the complicated question whether *federal* legislation is the exclusive vehicle through which Section 3 can be enforced. (Emphasis added.)

In *Dobbs v. Jackson Women's Health Organization* (2022), Justice Alito's majority opinion made a claim that the decision was based on neutral principles and was agnostic about any social implications the opinion might have:

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

Justice Barrett acknowledges that the justices do not in fact live in such a secluded ivory tower:

> The Court has settled a politically charged issue in the volatile season of a Presidential election. Particularly in this circumstance, writings on the Court should turn the national temperature down, not up.

The majority was clearly aware that there is no possibility of the Section 5 legislation required by their opinion being passed given the polarized state of contemporary American politics.

For a perceptive critique of the opinion, see the following analysis by Ilya Somin:

https://www.lawfaremedia.org/article/what-the-supreme-court-got-wrong-in-the-trump-section-3-case

Section IV-B, State Action after *Moose Lodge*.
[*Insert on page 1490, replacing current section IV-B.*]

B. State Action after *Moose Lodge*

The Warren Court had often found state action in cases challenging segregation after *Brown v. Board of Education* (1954). *Moose Lodge* (1972) represented a case involving racial discrimination after *Brown* where the Court failed to find state action and sent a signal that the Burger Court was much less likely to find state action. However, the significance of *Moose Lodge* in the realm of race relations is much reduced because of the decision in *Jones v. Alfred Mayer* (1968).

Moose Lodge was part of a series of state action cases decided from 1972 to 1982 in which the Burger Court systematically narrowed the scope of state action doctrine. These cases often involved attempts by plaintiffs to allege state action under both public function and entanglement theories. The Court systematically narrowed the scope of each theory.

In *Jackson v. Metropolitan Edison Company* (1974), the Court rejected a customer's due process challenge to the peremptory termination of her electric power. The plaintiff had argued that the Company was a state actor because the state had given it monopoly status and regulated it, and that the provision of power was a public function. In rejecting this argument, the Court held:

> Petitioner next urges that state action is present because respondent provides an essential public service required to be supplied on a reasonably continuous basis by Pa. Stat. Ann., Tit. 66, § 1171 (1959), and hence performs a "public function." We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. See, e.g., *Nixon v. Condon* (1932) (election); *Terry v. Adams* (1953) (election); *Marsh v. Alabama* (1946) (company town); *Evans v. Newton* (1966) (municipal park). If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty.
>
> Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses "affected with the public interest" are state actors in all their actions.
>
> We decline the invitation. …

Besides rejecting the plaintiff's public function theory, the Court held that there was insufficient entanglement to make the conduct of the utility equivalent to the conduct of the state. Extending the reasoning of *Moose Lodge*, the Court held that there must be a nexus between the complained of action and the state:

> Here the action complained of was taken by a utility company which is privately owned and operated, but which in many particulars of its business is subject to extensive state regulation. The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the 14th Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. *Public Utilities Comm'n v. Pollak* (1952). It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Moose Lodge No. 107*. …
>
> We also reject the notion that Metropolitan's termination is state action because the State "has specifically authorized and approved" the termination practice. In the instant case, Metropolitan filed with the Public Utility Commission a general tariff [a detailed description of the way that Metropolitan would conduct its business] — a provision of which states Metropolitan's right to terminate service for nonpayment. This provision has appeared in Metropolitan's previously filed tariffs for many years and has never been the subject of a hearing or other scrutiny by the Commission. Although the Commission did hold hearings on portions of Metropolitan's general tariff relating to a general rate increase, it never even considered the reinsertion of this provision in the newly filed general tariff. …
>
> All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the 14th Amendment.

In 1976, the Court refused to apply the logic of *Marsh v. Alabama* (1946) to a private shopping center. In *Hudgens v. National Labor Relations Board* (1976), the Court expressly overruled *Amalgamated Food Employees Union v. Logan Valley Plaza* (1968), which, citing *Marsh*, had held that shopping centers were the functional equivalent of downtown shopping districts and must be open to the public.

In *Flagg Brothers v. Brooks* (1978), the Court held there was no state action (and thus no possibility for a due process claim) when a storage facility sold a renter's goods, as it was authorized to do so by state law, without approval from any judicial official:

> Respondents' primary contention is that New York has delegated to Flagg Brothers a power

> "traditionally exclusively reserved to the State." They argue that the resolution of private disputes is a traditional function of civil government, and that the State in § 7-210 has delegated this function to Flagg Brothers. Respondents, however, have read too much into the language of our previous cases. While many functions have been traditionally performed by governments, very few have been "exclusively reserved to the State."

The Court elaborated on the exclusive function theme:

> And we would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of *Marsh* which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called "dispute resolution." Among these are such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the 14th Amendment.

The Court continued to narrow its approach to state action in *Blum v. Yaretsky* (1982) and *Rendell-Baker v. Kohn* (1982). In *Blum*, the Court rejected a claim that providing Medicare services was a public function. The plaintiff had argued that a nursing home was a state actor because the state funded his care and regulated it, and that the provision of medical care for the elderly was a public function. In rejecting a due process challenge from a patient whose medical care had been unilaterally adjusted, the Court held:

> We are also unable to conclude that the nursing homes perform a function that has been "traditionally the exclusive prerogative of the State." *Jackson v. Metropolitan Edison Co*. Respondents' argument in this regard is premised on their assertion that both the Medicaid statute and the New York Constitution make the State responsible for providing every Medicaid patient with nursing home services. The state constitutional provisions cited by respondents, however, do no more than authorize the legislature to provide funds for the care of the needy. See N.Y. Const., Art. XVII, §§ 1, 3. They do not mandate the provision of any particular care, much less long-term nursing care. Similarly, the Medicaid statute requires that the States provide funding for skilled nursing services as a condition to the receipt of federal moneys. It does not require that the States provide the services themselves. Even if respondents' characterization of the State's duties were correct, however, it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public. Indeed, respondents make no such claim, nor could they.

The Court also rejected entanglement as a basis for state action. In *Blum*, Medicaid patients were transferred to lower levels of care based upon a private physician's evaluation of their condition. However, the standards that the physician was to apply had been promulgated by the State.

> First, although it is apparent that nursing homes in New York are extensively regulated, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the 14th Amendment." *Jackson v. Metropolitan Edison Co*. The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties. . . .
>
> These regulations do not require the nursing homes to rely on the forms in making discharge or transfer decisions, nor do they demonstrate that the State is responsible for the decision to discharge or transfer particular patients. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State. This case, therefore, is not unlike *Polk County v. Dodson* (1981), in which the question was whether a public defender acts "under color of" state law within the meaning of 42 U.S.C. § 1983 when representing an indigent defendant in a state criminal proceeding. Although the public defender was employed by the State and appointed by the State to represent the respondent, we concluded that "[t]his assignment entailed functions and obligations in no way dependent on state authority." The decisions made by the public defender in the course of representing his client were framed in accordance with professional canons of ethics, rather than dictated by any rule of conduct imposed by the State. The same is true of nursing home decisions to discharge or transfer particular patients because the care they are receiving is medically inappropriate.

In *Rendell-Baker v. Kohn* (1982), the plaintiff taught at a private school for disturbed children. The school received virtually all of its operating funds from the state, and the state had diverted the children from the public schools to the private school. The plaintiff had filed a free speech claim, which would have been cognizable at a public school. The Court rejected her claim, finding no state action:

> The third factor asserted to show that the school is a state actor is that it performs a "public function." However, our holdings have made clear that the relevant question is not simply whether a private group is serving a "public function." We have held that the question is whether the function performed has been "traditionally the exclusive prerogative of the State." *Jackson*. There can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry. Chapter 766 of the Massachusetts Acts of 1972 demonstrates that the State intends to provide services for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the State. Indeed, the Court of Appeals noted that until recently the State had not undertaken to provide education for students who could not be

served by traditional public schools. That a private entity performs a function which serves the public does not make its acts state action.

The *Rendell-Baker* Court also rejected entanglement as a basis for state action. The Court noted:

> The District Court took as its standard "'whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself,'" quoting *Jackson v. Metropolitan Edison Co*. Noting that, although the State regulated the school in many ways, it imposed few conditions on the school's personnel policies, the District Court concluded that the nexus between the school and the State was not sufficiently close so that the action of the school in discharging Rendell-Baker could be considered action of the Commonwealth of Massachusetts. …
>
> The school, like the nursing homes [in *Blum*], is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

As *Shelley v. Kraemer* noted, a state supreme court creates binding law as surely as a state legislature and in at least some situations court decisions supporting private bias will be classified as impermissible state action. The Court has held there to be impermissible state action when litigants use peremptory challenges to exclude jurors on the basis of race or gender — even when the parties are completely private. *See Edmonson v. Leesville Concrete Co.* (1991).

In 2001, the Court found state action under the entanglement theory. In *Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001), the Court held 5–4 that a private association that regulated high school athletics was a state actor. Eighty-four per cent of the members were public schools and public officials sat on the board of directors. Justice Souter, joined by Justices O'Connor, Stevens, Ginsburg, and Breyer, concluded:

> The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.

Justice Thomas, joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy, countered in dissent:

> We have never found state action based upon mere "entwinement." Until today, we have found a private organization's acts to constitute state action only when the organization

> performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government. The majority's holding — that the Tennessee Secondary School Athletic Association's (TSSAA) enforcement of its recruiting rule is state action — not only extends state-action doctrine beyond its permissible limits but also encroaches upon the realm of individual freedom that the doctrine was meant to protect. I respectfully dissent.

In *Manhattan Community Access Corp. v. Halleck* (2019) the Court held in a 5-4 decision that a public access television channel was not a "state actor" under the public function theory. New York state law requires cable operators to set aside channels on their cable systems for public access. Those channels are operated by the cable operator unless the local government chooses to itself operate the channels or designates a private entity to operate the channels. New York City had designated a private nonprofit corporation, Manhattan Neighborhood Network (MNN), to operate the public access channels on Time Warner's cable system in Manhattan. Newly appointed Justice Kavanaugh, joined by Roberts, C.J., and Thomas, Alito, and Gorsuch, JJ., relied upon *Jackson v. Metropolitan Edison Company* (1974) for the proposition that "the government must have traditionally *and* exclusively performed the function," adding, "The Court has stressed that 'very few' functions fall into that category." The majority concluded that operating television channels was not a traditional, exclusive public function. Responding to the petitioners' argument that the channel represented a public forum because it was created pursuant to a statutory requirement, the majority contended its forum function could not be analyzed as to whether or not it was a "public forum" because the state action issue must *precede* any forum function issue. Justice Kavanaugh concluded:

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

Justice Sotomayor, joined by Ginsburg, Breyer, and Kagan, dissented: "The Court tells a very reasonable story about a case that is not before us. I write to address the one that is. This is a case about an organization appointed by the government to administer a constitutional public forum. (It is not, as the Court suggests, about a private property owner that simply opened up its property to others.)" The dissent contended that since the channel was created pursuant to a statutory mandate, it was created as a "public forum." The dissent contended that since it was fulfilling a mandatory public obligation, it had to be considered a public actor for purposes of state action. Justice Sotomayor concluded:

> This is not a case about bigger governments and smaller individuals; it is a case about principals and agents. New York City opened up a public forum on public-access

channels in which it has a property interest. It asked MNN to run that public forum, and MNN accepted the job. That makes MNN subject to the First Amendment, just as if the City had decided to run the public forum itself…It is crucial that the Court does not continue to ignore the reality, fully recognized by our precedents, that private actors who have been delegated constitutional responsibilities like this one should be accountable to the Constitution's demands.