The Reconstruction Amendments

2023 SUPPLEMENT

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Insert the following case at the end of page 559:

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

143 S.Ct. 2141 (2023)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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

I

….

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization founded in 2014 whose purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." In November 2014, SFFA filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.[2]
….

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

III

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A

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Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." *Adarand Constructors, Inc.* v. *Peña*,

[2] Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23 (2003). Although Justice GORSUCH questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself.

515 U.S. 200, 227 (1995). Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326, (2003). Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest. *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 311–312 (2013) (*Fisher I*).

Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. See, *e.g.*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007); *Shaw v. Hunt*, 517 U.S. 899, 909–910 (1996). The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. See *Johnson v. California*, 543 U.S. 499, 512–513 (2005).[3]

….

B

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in *Regents of University of California* v. *Bakke*, which involved a set-aside admissions program used by the University of California, Davis, medical school….

In a deeply splintered decision that produced six different opinions—none of which commanded a majority of the Court—we ultimately ruled in part in favor of the school and in part in favor of Bakke. Justice Powell announced the Court's judgment, and his opinion—though written for himself alone—would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U.S. at 323….

Justice Powell began by finding three of the school's four justifications for its policy not sufficiently compelling….

Justice Powell then turned to the school's last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. That interest, in his view, was "a constitutionally permissible goal for an institution of higher education." [*Bakke*, 438 U.S.] at

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[3] The first time we determined that a governmental racial classification satisfied "the most rigid scrutiny" was 10 years before *Brown v. Board of Education*, 347 U.S. 483 (1954), in the infamous case *Korematsu v. United States*, 323 U.S. 214, 216 (1944). There, the Court upheld the internment of "all persons of Japanese ancestry in prescribed West Coast ... areas" during World War II because "the military urgency of the situation demanded" it. *Id.*, at 217. We have since overruled *Korematsu*, recognizing that it was "gravely wrong the day it was decided." *Trump* v. *Hawaii*, 138 S.Ct. 2392, 2448 (2018). The Court's decision in *Korematsu* nevertheless "demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification" and that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 236 (1995)….

311–312. And that was so, he opined, because a university was entitled as a matter of academic freedom "to make its own judgments as to ... the selection of its student body." *Id.*, at 312….

C

In the years that followed our "fractured decision in *Bakke*," lower courts "struggled to discern whether Justice Powell's" opinion constituted "binding precedent." *Grutter*, 539 U.S. at 325. We accordingly took up the matter again in 2003, in the case *Grutter* v. *Bollinger*, which concerned the admissions system used by the University of Michigan law school. *Id.*, at 311. There, in another sharply divided decision, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.*, at 325….

The Court's analysis tracked Justice Powell's in many respects. As for compelling interest, the Court held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Id.*, at 328. In achieving that goal, however, the Court made clear—just as Justice Powell had—that the law school was limited in the means that it could pursue. The school could not "establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks." *Id.*, at 334. Neither could it "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." *Ibid.* Nor still could it desire "some specified percentage of a particular group merely because of its race or ethnic origin." *Id.*, at 329–330 (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.)).

These limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate…stereotyp[ing]." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). Universities were thus not permitted to operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333. The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341.

But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions….

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. *Id.*, at 342. This requirement was critical, and *Grutter* emphasized it repeatedly. "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the norm of equal treatment" must be "a temporary matter." *Ibid.* The importance of an end

point was not just a matter of repetition. It was the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection….

Grutter thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education.... We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343.

IV

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

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[4]

A

Because "[r]acial discrimination [is] invidious in all contexts," *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (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*, 579 U.S. 365, 381 (2016) (*Fisher II*). "Classifying and assigning" students based on their race "requires more than…an amorphous end to justify it." *Parents Involved*, 551 U.S. at 735.

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."

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

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals…. Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? …. Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.

Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison. See *Johnson*, 543 U.S. at 512–513. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class "whole for [the] injuries [they] suffered." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students "compar[able] to what it would have been in the absence of such constitutional violations." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977).

Nothing like that is possible when it comes to evaluating the interests respondents assert here. Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces "engaged and productive citizens," sufficiently "enhance[s] appreciation, respect, and empathy," or effectively "train[s] future leaders" is standardless. The interests that respondents seek, though plainly worthy, are inescapably imponderable.

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."

Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. Yet "[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is 'broadly diverse.'" *Parents Involved*, 551 U.S. at 724 (quoting *Grutter*, 539 U.S. at 329). And given the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use….

B

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

First, our cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. And the District Court observed that Harvard's "policy of considering applicants' race…overall results in fewer Asian American and white students being admitted."

Respondents nonetheless contend that an individual's race is never a negative factor in their admissions programs, but that assertion cannot withstand scrutiny. Harvard, for example, draws an analogy between race and other factors it considers in admission. "[W]hile admissions officers may give a preference to applicants likely to excel in the Harvard-Radcliffe Orchestra," Harvard explains, "that does not mean it is a 'negative' not to excel at a musical instrument." But on Harvard's logic, while it gives preferences to applicants with high grades and test scores, "that does not mean it is a 'negative'" to be a student with lower grades and lower test scores. This understanding of the admissions process is hard to take seriously. College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.

Respondents also suggest that race is not a negative factor because it does not impact many admissions decisions. Yet, at the same time, respondents also maintain that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned. And they acknowledge that race is determinative for at least some—if not many—of the students they admit. How else but "negative" can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been? ….

Respondents' admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the "belief that minority students

always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333. That requirement is found throughout our Equal Protection Clause jurisprudence more generally. See, *e.g.*, *Schuette v. BAMN*, 572 U.S. 291, 308 (2014) (plurality opinion).

Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke*, 438 U.S. at 316 (opinion of Powell, J.) UNC is much the same. It argues that race in itself "says [something] about who you are."

We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." *Shaw*, 509 U.S. at 647. The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.

"One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice*, 528 U.S. at 517. But when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike," *Miller v. Johnson*, 515 U.S. 900, 911–912 (1995)—at the very least alike in the sense of being different from nonminority students. In doing so, the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.*, at 912. Such stereotyping can only "cause[ ] continued hurt and injury," *Edmonson*, 500 U.S. at 631, contrary as it is to the "core purpose" of the Equal Protection Clause, *Palmore*, 466 U.S. at 432.

C

If all this were not enough, respondents' admissions programs also lack a "logical end point." *Grutter*, 539 U.S. at 342.

Respondents and the Government first suggest that respondents' race-based admissions programs will end when, in their absence, there is "meaningful representation and meaningful diversity" on college campuses. The metric of meaningful representation, respondents assert, does not involve any "strict numerical benchmark"; or "precise number or percentage"; or "specified percentage." So what does it involve?

Numbers all the same. At Harvard, each full committee meeting begins with a discussion of "how the breakdown of the class compares to the prior year in terms of racial identities." And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the Admissions Committee may decide to give additional attention to applications from students within that group."

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

UNC's admissions program operates similarly….

The problem with these approaches is well established. "[O]utright racial balancing" is "patently unconstitutional." *Fisher I*, 570 U.S. at 311. That is so, we have repeatedly explained, because "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller,* 515 U.S. at 911. By promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on its head. Their admissions programs "effectively assure[ ] that race will always be relevant…and that the ultimate goal of eliminating" race as a criterion "will never be achieved." *Croson*, 488 U.S. at 495.

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

Third, respondents suggest that race-based preferences must be allowed to continue for at least five more years, based on the Court's statement in *Grutter* that it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary." 539 U.S. at 343. The 25-year mark articulated in *Grutter*, however, reflected only that Court's view that race-based preferences would, by 2028, be unnecessary to ensure a requisite level of racial diversity on college campuses. *Ibid.* That expectation was oversold. Neither Harvard nor UNC believes that race-based admissions will in fact be unnecessary in five years, and both universities thus expect to continue using race as a criterion well beyond the time limit that *Grutter* suggested. Indeed, the high school applicants that Harvard and UNC will evaluate this fall using their race-based admissions systems are expected to graduate in 2028—25 years after *Grutter* was decided.

Finally, respondents argue that their programs need not have an end point at all because they frequently review them to determine whether they remain necessary. Respondents point to

language in *Grutter* that, they contend, permits "the durational requirement [to] be met" with "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." 539 U.S. at 342. But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional. To the contrary, the Court made clear that race-based admissions programs eventually had to end—despite whatever periodic review universities conducted. *Ibid*.

Here, however, Harvard concedes that its race-based admissions program has no end point. And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. UNC's race-based admissions program is likewise not set to expire any time soon—nor, indeed, any time at all. The University admits that it "has not set forth a proposed time period in which it believes it can end all race-conscious admissions practices." And UNC suggests that it might soon use race to a *greater* extent than it currently does. In short, there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon….

VI

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

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867). 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….

[The concurring opinions of Justices Thomas, Gorsuch, and Kavanaugh, and the dissenting opinions of Justices Sotomayor and Jackson, are omitted].

Insert the following case at the end of page 647:

Dobbs v. Jackson Women's Health Organization

142 S.Ct. 2228 (2022)

JUSTICE ALITO delivered the opinion of the Court.

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

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade*, 410 U.S. 113. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant (*e.g.*, its discussion of abortion in antiquity) to the plainly incorrect (*e.g.*, its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point at which a fetus was thought to achieve "viability," *i.e.*, the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting "potential life," it found that this interest could not justify any restriction on pre-viability abortions….

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….

Eventually, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court revisited *Roe*, but the Members of the Court split three ways. Two Justices expressed no desire to change *Roe* in any way. Four others wanted to overrule the decision in its entirety. And the three remaining Justices, who jointly signed the controlling opinion, took a third position. Their opinion did not endorse *Roe*'s reasoning, and it even hinted that one or more of its authors might have "reservations" about whether the Constitution protects a right to abortion. But the opinion concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*'s "central holding"—that a State may not constitutionally protect fetal life before "viability"—even if that holding was wrong. Anything less, the opinion claimed, would undermine respect for this Court and the rule of law.

Paradoxically, the judgment in *Casey* did a fair amount of overruling. Several important abortion decisions were overruled *in toto*, and *Roe* itself was overruled in part. *Casey* threw out *Roe*'s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman's right to have an abortion. The decision provided no clear guidance about the difference between a "due" and an "undue" burden. But the three Justices who authored the controlling opinion "call[ed] the contending sides of a national controversy to end their national division" by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.

Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as "viable" outside the womb. In defending this law, the State's primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. On the other side, respondents and the Solicitor General ask us to reaffirm *Roe* and *Casey*, and they contend that the Mississippi law cannot stand if we do so. Allowing Mississippi to prohibit abortions after 15 weeks of pregnancy, they argue, "would be no different than overruling *Casey* and *Roe* entirely." They contend that "no half-measures" are available and that we must either reaffirm or overrule *Roe* and *Casey*.

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

and tradition" and "implicit in the concept of ordered liberty." *Washington v.* Glucksberg, 521 U.S. 702, 721 (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. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."

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

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Casey*, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand….

II

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

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

A

1

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

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

The *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause.

We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents' *amici* have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other." *Geduldig v. Aiello*, 417 U.S. 484, 496, n. 20 (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*, 506 U.S. 263, 273–274 (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 Fourteenth Amendment.

2

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

The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, *Barron ex rel. Tiernan v. Mayor of Baltimore*,

7 Pet. 243, 247–251 (1833) (opinion for the Court by Marshall, C. J.), but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. See *McDonald*, 561 U.S. at 763–767, and nn. 12–13. 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." *Timbs v. Indiana*, 139 S.Ct. 682, 686 (2019); *McDonald*, 561 U.S. at 764, 767; *Glucksberg*, 521 U.S., at 721. And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue….

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," 521 U.S., at 711, and made clear that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition," *id*., at 720–721.

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

In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy….

On occasion, when the Court has ignored the "[a]ppropriate limits" imposed by "'respect for the teachings of history,'" *Moore,* 431 U.S. at 503 (plurality opinion), it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*, 198 U.S. 45 (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 *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.

B

1

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not

reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.

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

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

2

a

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

The "eminent common-law authorities (Blackstone, Coke, Hale, and the like)," *Kahler v. Kansas*, 140 S.Ct. 1021, 1027 (2020), *all* describe abortion after quickening as criminal….

English cases dating all the way back to the 13th century corroborate the treatises' statements that abortion was a crime…

Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*….

That the common law did not condone even pre-quickening abortions is confirmed by what one might call a proto-felony-murder rule. Hale and Blackstone explained a way in which a pre-quickening abortion could rise to the level of a homicide. Hale wrote that if a physician gave a woman "with child*"* a "potion" to cause an abortion, and the woman died, it was "murder" because the potion was given "*unlawfully* to destroy her child within her." 1 Hale 429–430 (emphasis added). As Blackstone explained, to be "murder" a killing had to be done with "malice aforethought, ... either express or implied." 4 Blackstone 198 (emphasis deleted). In the case of an abortionist, Blackstone wrote, "the law will imply [malice]" for the same reason that it would imply malice if a person who intended to kill one person accidentally killed a different person….

Notably, Blackstone, like Hale, did not state that this proto-felony-murder rule required that the woman be "with quick child"—only that she be "with child." ….

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

b

In this country, the historical record is similar….

The few cases available from the early colonial period corroborate that abortion was a crime…. And by the 19th century, courts frequently explained that the common law made abortion of a quick child a crime.

c

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages….

At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. During that period, treatise writers and commentators criticized the quickening distinction as "neither in accordance with the result of medical experience, nor with the principles of the common law." In 1803, the British Parliament made abortion a crime at all stages of pregnancy and authorized the imposition of severe punishment….

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910.

The trend in the Territories that would become the last 13 States was similar: All of them criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico). By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother." 410 U.S. at 139.

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. And though *Roe* discerned a "trend toward liberalization" in

about "one-third of the States," those States still criminalized some abortions and regulated them more stringently than *Roe* would allow. *Id*., at 140, and n. 37….

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….

C

1

….

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*, 388 U.S. 1 (1967); the right to marry while in prison, *Turner v. Safley*, 482 U.S. 78 (1987); the right to obtain contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); the right to reside with relatives, *Moore v. East Cleveland*, 431 U.S. 494 (1977); the right to make decisions about the education of one's children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska*, 262 U.S. 390 (1923); the right not to be sterilized without consent, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, *Winston v. Lee*, 470 U.S. 753 (1985), *Washington v. Harper*, 494 U.S. 210 (1990), *Rochin v. California*, 342 U.S. 165 (1952). Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges*, 576 U.S. 644 (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. *Casey*, 505 U.S. at 851. 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." See *Roe*, 410 U.S. at 159 (abortion is "inherently different"); *Casey*, 505 U.S. at 852 (abortion is "a unique act"). 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….

D

1

We have held that the "established method of substantive-due-process analysis" requires that an unenumerated right be "'deeply rooted in this Nation's history and tradition'" before it can be recognized as a component of the "liberty" protected in the Due Process Clause. *Glucksberg*, 521 U.S., at 721. But despite the dissent's professed fidelity to *stare decisis*, it fails to seriously engage with that important precedent—which it cannot possibly satisfy….

3

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

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," *Pearson v. Callahan*, 555 U.S. 223, 233 (2009), and it "is at its weakest when we interpret the Constitution," *Agostini v. Felton*, 521 U.S. 203, 235 (1997)…. 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*, 347 U.S. 483 (1954), the Court repudiated the "separate but equal" doctrine, which had allowed States to maintain racially segregated schools

and other facilities. *Id*., at 488. In so doing, the Court overruled the infamous decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule. See *Brown*, 347 U.S. at 491.

In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court overruled *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525 (1923), which had held that a law setting minimum wages for women violated the "liberty" protected by the Fifth Amendment's Due Process Clause. *Id.*, at 545. *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*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).

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

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

No Justice of this Court has ever argued that the Court should *never* overrule a constitutional decision, but overruling a precedent is a serious matter. It is not a step that should be taken lightly. Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision.

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

A

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

The infamous decision in *Plessy v. Ferguson*, was one such decision. It betrayed our commitment to "equality before the law." 163 U.S. at 562 (Harlan, J., dissenting). It was "egregiously wrong" on the day it was decided, see *Ramos,* 140 S.Ct., at 1414 (opinion of KAVANAUGH, J.)….

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….

The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*….

As the Court's landmark decision in *West Coast Hotel* illustrates, the Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process….

B

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

Roe found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. It relied on an erroneous historical narrative; it devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution; it disregarded the fundamental difference between the precedents on which it relied and the question before the Court; it concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source; and its most important rule (that States cannot protect fetal life prior to "viability") was never raised by any party and has never been plausibly explained. *Roe*'s reasoning quickly drew scathing scholarly criticism, even from supporters of broad access to abortion.

The *Casey* plurality, while reaffirming *Roe'*s central holding, pointedly refrained from endorsing most of its reasoning. It revised the textual basis for the abortion right, silently abandoned *Roe*'s erroneous historical narrative, and jettisoned the trimester framework. But it replaced that scheme with an arbitrary "undue burden" test and relied on an exceptional version of *stare decisis* that…this Court had never before applied and has never invoked since….

C

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

1

Problems begin with the very concept of an "undue burden." ….

The *Casey* plurality tried to put meaning into the "undue burden" test by setting out three subsidiary rules, but these rules created their own problems. The first rule is that "a provision of law is invalid, if its purpose or effect is to place a *substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. at 878 (emphasis added); see also *id*., at 877. But whether a particular obstacle qualifies as "substantial" is often open to reasonable debate. In the sense relevant here, "substantial" means "of ample or considerable amount, quantity, or size." Random House Webster's Unabridged Dictionary 1897 (2d ed. 2001). Huge burdens are plainly "substantial," and trivial ones are not, but in between these extremes, there is a wide gray area.

This ambiguity is a problem, and the second rule, which applies at all stages of a pregnancy, muddies things further. It states that measures designed "to ensure that the woman's choice is informed" are constitutional so long as they do not impose "an undue burden on the right." *Casey*, 505 U.S. at 878. To the extent that this rule applies to pre-viability abortions, it overlaps with the first rule and appears to impose a different standard. Consider a law that imposes an insubstantial obstacle but serves little purpose. As applied to a pre-viability abortion, would such a regulation be constitutional on the ground that it does not impose a "*substantial* obstacle"? Or would it be unconstitutional on the ground that it creates an "*undue* burden" because the burden it imposes, though slight, outweighs its negligible benefits? *Casey* does not say, and this ambiguity would lead to confusion down the line.

The third rule complicates the picture even more. Under that rule, *"[u]nnecessary health* regulations that have the purpose or effect of presenting a *substantial obstacle* to a woman seeking an abortion impose an *undue burden* on the right." *Casey*, 505 U.S. at 878 (emphasis added). This rule contains no fewer than three vague terms. It includes the two already discussed —"undue burden" and "substantial obstacle"—even though they are inconsistent. And it adds a third ambiguous term when it refers to "*unnecessary* health regulations." The term "necessary" has a range of meanings—from "essential" to merely "useful." See Black's Law Dictionary 928 (5th ed. 1979); American Heritage Dictionary of the English Language 877 (1971). *Casey* did not explain the sense in which the term is used in this rule.

In addition to these problems, one more applies to all three rules. They all call on courts to examine a law's effect on women, but a regulation may have a very different impact on different women for a variety of reasons, including their places of residence, financial resources, family situations, work and personal obligations, knowledge about fetal development and abortion, psychological and emotional disposition and condition, and the firmness of their desire to obtain abortions. In order to determine whether a regulation presents a substantial obstacle to women, a court needs to know which set of women it should have in mind and how many of the women in this set must find that an obstacle is "substantial."

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," 505 U.S.

at 895, 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….

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….

The Court's abortion cases have diluted the strict standard for facial constitutional challenges. They have ignored the Court's third-party standing doctrine. They have disregarded standard *res judicata* principles. They have flouted the ordinary rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality. And they have distorted First Amendment doctrines.

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." *[June Medical]*, 140 S.Ct., at 2152 (THOMAS, J., dissenting).

E

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

1

Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." *Casey*, 505 U.S. at 856 (joint opinion); see also *Payne*, 501 U.S. at 828. 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." 505 U.S. at 856. For these reasons, we agree with the *Casey* plurality that conventional, concrete reliance interests are not present here.

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." *Ibid.* But this Court is ill-equipped to assess

"generalized assertions about the national psyche." *Id.*, at 957 (opinion of Rehnquist, C. J.). *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." *Payne*, 501 U.S. at 828.

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….

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so….

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." Brief for United States 26 (citing *Obergefell*, 576 U.S. 644; *Lawrence*, 539 U.S. 558; *Griswold*, 381 U.S. 479). That is not correct for reasons we have already discussed. As even the *Casey* plurality recognized, "[a]bortion is a unique act" because it terminates "life or potential life." 505 U.S. at 852; see also *Roe*, 410 U.S. at 159 (abortion is "inherently different from marital intimacy," "marriage," or "procreation"). And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

IV

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

The argument was cast in different terms, but stated simply, it was essentially as follows. The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not "social and political pressures." 505 U.S. at 865. There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial "watershed" decision, such as *Roe*. 505 U.S. at 866–867. A decision overruling *Roe* would be perceived as having been made "under fire" and as a "surrender to political pressure," 505 U.S. at 867, and

therefore the preservation of public approval of the Court weighs heavily in favor of retaining *Roe*, see 505 U.S. at 869.

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

The *Casey* plurality "call[ed] the contending sides of a national controversy to end their national division," and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. *Id.,* at 867. That unprecedented claim exceeded the power vested in us by the Constitution…. Our sole authority is to exercise "judgment"—which is to say, the authority to judge what the law means and how it should apply to the case at hand. The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* and *Lochner* would still be the law. That is not how *stare decisis* operates.

The *Casey* plurality also misjudged the practical limits of this Court's influence. *Roe* certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* "inflamed" a national issue that has remained bitterly divisive for the past half century. And for the past 30 years, *Casey* has done the same.

Neither decision has ended debate over the issue of a constitutional right to obtain an abortion. Indeed, in this case, 26 States expressly ask us to overrule *Roe* and *Casey* and to return the issue of abortion to the people and their elected representatives. This Court's inability to end debate on the issue should not have been surprising. This Court cannot bring about the permanent resolution of a rancorous national controversy simply by dictating a settlement and telling the people to move on….

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

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

V

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." *Roe*, 410 U.S. at 150; *Casey*, 505 U.S. at 852. 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.

B

1

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

There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party…. The concurrence would do exactly what it criticizes *Roe* for doing: pulling "out of thin air" a test that "[n]o party or *amicus* asked the Court to adopt."

The concurrence's most fundamental defect is its failure to offer any principled basis for its approach. The concurrence would "discar[d]" "the rule from *Roe* and *Casey* that a woman's right to terminate her pregnancy extends up to the point that the fetus is regarded as 'viable' outside the womb." But this rule was a critical component of the holdings in *Roe* and *Casey*, and *stare decisis* is "a doctrine of preservation, not transformation," *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 384 (2010) (ROBERTS, C. J., concurring). Therefore, a new rule that discards the viability rule cannot be defended on *stare decisis* grounds.

The concurrence concedes that its approach would "not be available" if "the rationale of *Roe* and *Casey* were inextricably entangled with and dependent upon the viability standard." But the concurrence asserts that the viability line is separable from the constitutional right they recognized, and can therefore be "discarded" without disturbing any past precedent. That is simply incorrect.

Roe's trimester rule was expressly tied to viability, see 410 U.S. at 163–164, and viability played a critical role in later abortion decisions….

When the Court reconsidered *Roe* in *Casey*, it left no doubt about the importance of the viability rule. It described the rule as *Roe*'s "central holding," 505 U.S. at 860, and repeatedly stated that the right it reaffirmed was "the right of the woman to choose to have an abortion *before viability*." *Id*., at 846 (emphasis added).

Our subsequent cases have continued to recognize the centrality of the viability rule….

For all these reasons, *stare decisis* cannot justify the new "reasonable opportunity" rule propounded by the concurrence. If that rule is to become the law of the land, it must stand on its own, but the concurrence makes no attempt to show that this rule represents a correct interpretation of the Constitution. The concurrence does not claim that the right to a reasonable opportunity to obtain an abortion is "'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty.'" *Glucksberg*, 521 U.S., at 720–721. Nor does it propound any other theory that could show that the Constitution supports its new rule. And if the Constitution protects a woman's right to obtain an abortion, the opinion does not explain why that right should end after the point at which all "reasonable" women will have decided whether to seek an abortion. While the concurrence is moved by a desire for judicial minimalism, "we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right." *Citizens United*, 558 U.S. at 375 (ROBERTS, C. J., concurring). For the reasons that we have explained, the concurrence's approach is not.

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. Some States have set deadlines for obtaining an abortion that are shorter than Mississippi's. If we held only that Mississippi's 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. The "measured course" charted by the concurrence would be fraught with turmoil until the Court answered the question that the concurrence seeks to defer….

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.

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*, 372 U.S. at 729–730; see also *Dandridge v. Williams*, 397 U.S. 471, 484–486 (1970); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). 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*, 509 U.S. 312, 319 (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. *Id.,* at 320; *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955). These legitimate interests include respect for and preservation of prenatal life at all stages of development, *Gonzales*, 550 U.S. at 157–158; 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. See *id.*, at 156–157; *Roe*, 410 U.S. at 150; cf. *Glucksberg*, 521 U.S., at 728–731 (identifying similar interests).

B

These legitimate interests justify Mississippi's Gestational Age Act. Except "in a medical emergency or in the case of a severe fetal abnormality," the statute prohibits abortion "if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." Miss. Code Ann. § 41–41–191(4)(b). The Mississippi Legislature's findings recount the stages of "human prenatal development" and assert the State's interest in "protecting the life of the unborn." § 2(b)(i). The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure "for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." § 2(b)(i)(8); see also *Gonzales*, 550 U.S. at 135–143 (describing such procedures). These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail.

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….

JUSTICE THOMAS, concurring.

I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. Respondents invoke one source for that right: the Fourteenth Amendment's guarantee that no State shall "deprive any person of life, liberty, or property without due process of law." The Court well explains why, under our substantive due process precedents, the purported right to abortion is not a form of "liberty" protected by the Due Process Clause. Such a right is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)….

I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that "due process of law" merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. See, *e.g., Johnson v. United States*, 576 U.S. 591 (2015) (THOMAS, J., concurring in judgment). Other sources, by contrast, suggest that "due process of law" prohibited legislatures "from authorizing the deprivation of a person's life, liberty, or property without providing him the customary procedures to which freemen were entitled by the old law of England." *United States v. Vaello Madero*, 142 S.Ct. 1539, 1545 (2022) (THOMAS, J., concurring). Either way, the Due Process Clause at most guarantees *process*. It does not, as the Court's substantive due process cases suppose, "forbi[d] the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

As I have previously explained, "substantive due process" is an oxymoron that "lack[s] any basis in the Constitution." *Johnson*, 576 U.S. at 607–608 (opinion of THOMAS, J.)…. The resolution of this case is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.

The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts. Cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married persons to obtain contraceptives)[*]; *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in private, consensual sexual acts); and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (right to same-sex marriage), are not at issue. The Court's abortion cases are unique, and no party has asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised," *McDonald*, 561 U.S. at 813 (opinion of THOMAS, J.). Thus, I agree that "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion."

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*…. 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 Fourteenth Amendment. To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights. That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach….

Because the Court properly applies our substantive due process precedents to reject the fabrication of a constitutional right to abortion, and because this case does not present the opportunity to reject substantive due process entirely, I join the Court's opinion. But, in future cases, we should "follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away." *Carlton*, 512 U.S. at 42 (opinion of SCALIA, J.). Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity….

Chief Justice ROBERTS, concurring in the judgment….

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[*] *Griswold v. Connecticut* purported not to rely on the Due Process Clause, but rather reasoned "that specific guarantees in the Bill of Rights"—including rights enumerated in the First, Third, Fourth, Fifth, and Ninth Amendments—"have penumbras, formed by emanations," that create "zones of privacy." 381 U.S. at 484. Since *Griswold,* the Court, perhaps recognizing the facial absurdity of *Griswold*'s penumbral argument, has characterized the decision as one rooted in substantive due process. See, *e.g., Obergefell v. Hodges*, 576 U.S. 644, 663 (2015); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

II

….

Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all.

Of course, such an approach would not be available if the rationale of *Roe* and *Casey* was inextricably entangled with and dependent upon the viability standard. It is not. Our precedents in this area ground the abortion right in a woman's "right to choose." If that is the basis for *Roe*, *Roe*'s viability line should be scrutinized from the same perspective. And there is nothing inherent in the right to choose that requires it to extend to viability or any other point, so long as a real choice is provided.

To be sure, in reaffirming the right to an abortion, *Casey* termed the viability rule *Roe*'s "central holding." 505 U.S. at 860. Other cases of ours have repeated that language. But simply declaring it does not make it so. The question in *Roe* was whether there was any right to abortion in the Constitution. How far the right extended was a concern that was separate and subsidiary, and—not surprisingly—entirely unbriefed.

The Court in *Roe* just chose to address both issues in one opinion: It first recognized a right to "choose to terminate [a] pregnancy" under the Constitution, see 410 U.S. at 129–159, and then, having done so, explained that a line should be drawn at viability such that a State could not proscribe abortion before that period, see *id.*, at 163. The viability line is a separate rule fleshing out the metes and bounds of *Roe*'s core holding. Applying principles of *stare decisis*, I would excise that additional rule—and only that rule—from our jurisprudence….

Overruling the subsidiary rule is sufficient to resolve this case in Mississippi's favor. The law at issue allows abortions up through fifteen weeks, providing an adequate opportunity to exercise the right *Roe* protects. By the time a pregnant woman has reached that point, her pregnancy is well into the second trimester. Pregnancy tests are now inexpensive and accurate, and a woman ordinarily discovers she is pregnant by six weeks of gestation. See A. Branum & K. Ahrens, Trends in Timing of Pregnancy Awareness Among US Women, 21 Maternal & Child Health J. 715, 722 (2017). Almost all know by the end of the first trimester. Pregnancy Recognition 39. Safe and effective abortifacients, moreover, are now readily available, particularly during those early stages. See I. Adibi et al., Abortion, 22 Geo. J. Gender & L. 279, 303 (2021). Given all this, it is no surprise that the vast majority of abortions happen in the first trimester. See Centers for Disease Control and Prevention, Abortion Surveillance—United States 1 (2020). Presumably most of the remainder would also take place earlier if later abortions were not a legal option. Ample evidence thus suggests that a 15-week ban provides sufficient time, absent rare

circumstances, for a woman "to decide for herself " whether to terminate her pregnancy. *Webster*, 492 U.S. at 520 (plurality opinion).

III

….

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

Our cases say that the effect of overruling a precedent on reliance interests is a factor to consider in deciding whether to take such a step, and respondents argue that generations of women have relied on the right to an abortion in organizing their relationships and planning their futures. The Court questions whether these concerns are pertinent under our precedents, but the issue would not even arise with a decision rejecting only the viability line: It cannot reasonably be argued that women have shaped their lives in part on the assumption that they would be able to abort up to viability, as opposed to fifteen weeks.

In support of its holding, the Court cites three seminal constitutional decisions that involved overruling prior precedents: *Brown v. Board of Education*, 347 U.S. 483 (1954), *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The opinion in *Brown* was unanimous and eleven pages long; this one is neither. *Barnette* was decided only three years after the decision it overruled, three Justices having had second thoughts. And *West Coast Hotel* was issued against a backdrop of unprecedented economic despair that focused attention on the fundamental flaws of existing precedent. It also was part of a sea change in this Court's interpretation of the Constitution…. None of these leading cases, in short, provides a template for what the Court does today….

JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, dissenting.

….

[N]o 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*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015). They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does "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….

I

B

….

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.) Today's decision, the majority first says, "does not undermine" the decisions cited by *Roe* and *Casey*—the ones involving "marriage, procreation, contraception, [and] family relationships"—"in any way." Note that this first assurance does not extend to rights recognized after *Roe* and *Casey*, and partly based on them—in particular, rights to same-sex intimacy and marriage. On its later tries, though, the majority includes those too: "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." That right is unique, the majority asserts, "because [abortion] terminates life or potential life." So the majority depicts today's decision as "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (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's concurrence—which makes clear he is not with the program. In saying that nothing in today's opinion casts doubt on non-abortion precedents, Justice THOMAS explains, he means only that they are not at issue in this very case. But he lets us know what he wants to do when they are. "[I]n future cases," he says, "we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." And when we reconsider them? Then "we 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…. According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines. It did not protect the right recognized in *Griswold* to contraceptive use. For that matter, it did not protect the right recognized in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too —whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even "undermine"—any number of other constitutional rights.

Nor does it even help just to take the majority at its word. Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. Scout's honor. Still, the future significance of today's opinion will be decided in the future. And law often has a way of evolving without regard to original intentions—a way of actually following where logic leads, rather than tolerating hard-to-explain lines. Rights can expand in that way. Dissenting in *Lawrence*, Justice Scalia explained why he took no comfort in the Court's statement that a decision recognizing the right to same-sex intimacy did "not involve" same-sex marriage. 539 U.S. at 604. That could be true, he wrote, "only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court." *Id.*, at 605. Score one for the dissent, as a matter of prophecy. And logic and principle are not one-way ratchets. Rights can contract in the same way and for the same reason—because whatever today's majority might say, one thing really does lead to another. We fervently hope that does not happen because of today's decision. We hope that we will not join Justice Scalia in the book of prophets. But we cannot understand how anyone can be confident that today's opinion will be the last of its kind.

Consider, as our last word on this issue, contraception. The Constitution, of course, does not mention that word. And there is no historical right to contraception, of the kind the majority insists on. To the contrary, the American legal landscape in the decades after the Civil War was littered with bans on the sale of contraceptive devices. So again, there seem to be two choices. If the majority is serious about its historical approach, then *Griswold* and its progeny are in the line of fire too. Or if it is not serious, then…what *is* the basis of today's decision? If we had to guess, we suspect the prospects of this Court approving bans on contraception are low. But once again, the future significance of today's opinion will be decided in the future. At the least, today's opinion will fuel the fight to get contraception, and any other issues with a moral dimension, out of the Fourteenth Amendment and into state legislatures.

Anyway, today's decision, taken on its own, is catastrophic enough. As a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. Our law in this constitutional sphere, as in most, has for decades upon decades proceeded differently. It has considered fundamental constitutional

principles, the whole course of the Nation's history and traditions, and the step-by-step evolution of the Court's precedents. It is disciplined but not static. It relies on accumulated judgments, not just the sentiments of one long-ago generation of men (who themselves believed, and drafted the Constitution to reflect, that the world progresses). And by doing so, it includes those excluded from that olden conversation, rather than perpetuating its bounds.

As a matter of constitutional substance, the majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command. Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty….

[The concurring opinion of Justice Kavanaugh is omitted.]