

Constitutional Law

A CONTEXT AND PRACTICE CASEBOOK

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CHAPTER 3

For inclusion in Part E, after Trump v. Vance:

The following excerpt is from a separate opinion, written by Justice Kavanaugh, concurring in the denial of an application for injunctive relief in *Trump v. Thompson* (2022). The application was made by former President Donald Trump, after he had left office. Trump was attempting to assert executive privilege over communications related to the attack on the U.S. Capitol building on January 6, 2021. President Joe Biden, the incumbent president at the time of the dispute, had declined to assert executive privilege over the contested communications, thus presenting the question of whether the privilege was controlled by the current President or whether prior presidents could assert the privilege over communications occurring when they had held office. In other words, does executive privilege run with the person or the office?

The lower court had held that Trump's claim of privilege would have failed under any of the tests he proposed, without regard to his status as a former (not current) president. The Court denied Trump's request to intervene. Justices Kavanaugh issued a separate statement, reprinted below.

Guided Reading Questions: *Trump v. Thompson*

1. The lower court held that former President Trump would not prevail on his executive privilege claims under any of the tests he presented. Given the cases you have read in this area, can you reconstruct what those arguments likely were, and why the lower court might have found them unconvincing?

2. The Court does not decide whether a former president can exercise executive privilege against the determination of the current president. Based on the cases you have read in this area, who do you think should prevail in such a conflict – the current or former President?

Trump v. Thompson

142 S.Ct. 680 (2022)

Opinion of the Court

The application for stay of mandate and injunction pending review presented to THE CHIEF JUSTICE and by him referred to the Court is denied. The questions whether and in what circumstances a former President may obtain a court order preventing disclosure of privileged records from his tenure in office, in the face of a determination by the incumbent President to waive the privilege, are unprecedented and raise serious and substantial concerns. The Court of Appeals, however, had no occasion to decide these questions because it analyzed and rejected President Trump's privilege claims "under any

of the tests [he] advocated,” *Trump v. Thompson*, 20 F.4th 10, 33 (C.A.D.C. 2021), without regard to his status as a former President. Because the Court of Appeals concluded that President Trump’s claims would have failed even if he were the incumbent, his status as a former President necessarily made no difference to the court’s decision. *Id.*, at 33 (noting no “need [to] conclusively resolve whether and to what extent a court,” at a former President’s behest, may “second guess the sitting President’s” decision to release privileged documents). Any discussion of the Court of Appeals concerning President Trump’s status as a former President must therefore be regarded as nonbinding dicta.

Justice THOMAS would grant the application.

Statement of Justice KAVANAUGH respecting denial of application.

The Court of Appeals suggested that a former President may not successfully invoke the Presidential communications privilege for communications that occurred during his Presidency, at least if the current President does not support the privilege claim. As this Court’s order today makes clear, those portions of the Court of Appeals’ opinion were dicta and should not be considered binding precedent going forward.

Moreover, I respectfully disagree with the Court of Appeals on that point. A former President must be able to successfully invoke the Presidential communications privilege for communications that occurred during his Presidency, even if the current President does not support the privilege claim. Concluding otherwise would eviscerate the executive privilege for Presidential communications.

As this Court stated in *United States v. Nixon*, 418 U.S. 683, 708, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), the executive privilege for Presidential communications is rooted in Article II of the Constitution and is “fundamental to the operation of Government.” The Nixon Court explained that the “importance” of “confidentiality” to the Presidency was “too plain to require” further discussion. *Id.*, at 705, 94 S.Ct. 3090. “Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.” *Ibid.* Yet a President “and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.” *Id.*, at 708, 94 S.Ct. 3090. By protecting the confidentiality of those internal communications, the Presidential communications privilege facilitates candid advice and deliberations, and it leads to more informed and better Presidential decisionmaking.

The Nixon Court noted, by way of historical example, that the Constitutional Convention was conducted “in complete privacy” and that the records of the Convention remained confidential for more than 30 years. *Id.*, at 705, n. 15, 94 S.Ct. 3090. As was true at the Constitutional Convention, the Presidential communications privilege cannot fulfill its critical constitutional function unless Presidents and their advisers can be confident in the present and future confidentiality of their advice. If Presidents and their

advisers thought that the privilege's protections would terminate at the end of the Presidency and that their privileged communications could be disclosed when the President left office (or were subject to the absolute control of a subsequent President who could be a political opponent of a former President), the consequences for the Presidency would be severe. Without sufficient assurances of continuing confidentiality, Presidents and their advisers would be chilled from engaging in the full and frank deliberations upon which effective discharge of the President's duties depends.

To be clear, to say that a former President can invoke the privilege for Presidential communications that occurred during his Presidency does not mean that the privilege is absolute or cannot be overcome. The tests set forth in *Nixon*, 418 U.S., at 713, 94 S.Ct. 3090, and *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (C.A.D.C. 1974) (en banc), may apply to a former President's privilege claim as they do to a current President's privilege claim. Moreover, it could be argued that the strength of a privilege claim should diminish to some extent as the years pass after a former President's term in office. In all events, the *Nixon* and Senate Select Committee tests would provide substantial protection for Presidential communications, while still requiring disclosure in certain circumstances.

The Court of Appeals concluded that the privilege claim at issue here would not succeed even under the *Nixon* and Senate Select Committee tests. Therefore, as this Court's order today makes clear, the Court of Appeals' broader statements questioning whether a former President may successfully invoke the Presidential communications privilege if the current President does not support the claim were dicta and should not be considered binding precedent going forward.

Review Questions and Explanations: *Thompson*

1. Justice Kavanaugh writes separately to express his opinion that a former president must be able to prevail against a current president in an (appropriate) executive privilege claim. What reasons does he give for this? Do you find them convincing?
2. What do you think the strongest justifications for executive privilege are? Which of those reasons are and are not present in this case?

CHAPTER 5

Guided Reading Questions: *New York State Rifle & Pistol Association v. Bruen*

1. Try to identify the elements of the majority’s “historical methodology.”
2. What is the justification for that methodology?
3. Means-ends scrutiny, as we discuss in the introduction to chapters 7 & 8, is nothing more or less than an examination of the justification for a law or governmental action relative to the burden the law places on autonomy or equality. Why is it an inappropriate method for assessing the constitutionality of a restriction on the right to bear arms?

New York State Rifle & Pistol Association v. Bruen

142 S. Ct. 2111 (2022)

Majority: *Thomas*, Roberts (C. J.), Alito, Gorsuch, Kavanaugh, Barrett

Concurrences: *Alito* (omitted); *Kavanaugh*, Roberts (C. J.); *Barrett*

Dissent: *Breyer*, Sotomayor Kagan

Justice THOMAS delivered the opinion of the Court.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense. We too agree, and now hold, consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home.

The parties nevertheless dispute whether New York’s licensing regime respects the constitutional right to carry handguns publicly for self-defense. In 43 States, the government issues licenses to carry based on objective criteria. But in six States, including New York, the government further conditions issuance of a license to carry on a citizen’s showing of some additional special need. Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State’s licensing regime violates the Constitution.

[New York’s] licensing scheme largely tracks that of the early 1900s. It is a crime in New York to possess “any firearm” without a license, whether inside or outside the home, punishable by up to four years in prison or a \$5,000 fine for a felony offense, and one year in prison or a \$1,000 fine for a misdemeanor. A license applicant who wants to possess a firearm at home (or in his place of business) must convince a “licensing officer”—usually a judge or law enforcement officer—that, among other things, he is of good moral character, has no history of crime or mental illness, and that “no good cause exists for the denial of the license.” To secure that license, the applicant must prove that “proper cause exists” to issue it. *Ibid.* If an applicant cannot make that showing, he can receive only a “restricted” license for public carry, which allows him to carry a firearm for a limited purpose, such as hunting, target shooting, or employment.

No New York statute defines “proper cause.” But New York courts have held that an applicant shows proper cause only if he can “demonstrate a special need for self-protection distinguishable from that of the general community.” This “special need” standard is demanding. For example, living or working in an area “ ‘noted for criminal activity’ ” does not suffice. Rather, New York courts generally require evidence “of particular threats, attacks or other extraordinary danger to personal safety.” New York courts defer to an officer’s application of the proper-cause standard unless it is “arbitrary and capricious.” The rule leaves applicants little recourse if their local licensing officer denies a permit.

New York is not alone in requiring a permit to carry a handgun in public. But the vast majority of States—43 by our count—are “shall issue” jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability. Meanwhile, only six States and the District of Columbia have “may issue” licensing laws, under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license.... [Petitioners are two]

law-abiding, adult citizens of ...New York... [who] simply wanted to carry a handgun for self-defense [and were denied permits]....

II

In *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. ... In keeping with *Heller*, we hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.” ...

In *Heller*, we began with a “textual analysis” focused on the “normal and ordinary” meaning of the Second Amendment’s language. That analysis suggested that the Amendment’s operative clause—“the right of the people to keep and bear Arms shall not be infringed”—“guarantee[s] the individual right to possess and carry weapons in case of confrontation” that does not depend on service in the militia.

From there, we assessed whether our initial conclusion was “confirmed by the historical background of the Second Amendment.” We looked to history because “it has always been widely understood that the Second Amendment ... codified a pre-existing right.” ... We then canvassed the historical record and found the “analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment,” and “how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century.” ... [W]e clarified that “examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification” was “a critical tool of constitutional interpretation.”

In assessing the postratification history, we looked to four different types of sources. First, we reviewed “[t]hree important founding-era legal scholars [who] interpreted the Second Amendment in published writings.” Second, we looked to “19th-century cases that interpreted the Second Amendment” and found that they “universally support an individual right” to keep and bear arms. Third, we examined the “discussion of the Second Amendment in Congress and in public discourse” after the Civil War, “as people debated whether and how to secure constitutional rights for newly freed slaves.” Fourth, we considered how post-Civil War commentators understood the right.

After holding that the Second Amendment protected an individual right to armed self-defense, we also relied on the historical understanding of the Amendment to demark the limits on the exercise of that right. We noted that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” “From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” For example, we found it “fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’ ” that the Second Amendment protects the possession and use of weapons that are “in common use at the time.”

As the foregoing shows, *Heller*’s methodology centered on constitutional text and history. ... It did not invoke any means-end test such as strict or intermediate scrutiny. Moreover, *Heller* and *McDonald* expressly rejected the application of any “judge-empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.’ ” We declined to engage in means-end scrutiny because “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.” We then concluded: “A

constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." Not only did *Heller* decline to engage in means-end scrutiny generally, but it also specifically ruled out the intermediate-scrutiny test that respondents and the United States now urge us to adopt...

This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment.... In that context, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." ... And beyond the freedom of speech, our focus on history also comports with how we assess many other constitutional claims. If a litigant asserts the right in court to "be confronted with the witnesses against him," U.S. Const., Amdt. 6, we require courts to consult history to determine the scope of that right.

To be sure, "[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it." But reliance on history to inform the meaning of constitutional text—especially text meant to codify a pre-existing right—is, in our view, more legitimate, and more administrable, than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field

FN. 6. The dissent claims that *Heller*'s text-and-history test will prove unworkable compared to means-end scrutiny in part because judges are relatively ill equipped to "resolv[e] difficult historical questions" or engage in "searching historical surveys." We are unpersuaded. The job of judges is not to resolve historical questions in the abstract; it is to resolve legal questions presented in particular cases or controversies. That "legal inquiry is a refined subset" of a broader "historical inquiry," and it relies on "various evidentiary principles and default rules" to resolve uncertainties. For example, "[i]n our adversarial system of adjudication, we follow the principle of party presentation." Courts are thus entitled to decide a case based on the historical record compiled by the parties.

If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. The Second Amendment "is the very product of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. It is this balance—struck by the traditions of the American people—that demands our unqualified deference.

D

The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and

historical understanding. In some cases, that inquiry will be fairly straightforward. For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality....

New York’s proper-cause requirement concerns the same alleged societal problem addressed in *Heller*: “handgun violence,” primarily in “urban area[s].” ... While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution—and a Second Amendment—“intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819). Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.

We have already recognized in *Heller* at least one way in which the Second Amendment’s historically fixed meaning applies to new circumstances: Its reference to “arms” does not apply “only [to] those arms in existence in the 18th century.” ... Thus, even though the Second Amendment’s definition of “arms” is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense.

Much like we use history to determine which modern “arms” are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. ...

To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not “uphold every modern law that remotely resembles a historical analogue,” because doing so “risk[s] endorsing outliers that our ancestors would never have accepted.” On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.

Consider, for example, *Heller*’s discussion of “longstanding” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” Although the historical record yields relatively few 18th- and 19th-century “sensitive places” where weapons were altogether prohibited—e.g., legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions. We therefore can assume it settled that these locations were “sensitive places” where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of “sensitive places” to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible.

Although we have no occasion to comprehensively define “sensitive places” in this case, we do think respondents err in their attempt to characterize New York’s proper-cause requirement as a “sensitive-place” law. ... Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a “sensitive place” simply because it is crowded and protected generally by the New York City Police Department....

III

Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York’s proper-cause requirement. [*Heller*’s] definition of “bear” naturally encompasses public carry. Most gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table. ... To confine the right to “bear” arms to the home would nullify half of the Second Amendment’s operative protections.... The Second Amendment’s plain text thus presumptively guarantees petitioners Koch and Nash a right to “bear” arms in public for self-defense.

Conceding that the Second Amendment guarantees a general right to public carry, respondents instead claim that the Amendment “permits a State to condition handgun carrying in areas ‘frequented by the general public’ on a showing of a nonspeculative need for armed self-defense in those areas,” To support that claim, the burden falls on respondents to show that New York’s proper-cause requirement is consistent with this Nation’s historical tradition of firearm regulation.

Respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. We categorize these periods as follows: (1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; 6 (4) Reconstruction; and (5) the late-19th and early-20th centuries. We categorize these historical sources because, when it comes to interpreting the Constitution, not all history is created equal. “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.” *Heller*, 554 U.S. at 634–635. The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years. ... English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the

Framers of our own Constitution. ... A long, unbroken line of common-law precedent stretching from Bracton to Blackstone is far more likely to be part of our law than a short-lived, 14th-century English practice.

Similarly, we must also guard against giving postenactment history more weight than it can rightly bear. It is true that in *Heller* we reiterated that evidence of “how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century” represented a “critical tool of constitutional interpretation.” We therefore examined “a variety of legal and other sources to determine the public understanding of [the Second Amendment] after its ... ratification.” And, in other contexts, we have explained that “ ‘a regular course of practice’ can ‘liquidate & settle the meaning of ’ disputed or indeterminate ‘terms & phrases’ ” in the Constitution. *Chiafalo v. Washington*, 140 S.Ct. 2316, 2326 (2020) (quoting Letter from J. Madison to S. Roane (Sept. 2, 1819)). But to the extent later history contradicts what the text says, the text controls. ... “post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text.” As we recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms “took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.”

A final word on historical method: Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government.

With these principles in mind, we turn to respondents’ historical evidence.... [A 7,600-word discussion of antebellum gun regulation history is omitted.]

To summarize: The historical evidence from antebellum America does demonstrate that the manner of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.

[A 3,500-word discussion of post-Reconstruction gun regulation history is omitted. The Court emphasizes that “the exercise of this fundamental right by freed slaves was systematically thwarted,” though without noting the history of armed violence to which freed slaves were systematically subjected in this period.]

At the end of this long journey through the Anglo-American history of public carry, we conclude that respondents have not met their burden to identify an American tradition justifying the State’s proper-cause requirement. The Second Amendment guaranteed to

“all Americans” the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions. Those restrictions, for example, limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials. Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to “demonstrate a special need for self-protection distinguishable from that of the general community” in order to carry arms in public.

We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant’s right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.

New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Justice KAVANAUGH, with whom THE CHIEF JUSTICE joins, concurring.

....I join the Court’s opinion, and I write separately to underscore two important points about the limits of the Court’s decision. First, the Court’s decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense. In particular, the Court’s decision does not affect the existing licensing regimes—known as “shall-issue” regimes—that are employed in 43 States.

The Court’s decision addresses only the unusual discretionary licensing regimes, known as “may-issue” regimes, that are employed by 6 States including New York. As the Court explains, New York’s outlier may-issue regime is constitutionally problematic because it grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense.

By contrast, 43 States employ objective shall-issue licensing regimes. Those shall-issue regimes may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements. ... As petitioners acknowledge, shall-issue licensing regimes are constitutionally permissible, subject of course to an as-applied challenge if a shall-issue licensing regime does not operate in that manner in practice. Going forward, therefore, the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so. ...

Second, as *Heller* and *McDonald* established and the Court today again explains, “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

“We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those in common use at the time. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons.”

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

In 2020, 45,222 Americans were killed by firearms. See Centers for Disease Control and Prevention, Fast Facts: Firearm Violence Prevention (last updated May 4, 2022) (CDC, Fast Facts), <https://www.cdc.gov/violenceprevention/firearms/fastfact.html>. Since the start of this year (2022), there have been 277 reported mass shootings—an average of more than one per day. See Gun Violence Archive (last visited June 20, 2022), <https://www.gunviolencearchive.org>. Gun violence has now surpassed motor vehicle crashes as the leading cause of death among children and adolescents.

Many States have tried to address some of the dangers of gun violence just described by passing laws that limit, in various ways, who may purchase, carry, or use firearms of different kinds. The Court today severely burdens States’ efforts to do so. ...

In my view, when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms. ...

I

The question before us concerns the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address the serious problem of gun violence. And yet the Court today purports to answer that question without discussing the nature or severity of that problem.

In 2017, there were an estimated 393.3 million civilian-held firearms in the United States, or about 120 firearms per 100 people. A. Karp, Estimating Global Civilian-Held Firearms Numbers, Small Arms Survey 4 (June 2018), <https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-Civilian-Firearms-Numbers.pdf>. That is more guns per capita than in any other country in the world. *Ibid.* (By comparison, Yemen is second with about 52.8 firearms per 100 people—less than half the per capita rate in the United States—and some countries, like Indonesia and Japan, have fewer than one firearm per 100 people.

Unsurprisingly, the United States also suffers a disproportionately high rate of firearm-related deaths and injuries. ... Worse yet, gun violence appears to be on the rise. By 2020, the number of firearm-related deaths had risen to 45,222, CDC, Fast Facts, or by about 25% since 2015. That means that, in 2020, an average of about 124 people died from gun violence every day. Ibid. As I mentioned above, gun violence has now become the leading cause of death in children and adolescents, surpassing car crashes, which had previously been the leading cause of death in that age group for over 60 years....

And mass shootings are just one part of the problem. Easy access to firearms can also make many other aspects of American life more dangerous. Consider, for example, the effect of guns on road rage. In 2021, an average of 44 people each month were shot and either killed or wounded in road rage incidents, double the annual average between 2016 and 2019. ... The same could be said of protests: A study of 30,000 protests between January 2020 and June 2021 found that armed protests were nearly six times more likely to become violent or destructive than unarmed protests. ... Or suicides: A study found that men who own handguns are three times as likely to commit suicide than men who do not and women who own handguns are seven times as likely to commit suicide than women who do not.

Consider, too, interactions with police officers. The presence of a gun in the hands of a civilian poses a risk to both officers and civilians. Amici prosecutors and police chiefs tell us that most officers who are killed in the line of duty are killed by firearms; they explain that officers in States with high rates of gun ownership are three times as likely to be killed in the line of duty as officers in States with low rates of gun ownership. They also say that States with the highest rates of gun ownership report four times as many fatal shootings of civilians by police officers compared to States with the lowest rates of gun ownership.

.... I am not simply saying that “guns are bad.” Balancing these lawful uses against the dangers of firearms is primarily the responsibility of elected bodies, such as legislatures. It requires consideration of facts, statistics, expert opinions, predictive judgments, relevant values, and a host of other circumstances, which together make decisions about how, when, and where to regulate guns more appropriately legislative work. That consideration counsels modesty and restraint on the part of judges when they interpret and apply the Second Amendment.

Consider, for one thing, that different types of firearms may pose different risks and serve different purposes. The Court has previously observed that handguns, the type of firearm at issue here, “are the most popular weapon chosen by Americans for self-defense in the home.” But handguns are also the most popular weapon chosen by perpetrators of violent crimes. In 2018, 64.4% of firearm homicides and 91.8% of nonfatal firearm assaults were committed with a handgun. ...

Or consider, for another thing, that the dangers and benefits posed by firearms may differ between urban and rural areas. Firearm-related homicides and assaults are significantly more common in urban areas than rural ones....

All of the above considerations illustrate that the question of firearm regulation presents a complex problem—one that should be solved by legislatures rather than courts. What kinds of firearm regulations should a State adopt? Different States might choose to answer that question differently. They may face different challenges because of their different geographic and demographic compositions. ...

The question presented in this case concerns the extent to which the Second Amendment restricts different States (and the Federal Government) from working out solutions to these problems through democratic processes. The primary difference between the Court’s view and mine is that I believe the Amendment allows States to take account of the serious problems posed by gun violence that I have just described. I fear that the Court’s interpretation ignores these significant dangers and leaves States without the ability to address them....

[T]he Court today is wrong when it says that its rejection of means-end scrutiny and near-exclusive focus on history “accords with how we protect other constitutional rights.” ...[I]f conduct falls within a category of protected speech, we then use means-end scrutiny to determine whether a challenged regulation unconstitutionally burdens that speech. And the degree of scrutiny we apply often depends on the type of speech burdened and the severity of the burden. ...

Additionally, beyond the right to freedom of speech, we regularly use means-end scrutiny in cases involving other constitutional provisions. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993) (applying strict scrutiny under the [Free Exercise Clause]); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (applying strict scrutiny under the Equal Protection Clause to race-based classifications); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (applying intermediate scrutiny under the Equal Protection Clause to sex-based classifications).

The upshot is that applying means-end scrutiny to laws that regulate the Second Amendment right to bear arms would not create a constitutional anomaly. Rather, it is the Court’s rejection of means-end scrutiny and adoption of a rigid history-only approach that is anomalous.

B

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

The Court’s insistence that judges and lawyers rely nearly exclusively on history to interpret the Second Amendment thus raises a host of troubling questions. Consider, for example, the following. ... What historical regulations and decisions qualify as

representative analogues to modern laws? How will judges determine which historians have the better view of close historical questions? Will the meaning of the Second Amendment change if or when new historical evidence becomes available? And, most importantly, will the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?

Consider *Heller* itself. That case, fraught with difficult historical questions, illustrates the practical problems with expecting courts to decide important constitutional questions based solely on history. The majority in *Heller* undertook 40 pages of textual and historical analysis and concluded that the Second Amendment's protection of the right to "keep and bear Arms" historically encompassed an "individual right to possess and carry weapons in case of confrontation"—that is, for self-defense. Justice Stevens' dissent conducted an equally searching textual and historical inquiry and concluded, to the contrary, that the term "bear Arms" was an idiom that protected only the right "to use and possess arms in conjunction with service in a well-regulated militia." I do not intend to relitigate *Heller* here. I accept its holding as a matter of *stare decisis*. I refer to its historical analysis only to show the difficulties inherent in answering historical questions and to suggest that judges do not have the expertise needed to answer those questions accurately.

For example, the *Heller* majority relied heavily on its interpretation of the English Bill of Rights. Citing Blackstone, the majority claimed that the English Bill of Rights protected a " 'right of having and using arms for self-preservation and defence.' " The majority interpreted that language to mean a private right to bear arms for self-defense, "having nothing whatever to do with service in a militia." Two years later, however, 21 English and early American historians (including experts at top universities) told us in *McDonald v. Chicago*, 561 U.S. 742 (2010), that the *Heller* Court had gotten the history wrong: The English Bill of Rights "did not ... protect an individual's right to possess, own, or use arms for private purposes such as to defend a home against burglars." Rather, these amici historians explained, the English right to "have arms" ensured that the Crown could not deny Parliament (which represented the people) the power to arm the landed gentry and raise a militia—or the right of the people to possess arms to take part in that militia—"should the sovereign usurp the laws, liberties, estates, and Protestant religion of the nation." Thus, the English right did protect a right of "self-preservation and defence," as Blackstone said, but that right "was to be exercised not by individuals acting privately or independently, but as a militia organized by their elected representatives," i.e., Parliament. The Court, not an expert in history, had misread Blackstone and other sources explaining the English Bill of Rights.

And that was not the *Heller* Court's only questionable judgment. The majority rejected Justice Stevens' argument that the Second Amendment's use of the words "bear Arms" drew on an idiomatic meaning that, at the time of the founding, commonly referred to military service. Linguistics experts now tell us that the majority was wrong to do so. Since *Heller* was decided, experts have searched over 120,000 founding-era texts from between 1760 and 1799, as well as 40,000 texts from sources dating as far

back as 1475, for historical uses of the phrase “bear arms,” and they concluded that the phrase was overwhelmingly used to refer to “ ‘war, soldiering, or other forms of armed action by a group rather than an individual.’ ”

These are just two examples. Other scholars have continued to write books and articles arguing that the Court’s decision in *Heller* misread the text and history of the Second Amendment. I repeat that I do not cite these arguments in order to relitigate *Heller*. I wish only to illustrate the difficulties that may befall lawyers and judges when they attempt to rely solely on history to interpret the Constitution. In *Heller*, we attempted to determine the scope of the Second Amendment right to bear arms by conducting a historical analysis, and some of us arrived at very different conclusions based on the same historical sources. Many experts now tell us that the Court got it wrong in a number of ways. That is understandable given the difficulty of the inquiry that the Court attempted to undertake. The Court’s past experience with historical analysis should serve as a warning against relying exclusively, or nearly exclusively, on this mode of analysis in the future.

Failing to heed that warning, the Court today does just that. Its near-exclusive reliance on history will pose a number of practical problems. First, the difficulties attendant to extensive historical analysis will be especially acute in the lower courts. The Court’s historical analysis in this case is over 30 pages long and reviews numerous original sources from over 600 years of English and American history. Lower courts—especially district courts—typically have fewer research resources, less assistance from amici historians, and higher caseloads than we do. They are therefore ill equipped to conduct the type of searching historical surveys that the Court’s approach requires. ...

Second, the Court’s opinion today compounds these problems, for it gives the lower courts precious little guidance regarding how to resolve modern constitutional questions based almost solely on history. See, e.g., ante, at 2162 (BARRETT, J., concurring) (“highlight[ing] two methodological points that the Court does not resolve”). The Court declines to “provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment.” *Id.* Other than noting that its history-only analysis is “neither a ... straightjacket nor a ... blank check,” the Court offers little explanation of how stringently its test should be applied. Ironically, the only two “relevan[t]” metrics that the Court does identify are “how and why” a gun control regulation “burden[s the] right to armed self-defense.” In other words, the Court believes that the most relevant metrics of comparison are a regulation’s means (how) and ends (why)—even as it rejects the utility of means-end scrutiny.

What the Court offers instead is a laundry list of reasons to discount seemingly relevant historical evidence. The Court believes that some historical laws and decisions cannot justify upholding modern regulations because, it says, they were outliers. It explains that just two court decisions or three colonial laws are not enough to satisfy its test. But the Court does not say how many cases or laws would suffice “to show a tradition of public-carry regulation.” Other laws are irrelevant, the Court claims, because

they are too dissimilar from New York’s concealed-carry licensing regime. But the Court does not say what “representative historical analogue,” short of a “twin” or a “dead ringer,” would suffice. Indeed, the Court offers many and varied reasons to reject potential representative analogues, but very few reasons to accept them. At best, the numerous justifications that the Court finds for rejecting historical evidence give judges ample tools to pick their friends out of history’s crowd. At worst, they create a one-way ratchet that will disqualify virtually any “representative historical analogue” and make it nearly impossible to sustain common-sense regulations necessary to our Nation’s safety and security.

Third, even under ideal conditions, historical evidence will often fail to provide clear answers to difficult questions. As an initial matter, many aspects of the history of firearms and their regulation are ambiguous, contradictory, or disputed. Unsurprisingly, the extent to which colonial statutes enacted over 200 years ago were actually enforced, the basis for an acquittal in a 17th-century decision, and the interpretation of English laws from the Middle Ages (to name just a few examples) are often less than clear. And even historical experts may reach conflicting conclusions based on the same sources....

Fourth, I fear that history will be an especially inadequate tool when it comes to modern cases presenting modern problems. Consider the Court’s apparent preference for founding-era regulation. Our country confronted profoundly different problems during that time period than it does today. Society at the founding was “predominantly rural.” In 1790, most of America’s relatively small population of just four million people lived on farms or in small towns. Even New York City, the largest American city then, as it is now, had a population of just 33,000 people. Small founding-era towns are unlikely to have faced the same degrees and types of risks from gun violence as major metropolitan areas do today, so the types of regulations they adopted are unlikely to address modern needs.
...

Indeed, the Court’s application of its history-only test in this case demonstrates the very pitfalls described above. The historical evidence reveals a 700-year Anglo-American tradition of regulating the public carriage of firearms in general, and concealed or concealable firearms in particular. The Court spends more than half of its opinion trying to discredit this tradition. But, in my view, the robust evidence of such a tradition cannot be so easily explained away. Laws regulating the public carriage of weapons existed in England as early as the 13th century and on this Continent since before the founding. Similar laws remained on the books through the ratifications of the Second and Fourteenth Amendments through to the present day. Many of those historical regulations imposed significantly stricter restrictions on public carriage than New York’s licensing requirements do today. Thus, even applying the Court’s history-only analysis, New York’s law must be upheld because “historical precedent from before, during, and ... after the founding evinces a comparable tradition of regulation.”

[A 4,600-word historical discussion is omitted.]

The Court disregards “20th-century historical evidence.” But it is worth noting that the law the Court strikes down today is well over 100 years old, having been enacted in 1911 and amended to substantially its present form in 1913. That alone gives it a longer historical pedigree than at least three of the four types of firearms regulations that *Heller* identified as “presumptively lawful.” 554 U.S. at 626–627, and n. 26; see C. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 *Hastings L. J.* 1371, 1374–1379 (2009) (concluding that “ ‘prohibitions on the possession of firearms by felons and the mentally ill [and] laws imposing conditions and qualifications on the commercial sale of arms’ ” have their origins in the 20th century); *Kanter v. Barr*, 919 F.3d 437, 451 (CA7 2019) (Barrett, J., dissenting) (“Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons”). ...

The historical examples of regulations similar to New York’s licensing regime are legion. Closely analogous English laws were enacted beginning in the 13th century, and similar American regulations were passed during the colonial period, the founding era, the 19th century, and the 20th century. Not all of these laws were identical to New York’s, but that is inevitable in an analysis that demands examination of seven centuries of history. At a minimum, the laws I have recounted resembled New York’s law, similarly restricting the right to publicly carry weapons and serving roughly similar purposes. That is all that the Court’s test, which allows and even encourages “analogical reasoning,” purports to require.

In each instance, the Court finds a reason to discount the historical evidence’s persuasive force. Some of the laws New York has identified are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons. Some may have been based on a constitutional rationale that is now impossible to identify. Some arose in historically unique circumstances. And some are not sufficiently analogous to the licensing regime at issue here. But if the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York’s law, what could? Sadly, I do not know the answer to that question. What is worse, the Court appears to have no answer either.

....[T]he Court goes beyond *Heller*. It bases its decision to strike down New York’s law almost exclusively on its application of what it calls historical “analogical reasoning.” As I have admitted above, I am not a historian, and neither is the Court. But the history, as it appears to me, seems to establish a robust tradition of regulations restricting the public carriage of concealed firearms. To the extent that any uncertainty remains between the Court’s view of the history and mine, that uncertainty counsels against relying on history alone. In my view, it is appropriate in such circumstances to look beyond the history and engage in what the Court calls means-end scrutiny. Courts must be permitted to consider the State’s interest in preventing gun violence, the effectiveness of the contested law in achieving that interest, the degree to which the law

burdens the Second Amendment right, and, if appropriate, any less restrictive alternatives..... I respectfully dissent.

Review Questions and Explanations: *Bruen*

1. Return to GRQ #3. Was this question answered satisfactorily by the Court? Is it true that the “Second Amendment standard accords with how we protect other constitutional rights”?

2. The majority, citing *Heller*, “decline[s] to engage in means-end scrutiny because the very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.” The majority concludes: “A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.” Are those assertions consistent with the Court’s protection of other enumerated rights?

3. Is scouring the historical record for analogous eighteenth-century (or earlier) laws, and thereby justifying rights-limitations based on 150-year-old or older legal norms a preferable methodology to means/ends scrutiny that considers present-day justifications for restricting a right? Is it more “law-like,” consistent, or judicially manageable? Is it less prone to result-oriented or partisan outcomes?

CHAPTER 7

Dobbs v. Jackson Women’s Health Organization

142 S. Ct. 2228 (2022)

Majority: *Alito* Thomas, Gorsuch, Kavanaugh, Barrett,

Concurrences: *Thomas, Kavanaugh*

Concurrence in the Judgment: *Roberts (C. J.)*

Dissent: *Breyer, Sotomayor, Kagan*

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. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend *Roe*’s reasoning. One prominent constitutional scholar wrote that he “would vote for a statute very much like the one the Court end[ed] up drafting” if he were “a legislator,” but his assessment of *Roe* was memorable and brutal: *Roe* was “not constitutional law” at all and gave “almost no sense of an obligation to try to be.”

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State. As Justice Byron White aptly put it in his dissent, the decision represented the “exercise of raw judicial power,” and it sparked a national controversy that has embittered our political culture for a half century.⁴

FN 4. See R. Ginsburg, *Speaking in a Judicial Voice*, 67 N. Y. U. L. Rev. 1185, 1208 (1992) (“*Roe* ... halted a political process that was moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue”).

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.¹⁰ *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.” Brief for Respondents 43. They contend that “no half-measures” are available and that we must either reaffirm or overrule *Roe* and *Casey*.

We hold that *Roe* and *Casey* 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.

I

The law at issue in this case, Mississippi’s Gestational Age Act, see Miss. Code Ann. § 41–41–191 (2018), contains this central provision: “Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform ... or induce an abortion of an unborn human being if the probable gestational

age of the unborn human being has been determined to be greater than fifteen (15) weeks.” § 4(b).

FN 14. The Act defines “gestational age” to be “the age of an unborn human being as calculated from the first day of the last menstrual period of the pregnant woman.” § 3(f).

To support this Act, the legislature made a series of factual findings. It began by noting that, at the time of enactment, only six countries besides the United States “permit[ted] nontherapeutic or elective abortion-on-demand after the twentieth week of gestation.”¹⁵ § 2(a). The legislature then found that at 5 or 6 weeks’ gestational age an “unborn human being’s heart begins beating”; at 8 weeks the “unborn human being begins to move about in the womb”; at 9 weeks “all basic physiological functions are present”; at 10 weeks “vital organs begin to function,” and “[h]air, fingernails, and toenails ... begin to form”; at 11 weeks “an unborn human being’s diaphragm is developing,” and he or she may “move about freely in the womb”; and at 12 weeks the “unborn human being” has “taken on ‘the human form’ in all relevant respects.” It found that most abortions after 15 weeks employ “dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child,” and it concluded that the “intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession.” § 2(b)(i)(8).

FN 15. Those other six countries were Canada, China, the Netherlands, North Korea, Singapore, and Vietnam. A more recent compilation from the Center for Reproductive Rights indicates that Iceland and Guinea-Bissau are now also similarly permissive. See *The World’s Abortion Laws*, Center for Reproductive Rights (Feb. 23, 2021), <https://reproductiverights.org/maps/worlds-abortion-laws/>.

Respondents are an abortion clinic, Jackson Women’s Health Organization, and one of its doctors. On the day the Gestational Age Act was enacted, respondents filed suit in Federal District Court against various Mississippi officials, alleging that the Act violated this Court’s precedents establishing a constitutional right to abortion. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act.... The Fifth Circuit affirmed.

We granted certiorari to resolve the question whether “all pre-viability prohibitions on elective abortions are unconstitutional.” Petitioners’ primary defense of the Mississippi Gestational Age Act is that *Roe* and *Casey* were wrongly decided and that “the Act is constitutional because it satisfies rational-basis review.” Respondents answer that allowing Mississippi to ban pre-viability abortions “would be no different than overruling *Casey* and *Roe* entirely.” They tell us that “no half-measures” are available: We must either reaffirm or overrule *Roe* and *Casey*.

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....

A

.... The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text. Roe, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. And that privacy right, Roe observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

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

We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents’ amici have now offered as yet another potential home for the abortion right: the Fourteenth Amendment’s Equal Protection Clause. See Brief for United States as Amicus Curiae 24 (Brief for United States); see also Brief for Equal Protection Constitutional Law Scholars as Amici Curiae. Neither Roe nor Casey saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State’s regulation of abortion is not a sex-based classification and is thus not subject to the “heightened scrutiny” that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a “mere pretext[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....

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. ... 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; *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....

On occasion, when the Court has ignored the “[a]ppropriate limits” imposed by “respect for the teachings of history,” 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.” ...

B

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.

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.

[A 3,000-word historical discussion including “English cases dating all the way back to the 13th century” is omitted.]

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation’s history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. The Court in *Roe* could have said of abortion exactly what Glucksberg said of assisted suicide: “Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice].”

Respondents and their amici have no persuasive answer to this historical evidence.... Not only are respondents and their amici unable to show that a constitutional right to abortion was established when the Fourteenth Amendment was adopted, but they have found no support for the existence of an abortion right that predates the latter part of the 20th century....

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

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed “potential life.” But the people of the various States may evaluate those interests differently. ...

These attempts to justify abortion through appeals to a broader right to autonomy and to define one’s “concept of existence” prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like.

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

Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban

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

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

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

The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States’ interest in protecting fetal life. ...The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. ... The dissent repeatedly praises the “balance,” that the viability line strikes between a woman’s liberty interest and the State’s interest in prenatal life. But ... the viability line makes no sense. It was not adequately justified in Roe, and the dissent does not even try to defend it today. Nor does it identify any other point in a pregnancy after which a State is permitted to prohibit the destruction of a fetus.

Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution requires the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation’s legal traditions authorizes the Court to adopt that “theory of life.”

III

We next consider whether the doctrine of stare decisis counsels continued acceptance of Roe and Casey. Stare decisis plays an important role in our case law, and we have explained that it serves many valuable ends. ...We have long recognized, however, that

stare decisis is “not an inexorable command,” and it “is at its weakest when we interpret the Constitution.” ... [W]hen one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents. We mention three. In *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Court repudiated the “separate but equal” doctrine [and] overruled the infamous decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896). 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. *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 (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. ...

On many other occasions, this Court has overruled important constitutional decisions. [A 1,200-word footnote making “a partial list” is omitted.] Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.... In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*....

A

The nature of the Court’s error. ... *Roe*’s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.... [T]he Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process. As Justice White later explained, “decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people’s authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken.”

B

The quality of the reasoning. ... *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, as explained below, this Court had never before applied and has never invoked since....

Roe did not provide ... any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a woman’s health? The Court’s only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth. ... And the Court did not explain why it departed from the normal rule that courts defer to the judgments of legislatures “in areas fraught with medical and scientific uncertainties.”

An even more glaring deficiency was Roe’s failure to justify the critical distinction it drew between pre- and post-viability abortions. ... If, as Roe held, a State’s interest in protecting prenatal life is compelling “after viability,” why isn’t that interest “equally compelling before viability”? Roe did not say, and no explanation is apparent.

This arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. Some have argued that a fetus should not be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a “person.” Among the characteristics that have been offered as essential attributes of “personhood” are sentience, self-awareness, the ability to reason, or some combination thereof. By this logic, it would be an open question whether even born individuals, including young children or those afflicted with certain developmental or medical conditions, merit protection as “persons.” But even if one takes the view that “personhood” begins when a certain attribute or combination of attributes is acquired, it is very hard to see why viability should mark the point where “personhood” begins.

The most obvious problem with any such argument is that viability is heavily dependent on factors that have nothing to do with the characteristics of a fetus. One is the state of neonatal care at a particular point in time. Due to the development of new equipment and improved practices, the viability line has changed over the years. In the 19th century, a fetus may not have been viable until the 32d or 33d week of pregnancy or even later.⁵¹ When Roe was decided, viability was gauged at roughly 28 weeks. Today,

respondents draw the line at 23 or 24 weeks. Brief for Respondents 8. So, according to Roe's logic, States now have a compelling interest in protecting a fetus with a gestational age of, say, 26 weeks, but in 1973 States did not have an interest in protecting an identical fetus. How can that be?...

In addition, as the Court once explained, viability is not really a hard-and-fast line. *Ibid.* A physician determining a particular fetus's odds of surviving outside the womb must consider "a number of variables," including "gestational age," "fetal weight," a woman's "general health and nutrition," the "quality of the available medical facilities," and other factors. *Id.*, at 395–396, 99 S.Ct. 675. It is thus "only with difficulty" that a physician can estimate the "probability" of a particular fetus's survival. *Id.*, at 396, 99 S.Ct. 675. And even if each fetus's probability of survival could be ascertained with certainty, settling on a "probabilit[y] of survival" that should count as "viability" is another matter. *Ibid.* Is a fetus viable with a 10 percent chance of survival? 25 percent? 50 percent? Can such a judgment be made by a State? And can a State specify a gestational age limit that applies in all cases? Or must these difficult questions be left entirely to the individual "attending physician on the particular facts of the case before him"? *Id.*, at 388, 99 S.Ct. 675.

The viability line, which Casey termed Roe's central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line. The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy....

C

Workability. ... Casey's "undue burden" test has scored poorly on the workability scale.... As Justice Scalia noted in his Casey partial dissent, determining whether a burden is "due" or "undue" is "inherently standardless."

The Casey plurality tried to put meaning into the "undue burden" test by setting out three subsidiary rules, but these rules created their own problems. The first rule is that "a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." But whether a particular obstacle qualifies as "substantial" is often open to reasonable debate. ...

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

benefits? Casey does not say, and this ambiguity would lead to confusion down the line. Compare *June Medical*, 140 S.Ct., at 2112 (plurality opinion), with *id.*, at—, 140 S.Ct., at 2135-2136 (ROBERTS, C. J., concurring).

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.” This rule contains no fewer than three vague terms. It includes the two already discussed—“undue burden” and “substantial obstacle”—even though they are inconsistent. And it adds a third ambiguous term when it refers to “unnecessary health regulations.” The term “necessary” has a range of meanings—from “essential” to merely “useful.” Casey did not explain the sense in which the term is used in this rule.

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,” 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. Compare *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 627–628 (2016), with *id.*, at 666–667, and *n.* 11, 136 S.Ct. 2292 (ALITO, J., dissenting)....

This Court’s experience applying Casey has confirmed Chief Justice Rehnquist’s prescient diagnosis that the undue-burden standard was “not built to last.” Casey, 505 U.S. at 965, 112 S.Ct. 2791 (opinion concurring in judgment in part and dissenting in part).... The experience of the Courts of Appeals provides further evidence that Casey’s “line between” permissible and unconstitutional restrictions “has proved to be impossible to draw with precision.” Casey has generated a long list of Circuit conflicts. ... Casey’s “undue burden” test has proved to be unworkable. ...

D

Effect on other areas of law. 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....

E

... Traditional reliance interests arise “where advance planning of great precision is most obviously a necessity.” In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally “unplanned activity,” and “reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.” For these reasons, we agree with the *Casey* plurality that conventional, concrete reliance interests are not present here.

Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that “people [had] organized intimate relationships and made choices that define their views of themselves and their places in society ... in reliance on the availability of abortion in the event that contraception should fail” and that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” But this Court is ill-equipped to assess “generalized assertions about the national psyche.” *Casey*’s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in “cases involving property and contract rights.”

When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality’s speculations and weighing of the relative importance of the fetus and mother represent a departure from the “original constitutional proposition” that “courts do not substitute their social and economic beliefs for the judgment of legislative bodies.” *Ferguson v. Skrupa*, 372 U.S. 726, 729–730 (1963)....

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.” ... [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 [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." ...

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. As Chief Justice Rehnquist explained, "The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of stare decisis is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task." In suggesting otherwise, the Casey plurality went beyond this Court's role in our constitutional system....

Neither [Roe nor Casey] 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

.... [The] dissent suggests that our decision calls into question Griswold, Eisenstadt, Lawrence, and Obergefell. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." We have also explained why that is so: rights regarding contraception and same-sex

relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what Roe and Casey termed “potential life.” Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by “appeals to a broader right to autonomy.” It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own stare decisis analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence....

[Chief Justice Roberts] reproves us for deciding whether Roe and Casey should be retained or overruled. [His] opinion 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.... There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party. ... [Its] fundamental defect is its failure to offer any principled basis for its approach. [S]tare decisis cannot justify the new “reasonable opportunity” rule propounded by the [Chief Justice].

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. 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, 83 S.Ct. 1028; see also *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).... A law regulating abortion, like other health and welfare laws, is entitled to a “strong presumption of validity.” It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development, the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.... These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents’ constitutional challenge must fail.

Justice THOMAS, concurring.

....[T]he 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.” ... For that

reason, in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*....

Justice KAVANAUGH, concurring.

.... To be clear ... the Court’s decision today does not outlaw abortion throughout the United States. On the contrary, the Court’s decision properly leaves the question of abortion for the people and their elected representatives in the democratic process. ... Today’s decision therefore does not prevent the numerous States that readily allow abortion from continuing to readily allow abortion.... This Court ... does not possess the authority either to declare a constitutional right to abortion or to declare a constitutional prohibition of abortion. ... [T]he Constitution is neutral on the issue of abortion and allows the people and their elected representatives to address the issue through the democratic process. In my respectful view, the Court in *Roe* therefore erred by taking sides on the issue of abortion....

But the parties’ arguments have raised other related questions, and I address some of them here.

First is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); and *Obergefell v. Hodges*, 576 U.S. 644 (2015). I emphasize what the Court today states: Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.

Second, as I see it, some of the other abortion-related legal questions raised by today’s decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today’s decision takes effect? In my view, the answer is no based on the Due Process Clause or the Ex Post Facto Clause....

Chief Justice ROBERTS, concurring in the judgment.

We granted certiorari to decide one question: “Whether all pre-viability prohibitions on elective abortions are unconstitutional.” That question is directly implicated here: Mississippi’s Gestational Age Act, Miss. Code Ann. § 41–41–191 (2018), generally prohibits abortion after the fifteenth week of pregnancy—several weeks before a fetus is regarded as “viable” outside the womb. In urging our review, Mississippi stated that its case was “an ideal vehicle” to “reconsider the bright-line viability rule,” and that a judgment in its favor would “not require the Court to overturn” [*Roe* and *Casey*].

Today, the Court nonetheless rules for Mississippi by doing just that. I would take a more measured course. I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman’s

right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability. Mississippi’s law allows a woman three months to obtain an abortion, well beyond the point at which it is considered “late” to discover a pregnancy. See A. Ayoola, *Late Recognition of Unintended Pregnancies*, 32 *Pub. Health Nursing* 462 (2015) (pregnancy is discoverable and ordinarily discovered by six weeks of gestation). I see no sound basis for questioning the adequacy of that opportunity.

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

Both the Court’s opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after fifteen weeks. A thoughtful Member of this Court once counseled that the difficulty of a question “admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case.” *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, 372–373 (1955) (Frankfurter, J., for the Court). I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case. I therefore concur only in the judgment.

Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN, dissenting.

For half a century, *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman’s right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman’s body or the course of a woman’s life: It could not determine what the woman’s future would be. Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Roe and *Casey* well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans hold profoundly different views about the “moral[ity]” of

“terminating a pregnancy, even in its earliest stage.” Casey, 505 U.S. at 850, 112 S.Ct. 2791. And the Court recognized that “the State has legitimate interests from the outset of the pregnancy in protecting” the “life of the fetus that may become a child.” Id., at 846, 112 S.Ct. 2791. So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman’s life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a “substantial obstacle” on a woman’s “right to elect the procedure” as she (not the government) thought proper, in light of all the circumstances and complexities of her own life. Ibid.

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions. The Mississippi law at issue here bars abortions after the 15th week of pregnancy. Under the majority’s ruling, though, another State’s law could do so after ten weeks, or five or three or one—or, again, from the moment of fertilization. States have already passed such laws, in anticipation of today’s ruling. More will follow. Some States have enacted laws extending to all forms of abortion procedure, including taking medication in one’s own home. They have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapist’s child or a young girl her father’s—no matter if doing so will destroy her life. So too, after today’s ruling, some States may compel women to carry to term a fetus with severe physical anomalies—for example, one afflicted with Tay-Sachs disease, sure to die within a few years of birth. States may even argue that a prohibition on abortion need make no provision for protecting a woman from risk of death or physical harm. Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child.

Enforcement of all these draconian restrictions will also be left largely to the States’ devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today’s decision, a state law will criminalize the woman’s conduct too, incarcerating or fining her for daring to seek or obtain an abortion. And as Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.

The majority tries to hide the geographically expansive effects of its holding. Today’s decision, the majority says, permits “each State” to address abortion as it pleases. ... After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State. Some may

criminalize efforts, including the provision of information or funding, to help women gain access to other States' abortion services. Most threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest. If that happens, "the views of [an individual State's] citizens" will not matter. ...

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." *Casey*, 505 U.S. at 856, 112 S.Ct. 2791. But no longer....

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold v. Connecticut*, 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.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. ... *Stare decisis*, this Court has often said, "contributes to the actual and perceived integrity of the judicial process" by ensuring that decisions are "founded in the law rather than in the proclivities of individuals." Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

We start with Roe and Casey, and with their deep connections to a broad swath of this Court's precedents. To hear the majority tell the tale, Roe and Casey are aberrations: They came from nowhere, went nowhere—and so are easy to excise from this Nation's constitutional law. That is not true. ... Roe and Casey were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. So we do not (as the majority insists today) place everything within "the reach of majorities and [government] officials." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.

A

Some half-century ago, Roe struck down a state law making it a crime to perform an abortion unless its purpose was to save a woman's life. The Roe Court knew it was treading on difficult and disputed ground. It understood that different people's "experiences," "values," and "religious training" and beliefs led to "opposing views" about abortion. But by a 7-to-2 vote, the Court held that in the earlier stages of pregnancy, that contested and contestable choice must belong to a woman, in consultation with her family and doctor. The Court explained that a long line of precedents, "founded in the Fourteenth Amendment's concept of personal liberty," protected individual decisionmaking related to "marriage, procreation, contraception, family relationships, and child rearing and education." For the same reasons, the Court held, the Constitution must protect "a woman's decision whether or not to terminate her pregnancy." The Court recognized the myriad ways bearing a child can alter the "life and future" of a woman and other members of her family. A State could not, "by adopting one theory of life," override all "rights of the pregnant woman."

At the same time, though, the Court recognized ... "important interests" in "protecting potential life," "maintaining medical standards," and "safeguarding [the] health" of the woman. No "absolut[ist]" account of the woman's right could wipe away those significant state claims.

The Court therefore struck a balance, turning on the stage of the pregnancy at which the abortion would occur. The Court explained that early on, a woman's choice must prevail, but that "at some point the state interests" become "dominant." It then set some guideposts. In the first trimester of pregnancy, the State could not interfere at all with the decision to terminate a pregnancy. At any time after that point, the State could regulate to protect the pregnant woman's health, such as by insisting that abortion providers and facilities meet safety requirements. And after the fetus's viability—the point when the

fetus “has the capability of meaningful life outside the mother’s womb”—the State could ban abortions, except when necessary to preserve the woman’s life or health.

In the 20 years between *Roe* and *Casey*, the Court expressly reaffirmed *Roe* on two occasions, and applied it on many more. Recognizing that “arguments [against *Roe*] continue to be made,” we responded that the doctrine of *stare decisis* “demands respect in a society governed by the rule of law.” And we avowed that the “vitality” of “constitutional principles cannot be allowed to yield simply because of disagreement with them.” So the Court, over and over, enforced the constitutional principles *Roe* had declared.

Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*’s core precepts. *Casey* is in significant measure a precedent about the doctrine of precedent—until today, one of the Court’s most important. ... Central to that conclusion was a full-throated restatement of a woman’s right to choose. Like *Roe*, *Casey* grounded that right in the Fourteenth Amendment’s guarantee of “liberty.” That guarantee encompasses realms of conduct not specifically referenced in the Constitution: “Marriage is mentioned nowhere” in that document, yet the Court was “no doubt correct” to protect the freedom to marry “against state interference.” And the guarantee of liberty encompasses conduct today that was not protected at the time of the Fourteenth Amendment. “It is settled now,” the Court said—though it was not always so—that “the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood, as well as bodily integrity.” ...

We make one initial point about this analysis in light of the majority’s insistence that *Roe* and *Casey*, and we in defending them, are dismissive of a “State’s interest in protecting prenatal life.” Nothing could get those decisions more wrong. As just described, *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman’s liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment. But what *Roe* and *Casey* also recognized—which today’s majority does not—is that a woman’s freedom and equality are likewise involved. That fact—the presence of countervailing interests—is what made the abortion question hard, and what necessitated balancing. The majority scoffs at that idea, castigating us for “repeatedly prais[ing] the ‘balance’ ” the two cases arrived at (with the word “balance” in scare quotes). To the majority “balance” is a dirty word, as moderation is a foreign concept. The majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implicates a woman’s rights to equality and freedom. Today’s Court, that is, does not think there is anything of constitutional significance attached to a woman’s control of her body and the path of her life. *Roe* and *Casey* thought that one-sided view misguided. In some sense, that is the difference in a nutshell between our precedents and the majority opinion. The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them. The

constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's).

B

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

Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century. But that turns out to be wheel-spinning. First, it is not clear what relevance such early history should have, even to the majority. See *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S.Ct. 2111, 2136, (2022) ("Historical evidence that long predates [ratification] may not illuminate the scope of the right"). If the early history obviously supported abortion rights, the majority would no doubt say that only the views of the Fourteenth Amendment's ratifiers are germane. See *ibid.* (It is "better not to go too far back into antiquity," except if olden "law survived to become our Founders' law"). Second—and embarrassingly for the majority—early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before "quickening"—the point when the fetus moved in the womb.² And early American law followed the common-law rule. So the criminal law of that early time might be taken as roughly consonant with *Roe*'s and *Casey*'s different treatment of early and late abortions. Better, then, to move forward in time. On the other side of 1868, the majority occasionally notes that many States barred abortion up to the time of *Roe*. That is convenient for the majority, but it is window dressing. As the same majority (plus one) just informed us, "post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *New York State Rifle & Pistol Assn.*, 142 S.Ct., at 2137. Had the pre-*Roe* liberalization of abortion laws occurred more quickly and more widely in the 20th century, the majority would say (once again) that only the ratifiers' views are germane.

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

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their

capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase “We the People.” In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point. Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women’s rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship....

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

The answer is that this Court has rejected the majority’s pinched view of how to read our Constitution. “The Founders,” we recently wrote, “knew they were writing a document designed to apply to ever-changing circumstances over centuries.” *NLRB v. Noel Canning*, 573 U.S. 513, 533–534 (2014). Or in the words of the great Chief Justice John Marshall, our Constitution is “intended to endure for ages to come,” and must adapt itself to a future “seen dimly,” if at all. *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819). That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers’ invitation. It has kept true to the Framers’ principles by applying them in new ways, responsive to new societal understandings and conditions.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of “liberty” and “equality” for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example *Obergefell* used a few years ago. The Court there confronted a claim, based on *Washington v. Glucksberg*, 521 U.S. 702 (1997), that the Fourteenth Amendment “must be defined in a most circumscribed manner, with central reference to specific historical practices”—exactly the view today’s majority follows. *Obergefell*, 576 U.S. at 671. And the Court specifically rejected that view. In doing so, the Court reflected on what the proposed, historically circumscribed approach

would have meant for interracial marriage. The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving v. Virginia*, 388 U.S. 1 (1967), read the Fourteenth Amendment to embrace the Lovings' union. If, *Obergefell* explained, "rights were defined by who exercised them in the past, then received practices could serve as their own continued justification"—even when they conflict with "liberty" and "equality" as later and more broadly understood. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." At least, that idea is what the majority sometimes tries to convey. At other times, the majority (or, rather, most of it) tries to assure the public that it has no designs on rights (for example, to contraception) that arose only in the back half of the 20th century—in other words, that it is happy to pick and choose, in accord with individual preferences. But that is a matter we discuss later. For now, our point is different: It is that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. ... Judges, ... are not "free to roam where unguided speculation might take them." Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. That is why Americans, to go back to *Obergefell*'s example, have a right to marry across racial lines. And it is why... Americans have a right to use contraceptives so they can choose for themselves whether to have children.

All that is what *Casey* understood. *Casey* explicitly rejected the present majority's method. "[T]he specific practices of States at the time of the adoption of the Fourteenth Amendment," *Casey* stated, do not "mark[] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." 505 U.S. at 848. To hold otherwise—as the majority does today—"would be inconsistent with our law." Why? Because the Court has "vindicated [the] principle" over and over that (no matter the sentiment in 1868) "there is a realm of personal liberty which the government may not enter"—especially relating to "bodily integrity" and "family life." *Casey* described in detail the Court's contraception cases. It noted decisions protecting the right to marry, including to someone of another race. In reviewing decades and decades of constitutional law, *Casey* could draw but one conclusion: Whatever was true in 1868, "[i]t is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."

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

And eliminating that right, we need to say before further describing our precedents, is not taking a "neutral" position, as Justice KAVANAUGH tries to argue. His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being "scrupulously neutral" if it allowed New York and California to ban all the guns they want? If the Court allowed some States to use unanimous juries and others not? If the Court told the States: Decide for yourselves whether to put restrictions on church attendance? We could go on—and in fact we will. Suppose Justice KAVANAUGH were to say (in line with the majority opinion) that the rights we just listed are more textually or historically grounded than the right to choose. What, then, of the right to contraception or same-sex marriage? Would it be "scrupulously neutral" for the Court to eliminate those rights too? The point of all these examples is that when it comes to rights, the Court does not act "neutrally" when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers. And to apply that point to the case here: When the Court decimates a right women have held for 50 years, the Court is not being "scrupulously neutral." It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so. Justice KAVANAUGH cannot obscure that point by appropriating the rhetoric of even-handedness. His position just is what it is: A brook-no-compromise refusal to recognize a woman's right to choose, from the first day of a pregnancy. And that position, as we will now show, cannot be squared with this Court's longstanding view that women indeed have rights (whatever the state of the world in 1868) to make the most personal and consequential decisions about their bodies and their lives.

Consider first, then, the line of this Court's cases protecting "bodily integrity." "No right," in this Court's time-honored view, "is held more sacred, or is more carefully guarded," than "the right of every individual to the possession and control of his own person." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); see *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 269, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (Every adult "has a right to determine what shall be done with his own body"). Or to put it more simply: Everyone, including women, owns their own bodies. So the Court

has restricted the power of government to interfere with a person's medical decisions or compel her to undergo medical procedures or treatments.

Casey recognized the “doctrinal affinity” between those precedents and Roe. And that doctrinal affinity is born of a factual likeness. There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth. For every woman, those experiences involve all manner of physical changes, medical treatments (including the possibility of a cesarean section), and medical risk. Just as one example, an American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion. That women happily undergo those burdens and hazards of their own accord does not lessen how far a State impinges on a woman's body when it compels her to bring a pregnancy to term. And for some women, as Roe recognized, abortions are medically necessary to prevent harm. The majority does not say—which is itself ominous—whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment.

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

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays.. So before Roe and Casey, the Court expanded in successive cases those who could claim the right to marry—though their relationships would have been outside the law's protection in the mid-19th century. And after Roe and Casey, of course, the Court continued in that vein. With a critical stop to hold that the Fourteenth Amendment protected same-sex intimacy, the Court resolved that the Amendment also conferred on same-sex couples the right to marry. In considering that question, the Court held, “[h]istory and tradition,” especially as reflected in the course of our precedent, “guide and discipline [the] inquiry.” But the sentiments of 1868 alone do not and cannot “rule the present.”

Casey similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the Fourteenth Amendment and wrote the state laws of the time

did not view women as full and equal citizens. A woman then, Casey wrote, “had no legal existence separate from her husband.” Women were seen only “as the center of home and family life,” without “full and independent legal status under the Constitution.” But that could not be true any longer: The State could not now insist on the historically dominant “vision of the woman’s role.” And equal citizenship, Casey realized, was inescapably connected to reproductive rights. “The ability of women to participate equally” in the “life of the Nation”—in all its economic, social, political, and legal aspects—“has been facilitated by their ability to control their reproductive lives.” Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.

For much that reason, Casey made clear that the precedents Roe most closely tracked were those involving contraception. Over the course of three cases, the Court had held that a right to use and gain access to contraception was part of the Fourteenth Amendment’s guarantee of liberty. That clause, we explained, necessarily conferred a right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Eisenstadt*, 405 U.S. at 453, 92 S.Ct. 1029; see *Carey*, 431 U.S. at 684–685, 97 S.Ct. 2010. Casey saw Roe as of a piece: In “critical respects the abortion decision is of the same character.” 505 U.S. at 852, 112 S.Ct. 2791. “[R]easonable people,” the Court noted, could also oppose contraception; and indeed, they could believe that “some forms of contraception” similarly implicate a concern with “potential life.” *Id.*, at 853, 859, 112 S.Ct. 2791. Yet the views of others could not automatically prevail against a woman’s right to control her own body and make her own choice about whether to bear, and probably to raise, a child. When an unplanned pregnancy is involved—because either contraception or abortion is outlawed—“the liberty of the woman is at stake in a sense unique to the human condition.” *Id.*, at 852, 112 S.Ct. 2791. No State could undertake to resolve the moral questions raised “in such a definitive way” as to deprive a woman of all choice. *Id.*, at 850, 112 S.Ct. 2791.

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....

The first problem with the majority’s account comes from Justice THOMAS’s concurrence—which makes clear he is not with the program. ... “[I]n future cases,” he says, “we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.” ... 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. Except in the places quoted above, the state interest in protecting fetal life plays no part in the majority's analysis. To the contrary, the majority takes pride in not expressing a view "about the status of the fetus." The majority's departure from *Roe* and *Casey* rests instead—and only—on whether a woman's decision to end a pregnancy involves any Fourteenth Amendment liberty interest (against which *Roe* and *Casey* balanced the state interest in preserving fetal life). According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then (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. ...

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....

II

By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. "*Stare decisis*" means "to stand by things decided." *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles." It maintains a stability that allows people to order their lives under the law.

Stare decisis also "contributes to the integrity of our constitutional system of government" by ensuring that decisions "are founded in the law rather than in the proclivities of individuals." As Hamilton wrote: It "avoid[s] an arbitrary discretion in the courts." *The Federalist* No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). And as Blackstone said before him: It "keep[s] the scale of justice even and steady, and not liable to waver with every new judge's opinion." ...

The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling *Roe* and *Casey*. But none does In some, the Court only partially modified or clarified a precedent. And in the rest, the Court relied on one or more of the traditional *stare decisis* factors in reaching its conclusion. The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. ...None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives. First, for all the reasons we have given, *Roe* and *Casey* were correct. In holding that a State could not “resolve” the debate about abortion “in such a definitive way that a woman lacks all choice in the matter,” the Court protected women’s liberty and women’s equality in a way comports with our Fourteenth Amendment precedents. Contrary to the majority’s view, the legal status of abortion in the 19th century does not weaken those decisions. And the majority’s repeated refrain about “usurp[ing]” state legislatures’ “power to address” a publicly contested question does not help it on the key issue here. To repeat: The point of a right is to shield individual actions and decisions “from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” However divisive, a right is not at the people’s mercy.

.... *Casey* itself applied those principles, in one of this Court’s most important precedents about precedent. After assessing the traditional *stare decisis* factors, *Casey* reached the only conclusion possible—that *stare decisis* operates powerfully here. It still does. The standards *Roe* and *Casey* set out are perfectly workable. No changes in either law or fact have eroded the two decisions. And tens of millions of American women have relied, and continue to rely, on the right to choose. So under traditional *stare decisis* principles, the majority has no special justification for the harm it causes.

A

Contrary to the majority’s view, there is nothing unworkable about *Casey*’s “undue burden” standard. Its primary focus on whether a State has placed a “substantial obstacle” on a woman seeking an abortion is “the sort of inquiry familiar to judges across a variety of contexts.” *June Medical Services L.L.C.v.Russo*, 140 S.Ct. 2103, 2136, 207 L.Ed.2d 566 (2020) (ROBERTS, C. J., concurring in judgment). And it has given rise to no more conflict in application than many standards this Court and others unhesitatingly apply every day.

General standards, like the undue burden standard, are ubiquitous in the law, and particularly in constitutional adjudication. When called on to give effect to the Constitution’s broad principles, this Court often crafts flexible standards that can be applied case-by-case to a myriad of unforeseeable circumstances. See *Dickerson*, 530 U.S. at 441, (“No court laying down a general rule can possibly foresee the various

circumstances” in which it must apply). So, for example, the Court asks about undue or substantial burdens on speech, on voting, and on interstate commerce...

And the undue burden standard has given rise to no unusual difficulties. Of course, it has provoked some disagreement among judges. Casey knew it would: That much “is to be expected in the application of any legal standard which must accommodate life’s complexity.” Which is to say: That much is to be expected in the application of any legal standard. But the majority vastly overstates the divisions among judges applying the standard. We count essentially two. THE CHIEF JUSTICE disagreed with other Justices in the June Medical majority about whether Casey called for weighing the benefits of an abortion regulation against its burdens. We agree that the June Medical difference is a difference—but not one that would actually make a difference in the result of most cases (it did not in June Medical), and not one incapable of resolution were it ever to matter. As for lower courts, there is now a one-year-old, one-to-one Circuit split about how the undue burden standard applies to state laws that ban abortions for certain reasons, like fetal abnormality. That is about it, as far as we can see. And that is not much. This Court mostly does not even grant certiorari on one-year-old, one-to-one Circuit splits, because we know that a bit of disagreement is an inevitable part of our legal system....

Anyone concerned about workability should consider the majority’s substitute standard. The majority says a law regulating or banning abortion “must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.” And the majority lists interests like “respect for and preservation of prenatal life,” “protection of maternal health,” elimination of certain “medical procedures,” “mitigation of fetal pain,” and others. Ante, at 2284, 136 S.Ct. 2292. This Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a woman’s life and health? And if so, exactly when? How much risk to a woman’s life can a State force her to incur, before the Fourteenth Amendment’s protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment’s protection of liberty and equality? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? And how about the use of dilation and evacuation or medication for miscarriage management?

Finally, the majority’s ruling today invites a host of questions about interstate conflicts. Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so today’s ruling will give rise to a host of new constitutional questions. Far from removing the Court from the abortion issue, the majority puts the Court at the center of the coming “interjurisdictional abortion wars.”

B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision's original basis. ... [T]he majority throws longstanding precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law.

Subsequent legal developments have only reinforced *Roe* and *Casey*. The Court has continued to embrace all the decisions *Roe* and *Casey* cited, decisions which recognize a constitutional right for an individual to make her own choices about “intimate relationships, the family,” and contraception. ...

Moreover, no subsequent factual developments have undermined *Roe* and *Casey*. Women continue to experience unplanned pregnancies and unexpected developments in pregnancies. Pregnancies continue to have enormous physical, social, and economic consequences. Even an uncomplicated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain. For some women, pregnancy and childbirth can mean life-altering physical ailments or even death. Today, as noted earlier, the risks of carrying a pregnancy to term dwarf those of having an abortion. Experts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase. Pregnancy and childbirth may also impose large-scale financial costs. The majority briefly refers to arguments about changes in laws relating to healthcare coverage, pregnancy discrimination, and family leave. Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare services may be far away. Women also continue to face pregnancy discrimination that interferes with their ability to earn a living. Paid family leave remains inaccessible to many who need it most. Only 20 percent of private-sector workers have access to paid family leave, including a mere 8 percent of workers in the bottom quartile of wage earners.

Mississippi's own record illustrates how little facts on the ground have changed since *Roe* and *Casey*, notwithstanding the majority's supposed “modern developments.” Sixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from demonstrating proper contraceptive use. The State neither bans pregnancy discrimination nor requires provision of paid parental leave. It has strict eligibility requirements for Medicaid and nutrition assistance, leaving many women and families without basic medical care or enough food. Although 86 percent of pregnancy-related deaths in the State are due to postpartum complications, Mississippi rejected federal funding to provide a year's worth of Medicaid coverage to women after giving birth. Perhaps unsurprisingly, health outcomes in Mississippi are abysmal for both women and children. Mississippi has the highest infant mortality rate in the country, and some of the highest rates for preterm birth, low birthweight, cesarean section, and maternal death. It is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion.

We do not say that every State is Mississippi, and we are sure some have made gains since Roe and Casey in providing support for women and children. But a state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in women's and children's health.

The only notable change we can see since Roe and Casey cuts in favor of adhering to precedent: It is that American abortion law has become more and more aligned with other nations. The majority, like the Mississippi Legislature, claims that the United States is an extreme outlier when it comes to abortion regulation. The global trend, however, has been toward increased provision of legal and safe abortion care. A number of countries, including New Zealand, the Netherlands, and Iceland, permit abortions up to a roughly similar time as Roe and Casey set. Canada has decriminalized abortion at any point in a pregnancy. Most Western European countries impose restrictions on abortion after 12 to 14 weeks, but they often have liberal exceptions to those time limits, including to prevent harm to a woman's physical or mental health. They also typically make access to early abortion easier, for example, by helping cover its cost. Perhaps most notable, more than 50 countries around the world—in Asia, Latin America, Africa, and Europe—have expanded access to abortion in the past 25 years.. In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today.

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

Casey itself addressed both *West Coast Hotel* and *Brown*, and found that neither supported Roe's overruling. In *West Coast Hotel*, Casey explained, "the facts of economic life" had proved "different from those previously assumed." 505 U.S. at 862, 112 S.Ct. 2791. And even though "Plessy was wrong the day it was decided," the passage of time had made that ever more clear to ever more citizens: "Society's understanding of the facts" in 1954 was "fundamentally different" than in 1896....

Roe and Casey continue to reflect, not diverge from, broad trends in American society. It is, of course, true that many Americans, including many women, opposed those decisions when issued and do so now as well. Yet the fact remains: Roe and Casey were the product of a profound and ongoing change in women's roles in the latter part of the 20th century. Only a dozen years before Roe, the Court described women as "the center of home and family life," with "special responsibilities" that precluded their full legal status under the Constitution. By 1973, when the Court decided Roe, fundamental social change was underway regarding the place of women—and the law had begun to follow. See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (recognizing that the Equal Protection Clause prohibits sex-based discrimination). By 1992, when the Court decided Casey, the traditional view of a woman's role as only a wife and mother was "no longer consistent

with our understanding of the family, the individual, or the Constitution.” Under that charter, Casey understood, women must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions. Nothing since Casey—no changed law, no changed fact—has undermined that promise.

C

The reasons for retaining Roe and Casey gain further strength from the overwhelming reliance interests those decisions have created. ... In Casey, the Court observed that for two decades individuals “have organized intimate relationships and made” significant life choices “in reliance on the availability of abortion in the event that contraception should fail.” Over another 30 years, that reliance has solidified. For half a century now, in Casey’s words, “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of Roe’s and Casey’s protections.

The disruption of overturning Roe and Casey will therefore be profound. Abortion is a common medical procedure and a familiar experience in women’s lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of American women will have an abortion before the age of 45. Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. As Casey understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women’s opportunities to participate fully and equally in the Nation’s political, social, and economic life.

The majority’s response to these obvious points exists far from the reality American women actually live. The majority proclaims that “reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.” The facts are: 45 percent of pregnancies in the United States are unplanned. Even the most effective contraceptives fail, and effective contraceptives are not universally accessible. Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. The Mississippi law at issue here, for example, has no exception for rape or incest, even for underage women. Finally, the majority ignores, as explained above, that some women decide to have an abortion because their circumstances change during a pregnancy. Human bodies care little for hopes and plans. Events can occur after conception, from unexpected medical risks to

changes in family circumstances, which profoundly alter what it means to carry a pregnancy to term. In all these situations, women have expected that they will get to decide, perhaps in consultation with their families or doctors but free from state interference, whether to continue a pregnancy. For those who will now have to undergo that pregnancy, the loss of Roe and Casey could be disastrous.

That is especially so for women without money. When we “count[] the cost of [Roe’s] repudiation” on women who once relied on that decision, it is not hard to see where the greatest burden will fall. In States that bar abortion, women of means will still be able to travel to obtain the services they need. It is women who cannot afford to do so who will suffer most. These are the women most likely to seek abortion care in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line. Even with Roe’s protection, these women face immense obstacles to raising the money needed to obtain abortion care early in their pregnancy. After today, in States where legal abortions are not available, they will lose any ability to obtain safe, legal abortion care. They will not have the money to make the trip necessary; or to obtain childcare for that time; or to take time off work. Many will endure the costs and risks of pregnancy and giving birth against their wishes. Others will turn in desperation to illegal and unsafe abortions. They may lose not just their freedom, but their lives.

Finally, the expectation of reproductive control is integral to many women’s identity and their place in the Nation. That expectation helps define a woman as an “equal citizen[],” with all the rights, privileges, and obligations that status entails. *Gonzales*, 550 U.S. at 172, 127 S.Ct. 1610 (Ginsburg, J., dissenting). It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a sphere of freedom, in which a person has the capacity to make choices free of government control. As Casey recognized, the right “order[s]” her “thinking” as well as her “living.” Beyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right grants. ... Women have relied on Roe and Casey in this way for 50 years. Many have never known anything else. When Roe and Casey disappear, the loss of power, control, and dignity will be immense.

The Court’s failure to perceive the whole swath of expectations Roe and Casey created reflects an impoverished view of reliance. According to the majority, a reliance interest must be “very concrete,” like those involving “property” or “contract.” While many of this Court’s cases addressing reliance have been in the “commercial context,” none holds that interests must be analogous to commercial ones to warrant stare decisis protection. This unprecedented assertion is, at bottom, a radical claim to power. By disclaiming any need to consider broad swaths of individuals’ interests, the Court arrogates to itself the authority to overrule established legal principles without even acknowledging the costs of its decisions for the individuals who live under the law, costs

that this Court's stare decisis doctrine instructs us to privilege when deciding whether to change course.

The majority claims that the reliance interests women have in *Roe* and *Casey* are too "intangible" for the Court to consider, even if it were inclined to do so. This is to ignore as judges what we know as men and women. The interests women have in *Roe* and *Casey* are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and whether to try to become pregnant than they would have when *Roe* served as a backstop. Other women will carry pregnancies to term, with all the costs and risk of harm that involves, when they would previously have chosen to obtain an abortion. For millions of women, *Roe* and *Casey* have been critical in giving them control of their bodies and their lives. Closing our eyes to the suffering today's decision will impose will not make that suffering disappear. The majority cannot escape its obligation to "count[] the cost[s]" of its decision by invoking the "conflicting arguments" of "contending sides." Stare decisis requires that the Court calculate the costs of a decision's repudiation on those who have relied on the decision, not on those who have disavowed it.

More broadly, the majority's approach to reliance cannot be reconciled with our Nation's understanding of constitutional rights. The majority's insistence on a "concrete," economic showing would preclude a finding of reliance on a wide variety of decisions recognizing constitutional rights—such as the right to express opinions, or choose whom to marry, or decide how to educate children. The Court, on the majority's logic, could transfer those choices to the State without having to consider a person's settled understanding that the law makes them hers. That must be wrong. All those rights, like the right to obtain an abortion, profoundly affect and, indeed, anchor individual lives. To recognize that people have relied on these rights is not to dabble in abstractions, but to acknowledge some of the most "concrete" and familiar aspects of human life and liberty.

All those rights, like the one here, also have a societal dimension, because of the role constitutional liberties play in our structure of government. See, e.g., *Dickerson*, 530 U.S. at 443, 120 S.Ct. 2326 (recognizing that *Miranda* "warnings have become part of our national culture" in declining to overrule *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight. *Roe* and *Casey* have of course aroused controversy and provoked disagreement. But the right those decisions conferred and reaffirmed is part of society's understanding of constitutional law and of how the Court has defined the liberty and equality that women are entitled to claim.

After today, young women will come of age with fewer rights than their mothers and grandmothers had. The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away.

The majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision.

D

"The promise of constancy, once given" in so charged an environment, *Casey* explained, "binds its maker for as long as" the "understanding of the issue has not changed so fundamentally as to render the commitment obsolete." A breach of that promise is "nothing less than a breach of faith." "[A]nd no Court that broke its faith with the people could sensibly expect credit for principle." No Court breaking its faith in that way would deserve credit for principle. As one of *Casey*'s authors wrote in another case, "Our legitimacy requires, above all, that we adhere to *stare decisis*" in "sensitive political contexts" where "partisan controversy abounds." *Bush v. Vera*, 517 U.S. 952, 985, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (opinion of O'Connor, J.).

....Weakening *stare decisis* threatens to upend bedrock legal doctrines, far beyond any single decision. Weakening *stare decisis* creates profound legal instability. And as *Casey* recognized, weakening *stare decisis* in a hotly contested case like this one calls into question this Court's commitment to legal principle. It makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, today's decision takes aim, we fear, at the rule of law....

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

CHAPTER 10

Editors' Note: The Supreme Court's Establishment Clause and Free Exercise Clause doctrines are evolving rapidly. Individual instructors will have different ideas about how to integrate the Court's two 2021-22 term religion cases into their curriculum. We offer two suggested approaches.

First, instructors spending significant time on time on the religion clauses could work within the current framing of Chapter 10, and add *Carson v. Makin* after *Zelman v. Simmons-Harris*, in the section regarding state support for religion in private settings. *Kennedy v. Bremerton* could then be added after *American Legion v. American Humanist* as a Free Exercise cases, or, alternatively, *Kennedy* could be used instead of (or in addition to) *Espinoza v. Montana* in the "Does the First Amendment Violate the First Amendment" section.

Second, instructors spending less time on the religion clauses, or who want to emphasize what may soon be the collapse into one doctrine of the two clauses, could teach the foundational cases of both clauses (we would choose *Everson*, *Town of Greece, Smith*, and *Lukumi Babalu Aye*) and then go directly to the "Does the First Amendment Violate the First Amendment" section, teaching *Espinoza*, *Carson*, and *Kennedy* as a single unit.

Guided Reading Questions: *Carson v. Makin*

1. The justices disagree in *Carson* about whether *Zelman v. Simmons-Harris* fully answers the question presented. You read *Zelman* above: who do you think has the better of this argument
2. What does the majority see as the key facts of this cases? Does the dissent disagree?
3. To what extent do either the majority or the dissent persuasively engage history on this question, particularly James Madison's *Memorial and Remonstrances Against Religious Assessments*?

Carson v. Makin

142 S.Ct. 1987 (2022)

Majority: *Roberts*, Thomas, Alito, Gorsuch, Kavanaugh, Barrett

Dissent: *Breyer*, Kagan, *Sotomayor*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Maine has enacted a program of tuition assistance for parents who live in school districts that do not operate a secondary school of their own. Under the program, parents designate the secondary school they would like their child to attend—public or private—and the school district transmits payments to that school to help defray the costs of tuition. Most private schools are eligible to receive the payments, so long as they are “nonsectarian.” The question presented is whether this restriction violates the Free Exercise Clause of the First Amendment.

I

A

Maine’s Constitution provides that the State’s legislature shall “require ... the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools.” In accordance with that command, the legislature has required that every school-age child in Maine “shall be provided an opportunity to receive the benefits of a free public education,” and that the required schools be operated by “the legislative and governing bodies of local school administrative units,” But Maine is the most rural State in the Union, and for many school districts the realities of remote geography and low population density make those commands difficult to heed. Indeed, of Maine’s 260 school administrative units (SAUs), fewer than half operate a public secondary school of their own. (Citations omitted throughout).

Maine has sought to deal with this problem in part by creating a program of tuition assistance for families that reside in such areas. Under that program, if an SAU neither operates its own public secondary school nor contracts with a particular public or private school for the education of its school-age children, the SAU must “pay the tuition ... at the public school or the approved private school of the parent’s choice at which the student is accepted.” Parents who wish to take advantage of this benefit first select the school they wish their child to attend. If they select a private school that has been “approved” by the Maine Department of Education, the parents’ SAU “shall pay the tuition” at the chosen school up to a specified maximum rate.

To be “approved” to receive these payments, a private school must meet certain basic requirements under Maine’s compulsory education law. The school must either be “[c]urrently accredited by a New England association of schools and colleges” or separately “approv[ed] for attendance purposes” by the Department. Schools seeking approval from the Department must meet specified curricular requirements, such as using English as the language of instruction, offering a course in “Maine history, including the Constitution of Maine ... and Maine’s cultural and ethnic heritage,” and maintaining a student-teacher ratio of not more than 30 to 1.

The program imposes no geographic limitation: Parents may direct tuition payments to schools inside or outside the State, or even in foreign countries. In schools that qualify for the program because they are accredited, teachers need not be certified by the State, §

13003(3), and Maine’s curricular requirements do not apply. [Private] Single-sex schools are eligible.

Prior to 1981, parents could also direct the tuition assistance payments to religious schools. Indeed, in the 1979–1980 school year, over 200 Maine students opted to attend such schools through the tuition assistance program. In 1981, however, Maine imposed a new requirement that any school receiving tuition assistance payments must be “a nonsectarian school in accordance with the First Amendment of the United States Constitution.” That provision was enacted in response to an opinion by the Maine attorney general taking the position that public funding of private religious schools violated the Establishment Clause of the First Amendment. We subsequently held, however, that a benefit program under which private citizens “direct government aid to religious schools wholly as a result of their own genuine and independent private choice” does not offend the Establishment Clause. *Zelman v. Simmons-Harris* (2002). Following our decision in *Zelman*, the Maine Legislature considered a proposed bill to repeal the “nonsectarian” requirement, but rejected it.

The “nonsectarian” requirement for participation in Maine’s tuition assistance program remains in effect today. The Department has stated that, in administering this requirement, it “considers a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith.” (Citation deleted). “[A]ffiliation or association with a church or religious institution is one potential indicator of a sectarian school,” but “it is not dispositive.”

B

... In 2018, petitioners brought suit against the commissioner of the Maine Department of Education. *Id.*, at 11–12. They alleged that the “nonsectarian” requirement of Maine’s tuition assistance program violated the Free Exercise Clause and the Establishment Clause of the First Amendment, *id.*, at 23–27, as well as the Equal Protection Clause of the Fourteenth Amendment, *id.*, at 29–30. ... While petitioners’ appeal to the First Circuit was pending, this Court decided *Espinoza v. Montana* (2020). *Espinoza* held that a provision of the Montana Constitution barring government aid to any school “controlled in whole or in part by any church, sect, or denomination,” Art. X, § 6(1), violated the Free Exercise Clause by prohibiting families from using otherwise available scholarship funds at the religious schools of their choosing. The First Circuit recognized that, in light of *Espinoza*, its prior precedent upholding Maine’s “nonsectarian” requirement was no longer controlling. But it nevertheless affirmed the District Court’s grant of judgment to the commissioner.

As relevant here, the First Circuit offered two grounds to distinguish Maine’s “nonsectarian” requirement from the no-aid provision at issue in *Espinoza*. First, the panel reasoned that, whereas Montana had barred schools from receiving funding “simply based on their religious identity—a status that in and of itself does not determine how a

school would use the funds”—Maine bars BCS and Temple Academy from receiving funding “based on the religious use that they would make of it in instructing children.” Second, the panel determined that Maine’s tuition assistance program was distinct from the scholarships at issue in *Espinoza* because Maine had sought to provide “a rough equivalent of the public school education that Maine may permissibly require to be secular but that is not otherwise accessible.” Thus, “the nature of the restriction at issue and the nature of the school aid program of which it is a key part” led the panel to conclude “once again” that Maine’s “nonsectarian” requirement did not violate the Free Exercise Clause. We granted certiorari.

II

The Free Exercise Clause of the First Amendment protects against “indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.” *Lynn v. Northwest Indian Cemetery* (1988). In particular, we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits. See *Sherbert v. Verner*, (1963); *Everyone v. Board of Education of Ewing* (1947). A State may not withhold unemployment benefits, for instance, on the ground that an individual lost his job for refusing to abandon the dictates of his faith. See *Sherbert*.

We have recently applied these principles in the context of two state efforts to withhold otherwise available public benefits from religious organizations. In *Trinity Lutheran Church v. Comer* (2017), we considered a Missouri program that offered grants to qualifying nonprofit organizations that installed cushioning playground surfaces made from recycled rubber tires. The Missouri Department of Natural Resources maintained an express policy of denying such grants to any applicant owned or controlled by a church, sect, or other religious entity. The Trinity Lutheran Church Child Learning Center applied for a grant to resurface its gravel playground, but the Department denied funding on the ground that the Center was operated by the Church.

We deemed it “unremarkable in light of our prior decisions” to conclude that the Free Exercise Clause did not permit Missouri to “expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.” *Trinity* While it was true that Trinity Lutheran remained “free to continue operating as a church,” it could enjoy that freedom only “at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center [was] otherwise fully qualified.” Such discrimination, we said, was “odious to our Constitution” and could not stand.

Two Terms ago, in *Espinoza*, we reached the same conclusion as to a Montana program that provided tax credits to donors who sponsored scholarships for private school tuition. The Montana Supreme Court held that the program, to the extent it included religious schools, violated a provision of the Montana Constitution that barred government aid to any school controlled in whole or in part by a church, sect, or denomination. As a result of that holding, the State terminated the scholarship program,

preventing the petitioners from accessing scholarship funds they otherwise would have used to fund their children's educations at religious schools.

We again held that the Free Exercise Clause forbade the State's action. The application of the Montana Constitution's no-aid provision, we explained, required strict scrutiny because it "bar[red] religious schools from public benefits solely because of the religious character of the schools." *Espinoza*. "A State need not subsidize private education," we concluded, "[b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.*

B

The "unremarkable" principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case. Maine offers its citizens a benefit: tuition assistance payments for any family whose school district does not provide a public secondary school. Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in *Trinity Lutheran*, a wide range of private schools are eligible to receive Maine tuition assistance payments here. And like the daycare center in *Trinity Lutheran*, BCS and Temple Academy are disqualified from this generally available benefit "solely because of their religious character." By "condition[ing] the availability of benefits" in that manner, Maine's tuition assistance program—like the program in *Trinity Lutheran*—"effectively penalizes the free exercise" of religion. *Ibid.*

Our recent decision in *Espinoza* applied these basic principles in the context of religious education that we consider today. There, as here, we considered a state benefit program under which public funds flowed to support tuition payments at private schools. And there, as here, that program specifically carved out private religious schools from those eligible to receive such funds. While the wording of the Montana and Maine provisions is different, their effect is the same: to "disqualify some private schools" from funding "solely because they are religious." A law that operates in that manner, we held in *Espinoza*, must be subjected to "the strictest scrutiny."

To satisfy strict scrutiny, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye v. Hialeah* (1993). A law that targets religious conduct for distinctive treatment ... will survive strict scrutiny only in rare cases."

This is not one of them. As noted, a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause. See *Zelman*. Maine's decision to continue excluding religious schools from its tuition assistance program after *Zelman* thus promotes stricter separation of church and state than the Federal Constitution requires. See also *post*, at 2004 (BREYER, J., dissenting) (States may choose "not to fund certain religious activity ... even when the Establishment Clause does not itself prohibit the State from funding that activity"); *post*, at 2012 (SOTOMAYOR, J., dissenting) (same point).

But as we explained in both *Trinity Lutheran* and *Espinoza*, such an “interest in separating church and state ‘more fiercely’ than the Federal Constitution ... ‘cannot qualify as compelling’ in the face of the infringement of free exercise.” (Citations omitted). Justice BREYER stresses the importance of “government neutrality” when it comes to religious matters, *post*, at 2009 but there is nothing neutral about Maine’s program. The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion. A State’s antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.

III

The First Circuit attempted to distinguish our precedent by recharacterizing the nature of Maine’s tuition assistance program in two ways, both of which Maine echoes before this Court. First, the panel defined the benefit at issue as the “rough equivalent of [a Maine] public school education,” an education that cannot include sectarian instruction. Second, the panel defined the nature of the exclusion as one based not on a school’s religious “status,” as in *Trinity Lutheran* and *Espinoza*, but on religious “uses” of public funds. Neither of these formal distinctions suffices to distinguish this case from *Trinity Lutheran* or *Espinoza*, or to affect the application of the free exercise principles outlined above.

A

The First Circuit held that the “nonsectarian” requirement was constitutional because the benefit was properly viewed not as tuition assistance payments to be used at approved private schools, but instead as funding for the “rough equivalent of the public school education that Maine may permissibly require to be secular.” As Maine puts it, “[t]he public benefit Maine is offering is a free public education.”

To start with, the statute does not say anything like that. It says that an SAU without a secondary school of its own “shall pay the tuition ... at the public school or the approved private school of the parent’s choice at which the student is accepted.” The benefit is *tuition* at a public *or* private school, selected by the parent, with no suggestion that the “private school” must somehow provide a “public” education.

This reading of the statute is confirmed by the program’s operation. The differences between private schools eligible to receive tuition assistance under Maine’s program and a Maine public school are numerous and important. To start with the most obvious, private schools are different by definition because they do not have to accept all students. Public schools generally do. Second, the free public education that Maine insists it is providing through the tuition assistance program is often *not* free. That “assistance” is available at private schools that charge several times the maximum benefit that Maine is willing to provide.

Moreover, the curriculum taught at participating private schools need not even resemble that taught in the Maine public schools. For example, Maine public schools must abide by certain “parameters for essential instruction in English language arts; mathematics; science and technology; social studies; career and education development; visual and performing arts; health, physical education and wellness; and world languages.” But NEASC-accredited private schools are exempt from these requirements, and instead subject only to general “standards and indicators” governing the implementation of their own chosen curriculum.

Private schools approved by the Department (rather than accredited by NEASC) are likewise exempt from many of the State’s curricular requirements, so long as fewer than 60% of their students receive tuition assistance from the State. For instance, such schools need not abide by Maine’s “comprehensive, statewide system of learning results,” including the “parameters for essential instruction” referenced above, and they need not administer the annual state assessments in English language arts, mathematics, and science.

There are other distinctions, too. ... But the key manner in which the two educational experiences *are* required to be “equivalent” is that they must both be secular. Saying that Maine offers a benefit limited to private secular education is just another way of saying that Maine does not extend tuition assistance payments to parents who choose to educate their children at religious schools. But “the definition of a particular program can always be manipulated to subsume the challenged condition,” and to allow States to “recast a condition on funding” in this manner would be to see “the First Amendment ... reduced to a simple semantic exercise.” (Citations omitted). Maine’s formulation does not answer the question in this case; it simply restates it.

Indeed, were we to accept Maine’s argument, our decision in *Espinoza* would be rendered essentially meaningless. By Maine’s logic, Montana could have obtained the same result that we held violated the First Amendment simply by redefining its tax credit for sponsors of generally available scholarships as limited to “tuition payments for the rough equivalent of a Montana public education”—meaning a secular education. But our holding in *Espinoza* turned on the substance of free exercise protections, not on the presence or absence of magic words. That holding applies fully whether the prohibited discrimination is in an express provision like or in a party’s reconceptualization of the public benefit.

Maine may provide a strictly secular education in its public schools. But BCS and Temple Academy—like numerous other recipients of Maine tuition assistance payments—are not public schools. In order to provide an education to children who live in certain parts of its far-flung State, Maine has decided *not* to operate schools of its own, but instead to offer tuition assistance that parents may direct to the public or private schools of *their* choice. Maine’s administration of that benefit is subject to the free exercise principles governing any such public benefit program—including the prohibition on denying the benefit based on a recipient’s religious exercise.

The dissents are wrong to say that under our decision today Maine “*must*” fund religious education. *Post*, at 2006 (BREYER, J., dissenting). Maine chose to allow some parents to direct state tuition payments to private schools; that decision was not “forced upon” it. *Post*, at 2014 (SOTOMAYOR, J., dissenting). The State retains a number of options: it could expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or even operate boarding schools of its own. As we held in *Espinoza*, a “State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”

B

The Court of Appeals also attempted to distinguish this case from *Trinity Lutheran* and *Espinoza* on the ground that the funding restrictions in those cases were “solely status-based religious discrimination,” while the challenged provision here “imposes a use-based restriction.” Justice BREYER makes the same argument.

In *Trinity Lutheran*, the Missouri Constitution banned the use of public funds in aid of “any church, sect or denomination of religion.” We noted that the case involved “express discrimination based on religious identity,” which was sufficient unto the day in deciding it, and that our opinion did “not address religious uses of funding.”

So too in *Espinoza*, the discrimination at issue was described by the Montana Supreme Court as a prohibition on aiding “schools controlled by churches,” and we analyzed the issue in terms of “religious status and not religious use.” Foreshadowing Maine’s argument here, Montana argued that its case was different from *Trinity Lutheran*’s because it involved not playground resurfacing, but general funds that “could be used for religious ends by some recipients, particularly schools that believe faith should ‘permeate[]’ everything they do.” We explained, however, that the strict scrutiny triggered by status-based discrimination could not be avoided by arguing that “one of its goals or effects [was] preventing religious organizations from putting aid to religious uses.” *Ibid.* (emphasis added). And we noted that nothing in our analysis was “meant to suggest that we agree[d] with [Montana] that some lesser degree of scrutiny applies to discrimination against religious uses of government aid.”

Maine’s argument, however—along with the decision below and Justice BREYER’s dissent—is premised on precisely such a distinction. See Brief for Respondent 44 (“Maine has not broadly excluded private schools simply because they are affiliated with or controlled by a religious organization. Rather, a school is excluded only if it promotes a particular faith and presents academic material through the lens of that faith.”); (Maine provision “does not bar schools from receiving funding simply based on their religious identity” but instead “based on the religious use that they would make of it in instructing children.”); *post*, at 2007 (BREYER, J., dissenting) (“[U]nlike the circumstances present in *Trinity Lutheran* and *Espinoza*, it is religious activity, not religious labels, that lies at the heart of this case.”).

That premise, however, misreads our precedents. In *Trinity Lutheran* and *Espinoza*, we held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. This case illustrates why. “[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.” (Citations omitted). Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism. Indeed, Maine concedes that the Department barely engages in any such scrutiny when enforcing the “nonsectarian” requirement. See Brief for Respondent 5 (asserting that there will be no need to probe private schools’ uses of tuition assistance funds because “schools self-identify as nonsectarian” under the program and the need for any further questioning is “extremely rare”). That suggests that any status-use distinction lacks a meaningful application not only in theory, but in practice as well. In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.

Maine and the dissents invoke *Locke v. Davey* (2004) in support of the argument that the State may preclude parents from designating a religious school to receive tuition assistance payments. ... Our opinions in *Trinity Lutheran* and *Espinoza*, however, have already explained why *Locke* can be of no help to Maine here. Both precedents emphasized, as did *Locke* itself, that the funding in *Locke* was intended to be used “to prepare for the ministry.” Funds could be and were used for theology courses; only pursuing a “vocational religious” *degree* was excluded. ... *Locke*’s reasoning expressly turned on what it identified as the “historic and substantial state interest” against using “taxpayer funds to support church leaders.” But as we explained at length in *Espinoza*, “it is clear that there is no ‘historic and substantial’ tradition against aiding [private religious] schools comparable to the tradition against state-supported clergy invoked by *Locke*. *Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits.

* * *

Maine’s “nonsectarian” requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion. *It is so ordered.*

JUSTICE BREYER with whom JUSTICE KAGAN joins, and with whom JUSTICE SOTOMAYOR joins except as to Part I–B, dissenting.

The First Amendment begins by forbidding the government from “mak[ing] [any] law respecting an establishment of religion.” It next forbids them to make any law “prohibiting the free exercise thereof.” The Court today pays almost no attention to the words in the first Clause while giving almost exclusive attention to the words in the second. The majority also fails to recognize the “ ‘play in the joints’ ” between the two Clauses. See *Trinity Lutheran*. That “play” gives States some degree of legislative leeway. It sometimes allows a State to further antiestablishment interests by withholding aid from religious institutions without violating the Constitution’s protections for the free exercise of religion. In my view, Maine’s nonsectarian requirement falls squarely within the scope of that constitutional leeway. I respectfully dissent.

I

A

The First Amendment’s two Religion Clauses together provide that the government “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Each Clause, linguistically speaking, is “cast in absolute terms.” (Citation omitted). The first Clause, the Establishment Clause, seems to bar all government “sponsorship, financial support, [or] active involvement ... in religious activity,” while the second Clause, the Free Exercise Clause, seems to bar all “governmental restraint on religious practice.” The apparently absolutist nature of these two prohibitions means that either Clause, “if expanded to a logical extreme, would tend to clash with the other.” Because of this, we have said, the two Clauses “are frequently in tension,” *Locke*, and “often exert conflicting pressures” on government action.

On the one hand, the Free Exercise Clause “ ‘protect[s] religious observers against unequal treatment.’ ” *Trinity Lutheran*, quoting *Church of Lukumi Babalu Aye*. We have said that, in the education context, this means that States generally cannot “ba[r] religious schools from public benefits solely because of the religious character of the schools.” *Espinoza*; *Trinity Lutheran*. On the other hand, the Establishment Clause “commands a separation of church and state.” (Citations omitted). A State cannot act to “aid one religion, aid all religions, or prefer one religion over another.” *Everson*. This means that a State cannot use “its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals.” Nor may a State “adopt programs or practices in its public schools ... which ‘aid or oppose’ any religion.” “This prohibition,” we have cautioned, “is absolute.” (Citations omitted). Although the Religion Clauses are, in practice, often in tension, they nonetheless “express complementary values.” *Cutter*. Together they attempt to chart a “course of constitutional neutrality” with respect to government and religion. They were written to help create an American Nation free of the religious conflict that had long plagued European nations with “governmentally established religion[s].” *Engle*. Through the Clauses, the Framers sought to avoid the “anguish, hardship and bitter strife” that resulted from the “union of Church and State” in those countries. (Citations omitted).

The Religion Clauses thus created a compromise in the form of religious freedom. They aspired to create a “benevolent neutrality”—one which would “permit religious exercise to exist without sponsorship and without interference.” “[T]he basic purpose of these provisions” was “to insure that no religion be sponsored or favored, none commanded, and none inhibited.” *Walz*. This religious freedom in effect meant that people “were entitled to worship God in their own way and to teach their children” in that way. C. Radcliffe, *The Law & Its Compass* 71 (1960). We have historically interpreted the Religion Clauses with these basic principles in mind.

And in applying these Clauses, we have often said that “there is room for play in the joints” between them. This doctrine reflects the fact that it may be difficult to determine in any particular case whether the Free Exercise Clause *requires* a State to fund the activities of a religious institution, or whether the Establishment Clause *prohibits* the State from doing so. Rather than attempting to draw a highly reticulated and complex free-exercise/establishment line that varies based on the specific circumstances of each state-funded program, we have provided general interpretive principles that apply uniformly in all Religion Clause cases. At the same time, we have made clear that States enjoy a degree of freedom to navigate the Clauses’ competing prohibitions. This includes choosing not to fund certain religious activity where States have strong, establishment-related reasons for not doing so. And, States have freedom to make this choice even when the Establishment Clause does not itself prohibit the State from funding that activity. (“[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause”). The Court today nowhere mentions, and I fear effectively abandons, this longstanding doctrine.

B

I have previously discussed my views of the relationship between the Religion Clauses and how I believe these Clauses should be interpreted to advance their goal of avoiding religious strife. Here I simply note the increased risk of religiously based social conflict when government promotes religion in its public school system. “[T]he prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled,” can “give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment” sought to prevent.

This potential for religious strife is still with us. We are today a Nation with well over 100 different religious groups, from Free Will Baptist to African Methodist, Buddhist to Humanist. See Pew Research Center, *America’s Changing Religious Landscape* 21 (May 12, 2015). People in our country adhere to a vast array of beliefs, ideals, and philosophies. And with greater religious diversity comes greater risk of religiously based strife, conflict, and social division. The Religion Clauses were written in part to help avoid that disunion. As Thomas Jefferson, one of the leading drafters and proponents of those Clauses, wrote, “ ‘to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.’ ” *Everson*. And as

James Madison, another drafter and proponent, said, compelled taxpayer sponsorship of religion “is itself a signal of persecution,” which “will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects.” To interpret the Clauses with these concerns in mind may help to further their original purpose of avoiding religious-based division.

I have also previously explained why I believe that a “rigid, bright-line” approach to the Religion Clauses—an approach without any leeway or “play in the joints”—will too often work against the Clauses’ underlying purposes. *Espinoza*. “[G]overnment benefits come in many shapes and sizes.” *Ibid.* (dissenting opinion). Not all state-funded programs that have religious restrictions carry the same risk of creating social division and conflict. In my view, that risk can best be understood by considering the particular benefit at issue, along with the reasons for the particular religious restriction at issue. *Trinity Lutheran* (BREYER, J., concurring in judgment). Recognition that States enjoy a degree of constitutional leeway allows States to enact laws sensitive to local circumstances while also allowing this Court to consider those circumstances in light of the basic values underlying the Religion Clauses.

In a word, to interpret the two Clauses as if they were joined at the hip will work against their basic purpose: to allow for an American society with practitioners of over 100 different religions, and those who do not practice religion at all, to live together without serious risk of religion-based social divisions.

II

The majority believes that the principles set forth in this Court’s earlier cases easily resolve this case. But they do not. WE have previously found, as the majority points out, that “a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause.” *Ante*, at 1997 (citing *Zelman*). We have thus concluded that a State *may*, consistent with the Establishment Clause, provide funding to religious schools through a general public funding program if the “government aid ... reach[es] religious institutions only by way of the deliberate choices of ... individual [aid] recipients.”

But the key word is “may.” We have never previously held what the Court holds today, namely, that a State *must* (not *may*) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education.

What happens once “may” becomes “must”? Does that transformation mean that a school district that pays for public schools must pay equivalent funds to parents who wish to send their children to religious schools? Does it mean that school districts that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education? What other social benefits are there the State’s provision of which means—under the majority’s interpretation of the Free Exercise Clause—that the State must pay parents for the religious equivalent of the secular benefit

provided? The concept of “play in the joints” means that courts need not, and should not, answer with “must” these questions that can more appropriately be answered with “may.”

The majority also asserts that “[t]he ‘unremarkable’ principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case.” *Ante*, at 1997. Not so. The state-funded program at issue in *Trinity Lutheran* provided payment for resurfacing school playgrounds to make them safer for children. Any Establishment Clause concerns arising from providing money to religious schools for the creation of safer play yards are readily distinguishable from those raised by providing money to religious schools through the program at issue here—a tuition program designed to ensure that all children receive their constitutionally guaranteed right to a free public education. After all, cities and States normally pay for police forces, fire protection, paved streets, municipal transport, and hosts of other services that benefit churches as well as secular organizations. But paying the salary of a religious teacher as part of a public school tuition program is a different matter.

In addition, schools were excluded from the playground resurfacing program at issue in *Trinity Lutheran* because of the mere fact that they were “owned or controlled by a church, sect, or other religious entity.” Schools were thus disqualified from receiving playground funds “solely because of their religious character,” not because of the “religious uses of [the] funding” they would receive. Here, by contrast, a school’s “‘affiliation or association with a church or religious institution ... is not dispositive’ ” of its ability to receive tuition funds.(quoting then-commissioner of Maine’s Department of Education). Instead, Maine chooses not to fund only those schools that “ ‘promot[e] the faith or belief system with which [the schools are] associated and/or presen[t] the [academic] material taught through the lens of this faith’ ”—*i.e.*, schools that will use public money for religious purposes. Maine thus excludes schools from its tuition program not because of the schools’ religious character but because the schools will use the funds to teach and promote religious ideals.

For similar reasons, *Espinoza* does not resolve the present case. In *Espinoza*, Montana created “a scholarship program for students attending private schools.” But the State prohibited families from using the scholarship at any private school “ ‘owned or controlled in whole or in part by any church, religious sect, or denomination.’ ” As in *Trinity Lutheran*, Montana denied funds to schools based “expressly on religious status and not religious use”; “[t]o be eligible” for scholarship funds, a school had to “divorce itself from any religious control or affiliation.” Here, again, Maine denies tuition money to schools not because of their religious affiliation, but because they will use state funds to promote religious views.

These distinctions are important. The very point of the Establishment Clause is to prevent the government from sponsoring religious activity itself, thereby favoring one religion over another or favoring religion over nonreligion. See *Engel* (“Under [the Establishment Clause] ... government in this country, be it state or federal, is without power to prescribe by law ... any program of governmentally sponsored religious

activity”); *Walz* (“[F]or the men who wrote the Religion Clauses ... the ‘establishment’ of a religion connoted ... [any] active involvement of the sovereign in religious activity”); *Everson* (States may not “pass laws which aid one religion, aid all religions, or prefer one religion over another”). State funding of religious activity risks the very social conflict based upon religion that the Religion Clauses were designed to prevent. And, unlike the circumstances present in *Trinity Lutheran* and *Espinoza*, it is religious activity, not religious labels, that lies at the heart of this case.

III A

I turn now to consider the Maine program at issue here. ... The two private religious schools at issue here [are] affiliated with a church or religious organization. And they also teach students to accept particular religious beliefs and to engage in particular religious practices.

The first school, Bangor Christian, has “educational objectives” that include “ ‘lead[ing] each unsaved student to trust Christ as his/her personal savior and then to follow Christ as Lord of his/her life,’ ” and “ ‘develop[ing] within each student a Christian world view and Christian philosophy of life.’ ” Bangor Christian “does not believe there is any way to separate the religious instruction from the academic instruction.” Academic instruction and religious instruction are thus “completely intertwined.” Bangor Christian teaches in its social studies class, for example, “ ‘that God has ordained evangelism.’ ” And in science class, students learn that atmospheric layers “ ‘are evidence of God’s good design.’ ”

The second school, Temple Academy, similarly promotes religion through academics. Its “educational philosophy ‘is based on a thoroughly Christian and Biblical world view.’ ” The school’s “objectives” include “ ‘foster[ing] within each student an attitude of love and reverence of the Bible as the infallible, inerrant, and authoritative Word of God.’ ” *Ibid.* And the school’s “ ‘academic growth’ objectives” include “ ‘provid[ing] a sound academic education in which the subject areas are taught from a Christian point of view,’ ” and “ ‘help[ing] every student develop a truly Christian world view by integrating studies with the truths of Scripture.’ ” Like Bangor Christian, Temple “provides a ‘biblically-integrated education,’ which means that the Bible is used in every subject that is taught.” In mathematics classes, for example, students learn that “a creator designed the universe such that ‘one plus one is always going to be two.’ ”

The differences between this kind of education and a purely civic, public education are important. “The religious education and formation of students is the very reason for the existence of most private religious schools.” *Our Lady of Guadalupe* “[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith,” we have said, “are responsibilities that lie at the very core of the mission of a private religious school.” Indeed, we have recognized that the “connection that religious institutions draw between their central purpose and educating the young in the faith” is so

“close” that teachers employed at such schools act as “ministers” for purposes of the First Amendment.

By contrast, public schools, including those in Maine, seek first and foremost to provide a primarily civic education. We have said that, in doing so, they comprise “a most vital civic institution for the preservation of a democratic system of government, and ... the primary vehicle for transmitting the values on which our society rests.” *Plyler v. Doe* (1982) (citation and internal quotation marks omitted). To play that role effectively, public schools are religiously neutral, neither disparaging nor promoting any one particular system of religious beliefs. We accordingly have, as explained above, consistently required public school education to be free from religious affiliation or indoctrination.

Maine legislators who endorsed the State’s nonsectarian requirement recognized these differences between public and religious education. They did not want Maine taxpayers to finance, through a tuition program designed to ensure the provision of free public education, schools that would use state money for teaching religious practices. See, e.g., App. 104 (Maine representative stating that “[f]rom a public policy position, we must believe that a religiously neutral classroom is the best if funded by public dollars”); *id.*, at 106 (Maine senator asserting that the State’s “limited [tax] dollars for schools” should be spent on those “that are non-religious and that are neutral on religion”). Underlying these views is the belief that the Establishment Clause seeks government neutrality. And the legislators thought that government payment for this kind of religious education would be antithetical to the religiously neutral education that the Establishment Clause requires in public schools. Maine’s nonsectarian requirement, they believed, furthered the State’s antiestablishment interests in not promoting religion in its public school system; the requirement prevented public funds—funds allocated to ensure that all children receive their constitutional right to a free public education—from being given to schools that would use the funds to promote religion.

In the majority’s view, the fact that private individuals, not Maine itself, choose to spend the State’s money on religious education saves Maine’s program from Establishment Clause condemnation. But that fact, as I have said, simply *permits* Maine to route funds to religious schools. See, e.g., *Zelman*. It does not *require* Maine to spend its money in that way. That is because, as explained above, this Court has long followed a legal doctrine that gives States flexibility to navigate the tension between the two Religion Clauses. *Supra*, at 2004. This doctrine “recognize[s] that there is ‘play in the joints’ between what the Establishment Clause permits and the Free Exercise Clause compels.” *Trinity Lutheran*, quoting *Locke*. This wiggle-room means that “[t]he course of constitutional neutrality in this area cannot be an absolutely straight line.” *Walz*. And in walking this line of government neutrality, States must have “some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause,” *Cutter*, in which they can navigate the tension created by the Clauses and consider their own interests in light of the Clauses’ competing prohibitions.

Nothing in our Free Exercise Clause cases *compels* Maine to give tuition aid to private schools that will use the funds to provide a religious education. As explained above, this Court’s decisions in *Trinity Lutheran* and *Espinoza* prohibit States from denying aid to religious schools solely because of a school’s religious *status*—that is, its affiliation with or control by a religious organization. *Supra*, at 2006 - 2007. But we have never said that the Free Exercise Clause prohibits States from withholding funds because of the religious *use* to which the money will be put. To the contrary, we upheld in *Locke* a State’s decision to deny public funding to a recipient “because of what he proposed *to do*” with the money, when what he proposed to do was to “use the funds to prepare for the ministry.” *Trinity Lutheran; Espinoza* (characterizing *Locke* similarly). Maine does not refuse to pay tuition at private schools because of religious status or affiliation. The State only denies funding to schools that will use the money to promote religious beliefs through a religiously integrated education—an education that, in Maine’s view, is not a replacement for a civic-focused public education. This makes Maine’s decision to withhold public funds more akin to the state decision that we upheld in *Locke*, and unlike the withholdings that we invalidated in *Trinity Lutheran* and *Espinoza*.

The Free Exercise Clause thus does not require Maine to fund, through its tuition program, schools that will use public money to promote religion. And considering the Establishment Clause concerns underlying the program, Maine’s decision not to fund such schools falls squarely within the play in the joints between those two Clauses. Maine has promised all children within the State the right to receive a free public education. In fulfilling this promise, Maine endeavors to provide children the religiously neutral education required in public school systems. And that, in significant part, reflects the State’s antiestablishment interests in avoiding spending public money to support what is essentially religious activity. The Religion Clauses give Maine the ability, and flexibility, to make this choice.

B

In my view, Maine’s nonsectarian requirement is also constitutional because it supports, rather than undermines, the Religion Clauses’ goal of avoiding religious strife. Forcing Maine to fund schools that provide the sort of religiously integrated education offered by Bangor Christian and Temple Academy creates a similar potential for religious strife as that raised by promoting religion in public schools. It may appear to some that the State favors a particular religion over others, or favors religion over nonreligion. Members of minority religions, with too few adherents to establish schools, may see injustice in the fact that only those belonging to more popular religions can use state money for religious education. Taxpayers may be upset at having to finance the propagation of religious beliefs that they do not share and with which they disagree. And parents in school districts that have a public secondary school may feel indignant that only *some* families in the State—those families in the more rural districts without public schools—have the opportunity to give their children a Maine-funded religious education.

Maine legislators who endorsed the State’s nonsectarian requirement understood this potential for social conflict. They recognized the important rights that religious schools have to create the sort of religiously inspired curriculum that Bangor Christian and Temple Academy teach. Legislators also recognized that these private schools make religiously based enrollment and hiring decisions. Bangor Christian and Temple Academy, for example, have admissions policies that allow them to deny enrollment to students based on gender, gender-identity, sexual orientation, and religion, and both schools require their teachers to be Born Again Christians.. Legislators did not want Maine taxpayers to pay for these religiously based practices—practices not universally endorsed by all citizens of the State—for fear that doing so would cause a significant number of Maine citizens discomfort or displeasure. (Maine representative noting that “private religious schools discriminate against citizens of the State of Maine,” such as by “not hir[ing] individuals whose beliefs are not consistent with the school’s religious teachings,” and asserting that “it is fundamentally wrong for us to fund” such discrimination); *id.*, at 104 (Maine representative stating that “the people of Maine” should not use “public money” to advance “their religious pursuits,” and that “discrimination in religious institutions” should not be funded “with my dollar”); (Maine senator expressing concern that “public funds could be used to teach intolerant religious views”). The nonsectarian requirement helped avoid this conflict—the precise kind of social conflict that the Religion Clauses themselves sought to avoid.

Maine’s nonsectarian requirement also serves to avoid religious strife between the State and the religious schools. Given that Maine is funding the schools as part of its effort to ensure that all children receive the basic public education to which they are entitled, Maine has an interest in ensuring that the education provided at these schools meets certain curriculum standards. Religious schools, on the other hand, have an interest in teaching a curriculum that advances the tenets of their religion. And the schools are of course entitled to teach subjects in the way that best reflects their religious beliefs. But the State may disagree with the particular manner in which the schools have decided that these subjects should be taught.

This is a situation ripe for conflict, as it forces Maine into the position of evaluating the adequacy or appropriateness of the schools’ religiously inspired curriculum. Maine does not want this role. As one legislator explained, one of the reasons for the nonsectarian requirement was that “[g]overnment officials cannot, and should not, review the religious teachings of religious schools.” *Ibid.* Another legislator cautioned that the State would be unable to “reconcile” the curriculum of “private religious schools who teach religion in the classroom” with Maine “standards ... that do not include any sort of religion in them.”

Nor do the schools want Maine in this role. Bangor Christian asserted that it would only consider accepting public funds if it “did not have to make any changes in how it operates.” Temple Academy similarly stated that it would only accept state money if it had “in writing that the school would not have to alter its admissions standards, hiring standards, or curriculum.” The nonsectarian requirement ensures that Maine is not pitted

against private religious schools in these battles over curriculum or operations, thereby avoiding the social strife resulting from this state-versus-religion confrontation. By invalidating the nonsectarian requirement, the majority today subjects the State, the schools, and the people of Maine to social conflict of a kind that they, and the Religion Clauses, sought to prevent.

I emphasize the problems that may arise out of today's decision because they reinforce my belief that the Religion Clauses do not require Maine to pay for a religious education simply because, in some rural areas, the State will help parents pay for a secular education. After all, the Establishment Clause forbids a State from paying for the practice of religion itself. And state neutrality in respect to the *teaching* of the practice of religion lies at the heart of this Clause. *Locke* (noting that there are "few areas in which a State's antiestablishment interests come more into play" than state funding of ministers who will "lead [their] congregation[s]" in "religious endeavor[s]"). There is no meaningful difference between a State's payment of the salary of a religious minister and the salary of someone who will teach the practice of religion to a person's children. At bottom, there is almost no area "as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits." *Zelman* (BREYER, J., dissenting). The Establishment Clause was intended to keep the State out of this area.

* * *

Maine wishes to provide children within the State with a secular, public education. This wish embodies, in significant part, the constitutional need to avoid spending public money to support what is essentially the teaching and practice of religion. That need is reinforced by the fact that we are today a Nation of more than 330 million people who ascribe to over 100 different religions. In that context, state neutrality with respect to religion is particularly important. The Religion Clauses give Maine the right to honor that neutrality by choosing not to fund religious schools as part of its public school tuition program. I believe the majority is wrong to hold the contrary. And with respect, I dissent.

Review Questions and Explanations: *Carson*

1. What justices in *Carson* sharply disagree about how to best apply the Free Exercise clause. Which arguments on each side do you find most and least persuasive?
2. Under the majority's test, what types of state funding for religious instruction would be unconstitutional? Under the dissent's test, what types would be permitted?

Guided Reading Questions: *Kennedy v. Bremerton*

1. When reading *Kennedy*, pay close attention to how the justices describe the facts of the case. What does the majority see as the key facts of this cases? Does the dissent disagree?
2. What, exactly, is Mr. Kennedy claiming infringes his Free Exercises rights?
3. Why does the School District believe honoring Mr. Kennedy's request to pray on the field at the end of games violates the Establishment Clause?

Kennedy v. Bremerton School District

142 S.Ct. 2407 (2022)

Majority: *Gorsuch*, Roberts, *Thomas*, *Alito*, Kavanaugh, Barrett

Dissent: *Sotomayor*, Breyer, Kagan

JUSTICE GORSUCH delivered the opinion of the Court.

Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway. It did so because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.

I

A

Joseph Kennedy began working as a football coach at Bremerton High School in 2008 after nearly two decades of service in the Marine Corps. Like many other football players and coaches across the country, Mr. Kennedy made it a practice to give “thanks through prayer on the playing field” at the conclusion of each game. In his prayers, Mr. Kennedy sought to express gratitude for “what the players had accomplished and for the opportunity to be part of their lives through the game of football.” Mr. Kennedy offered his prayers after the players and coaches had shaken hands, by taking a knee at the 50-yard line and praying “quiet[ly]” for “approximately 30 seconds.”

Initially, Mr. Kennedy prayed on his own. But over time, some players asked whether they could pray alongside him. Mr. Kennedy responded by saying, “ ‘This is a free country. You can do what you want.’ ” The number of players who joined Mr. Kennedy eventually grew to include most of the team, at least after some games. Sometimes team members invited opposing players to join. Other times Mr. Kennedy still prayed alone. Eventually, Mr. Kennedy began incorporating short motivational speeches with his prayer when others were present. Separately, the team at times engaged in pregame or postgame prayers in the locker room. It seems this practice was a “school tradition” that predated Mr. Kennedy’s tenure. Mr. Kennedy explained that he “never told any student that it was important they participate in any religious activity.” In particular, he “never pressured or encouraged any student to join” his postgame midfield prayers.

For over seven years, no one complained to the Bremerton School District (District) about these practices. It seems the District’s superintendent first learned of them only in September 2015, after an employee from another school commented positively on the school’s practices to Bremerton’s principal. At that point, the District reacted quickly. On September 17, the superintendent sent Mr. Kennedy a letter. In it, the superintendent identified “two problematic practices” in which Mr. Kennedy had engaged. First, Mr. Kennedy had provided “inspirational talk[s]” that included “overtly religious references” likely constituting “prayer” with the students “at midfield following the completion of ... game[s].” Second, he had led “students and coaching staff in a prayer” in the locker-room tradition that “predated [his] involvement with the program.”

The District explained that it sought to establish “clear parameters” “going forward.” It instructed Mr. Kennedy to avoid any motivational “talks with students” that “include[d] religious expression, including prayer,” and to avoid “suggest[ing], encourag[ing] (or discourag[ing]), or supervis[ing]” any prayers of students, which students remained free to “engage in.” The District also explained that any religious activity on Mr. Kennedy’s part must be “nondemonstrative (*i.e.*, not outwardly discernible as religious activity)” if “students are also engaged in religious conduct” in order to “avoid the perception of endorsement.” In offering these directives, the District appealed to what it called a “direct tension between” the “Establishment Clause” and “a school employee’s [right to] free[ly] exercise” his religion. To resolve that “tension,” the District explained, an employee’s free exercise rights “must yield so far as necessary to avoid school endorsement of religious activities.”

After receiving the District’s September 17 letter, Mr. Kennedy ended the tradition, predating him, of offering locker-room prayers. He also ended his practice of incorporating religious references or prayer into his postgame motivational talks to his team on the field. Mr. Kennedy further felt pressured to abandon his practice of saying his own quiet, on-field postgame prayer. Driving home after a game, however, Mr. Kennedy felt upset that he had “broken [his] commitment to God” by not offering his own prayer, so he turned his car around and returned to the field. By that point, everyone had left the stadium, and he walked to the 50-yard line and knelt to say a brief prayer of thanks.

On October 14, through counsel, Mr. Kennedy sent a letter to school officials informing them that, because of his “sincerely-held religious beliefs,” he felt “compelled” to offer a “post-game personal prayer” of thanks at midfield. He asked the District to allow him to continue that “private religious expression” alone. Consistent with the District’s policy, Mr. Kennedy explained that he “neither requests, encourages, nor discourages students from participating in” these prayers. Mr. Kennedy emphasized that he sought only the opportunity to “wai[t] until the game is over and the players have left the field and then wal[k] to mid-field to say a short, private, personal prayer.” He “told everybody” that it would be acceptable to him to pray “when the kids went away from [him].” He later clarified that this meant he was even willing to say his “prayer while the players were walking to the locker room” or “bus,” and then catch up with his team. However, Mr. Kennedy objected to the logical implication of the District’s September 17 letter, which he understood as banning him “from bowing his head” in the vicinity of students, and as requiring him to “flee the scene if students voluntarily [came] to the same area” where he was praying. After all, District policy prohibited him from “discourag[ing]” independent student decisions to pray.

On October 16, shortly before the game that day, the District responded with another letter. The District acknowledged that Mr. Kennedy “ha[d] complied” with the “directives” in its September 17 letter. Yet instead of accommodating Mr. Kennedy’s request to offer a brief prayer on the field while students were busy with other activities—whether heading to the locker room, boarding the bus, or perhaps singing the school fight song—the District issued an ultimatum. It forbade Mr. Kennedy from engaging in “any overt actions” that could “appea[r] to a reasonable observer to endorse ... prayer ... while he is on duty as a District-paid coach.” The District did so because it judged that anything less would lead it to violate the Establishment Clause.

B

After receiving this letter, Mr. Kennedy offered a brief prayer following the October 16 game. When he bowed his head at midfield after the game, “most [Bremerton] players were ... engaged in the traditional singing of the school fight song to the audience.” Though Mr. Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer.

This event spurred media coverage of Mr. Kennedy’s dilemma and a public response from the District. The District placed robocalls to parents to inform them that public access to the field is forbidden; it posted signs and made announcements at games saying the same thing; and it had the Bremerton Police secure the field in future games. Subsequently, the District superintendent explained in an October 20 email to the leader of a state association of school administrators that “the coach moved on from leading prayer with kids, to taking a silent prayer at the 50 yard line.” The official with whom the superintendent corresponded acknowledged that the “use of a silent prayer changes the equation a bit.” On October 21, the superintendent further observed to a state official that

“[t]he issue is quickly changing as it has shifted from leading prayer with student athletes, to a coaches [*sic*] right to conduct” his own prayer “on the 50 yard line.”

On October 23, shortly before that evening’s game, the District wrote Mr. Kennedy again. It expressed “appreciation” for his “efforts to comply” with the District’s directives, including avoiding “on-the-job prayer with players in the ... football program, both in the locker room prior to games as well as on the field immediately following games.” The letter also admitted that, during Mr. Kennedy’s recent October 16 postgame prayer, his students were otherwise engaged and not praying with him, and that his prayer was “fleeting.” Still, the District explained that a “reasonable observer” could think government endorsement of religion had occurred when a “District employee, on the field only by virtue of his employment with the District, still on duty” engaged in “overtly religious conduct.” The District thus made clear that the only option it would offer Mr. Kennedy was to allow him to pray after a game in a “private location” behind closed doors and “not observable to students or the public.”

After the October 23 game ended, Mr. Kennedy knelt at the 50-yard line, where “no one joined him,” and bowed his head for a “brief, quiet prayer.” The superintendent informed the District’s board that this prayer “moved closer to what we want,” but nevertheless remained “unconstitutional.” After the final relevant football game on October 26, Mr. Kennedy again knelt alone to offer a brief prayer as the players engaged in postgame traditions. While he was praying, other adults gathered around him on the field. Later, Mr. Kennedy rejoined his players for a postgame talk, after they had finished singing the school fight song.

C

Shortly after the October 26 game, the District placed Mr. Kennedy on paid administrative leave and prohibited him from “participat[ing], in any capacity, in ... football program activities.” In a letter explaining the reasons for this disciplinary action, the superintendent criticized Mr. Kennedy for engaging in “public and demonstrative religious conduct while still on duty as an assistant coach” by offering a prayer following the games on October 16, 23, and 26. The letter did not allege that Mr. Kennedy performed these prayers with students, and it acknowledged that his prayers took place while students were engaged in unrelated postgame activities. Additionally, the letter faulted Mr. Kennedy for not being willing to pray behind closed doors.

In an October 28 Q&A document provided to the public, the District admitted that it possessed “no evidence that students have been directly coerced to pray with Kennedy.” The Q&A also acknowledged that Mr. Kennedy “ha[d] complied” with the District’s instruction to refrain from his “prior practices of leading players in a pre-game prayer in the locker room or leading players in a post-game prayer immediately following games.” But the Q&A asserted that the District could not allow Mr. Kennedy to “engage in a public religious display.” Otherwise, the District would “violat[e] the ... Establishment Clause” because “reasonable ... students and attendees” might perceive the “district [as] endors[ing] ... religion.”

While Mr. Kennedy received “uniformly positive evaluations” every other year of his coaching career, after the 2015 season ended in November, the District gave him a poor performance evaluation. The evaluation advised against rehiring Mr. Kennedy on the grounds that he “ ‘failed to follow district policy’ ” regarding religious expression and “ ‘failed to supervise student-athletes after games.’ ” Mr. Kennedy did not return for the next season.

II A

After these events, Mr. Kennedy sued in federal court, alleging that the District’s actions violated the First Amendment’s Free Speech and Free Exercise Clauses. ... The District Court denied that motion, concluding that a “reasonable observer ... would have seen him as ... leading an orchestrated session of faith.” Indeed, if the District had not suspended him, the court agreed, it might have violated the Constitution’s Establishment Clause. See *id.*, at 302–303. On appeal, the Ninth Circuit affirmed.

Following the Ninth Circuit’s ruling, Mr. Kennedy sought certiorari in this Court. The Court denied the petition. But Justice ALITO, joined by three other Members of the Court, issued a statement stressing that “denial of certiorari does not signify that the Court necessarily agrees with the decision ... below.” [*Kennedy v. Bremerton School Dist.*, 586 U. S. —, —, 139 S.Ct. 634, 635, 203 L.Ed.2d 137 \(2019\)](#). ... After the case returned to the District Court, the parties engaged in discovery and eventually brought cross-motions for summary judgment. At the end of that process, the District Court found that the “ ‘sole reason’ ” for the District’s decision to suspend Mr. Kennedy was its perceived “risk of constitutional liability” under the Establishment Clause for his “religious conduct” after the October 16, 23, and 26 games. ... Turning to Mr. Kennedy’s free exercise claim, the District Court held that, even if the District’s policies restricting his religious exercise were not neutral toward religion or generally applicable, the District had a compelling interest in prohibiting his postgame prayers, because, once more, had it “allow[ed]” them it “would have violated the Establishment Clause.” ...

The Ninth Circuit affirmed. ... According to the court, “Kennedy’s on-field religious activity,” coupled with what the court called “his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities,” were enough to lead an “objective observer” to conclude that the District “endorsed Kennedy’s religious activity by not stopping the practice.” And that, the court held, would amount to a violation of the Establishment Clause.

The Court of Appeals rejected Mr. Kennedy’s free exercise claim for similar reasons. The District “concede[d]” that its policy that led to Mr. Kennedy’s suspension was not “neutral and generally applicable” and instead “restrict[ed] Kennedy’s religious conduct because the conduct [was] religious.” Still, the court ruled, the District “had a compelling state interest to avoid violating the Establishment Clause,” and its suspension was narrowly tailored to vindicate that interest.

III

Now before us, Mr. Kennedy renews his argument that the District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. [The Court's discussion of the overlapping role of the Free Speech and Free Exercises clauses is deleted].

A

The Free Exercise Clause provides that "Congress shall make no law ... prohibiting the free exercise" of religion. This Court has held the Clause applicable to the States under the terms of the Fourteenth Amendment. The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention from) physical acts." *Employment Division v. Smith* (1990).

Under this Court's precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." Should a plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy "strict scrutiny" by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Church of Lukumi Babalu Aye* (1993).

That Mr. Kennedy has discharged his burdens is effectively undisputed. No one questions that he seeks to engage in a sincerely motivated religious exercise. The exercise in question involves, as Mr. Kennedy has put it, giving "thanks through prayer" briefly and by himself "on the playing field" at the conclusion of each game he coaches. Mr. Kennedy has indicated repeatedly that he is willing to "wai[t] until the game is over and the players have left the field" to "wal[k] to mid-field to say [his] short, private, personal prayer." The contested exercise before us does not involve leading prayers with the team or before any other captive audience. Mr. Kennedy's "religious beliefs do not require [him] to lead any prayer ... involving students." At the District's request, he voluntarily discontinued the school tradition of locker-room prayers and his postgame religious talks to students. The District disciplined him *only* for his decision to persist in praying quietly without his players after three games in October 2015.

Nor does anyone question that, in forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. A government policy will not qualify as neutral if it is "specifically directed at ... religious practice." *Smith*. A policy can fail this test if it "discriminate[s] on its face," or if a religious exercise is otherwise its "object." *Lukumi*. A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a

mechanism for individualized exemptions.” Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny.

In this case, the District’s challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy’s actions at least in part because of their religious character. As it put it in its September 17 letter, the District prohibited “any overt actions on Mr. Kennedy’s part, appearing to a reasonable observer to endorse even voluntary, student-initiated prayer.” The District further explained that it could not allow “an employee, while still on duty, to engage in *religious* conduct.” Prohibiting a religious practice was thus the District’s unquestioned “object.” The District candidly acknowledged as much below, conceding that its policies were “not neutral” toward religion.

The District’s challenged policies also fail the general applicability test. The District’s performance evaluation after the 2015 football season advised against rehiring Mr. Kennedy on the ground that he “failed to supervise student-athletes after games.” But, in fact, this was a bespoke requirement specifically addressed to Mr. Kennedy’s religious exercise. The District permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls. Thus, any sort of postgame supervisory requirement was not applied in an evenhanded, across-the-board way. Again recognizing as much, the District conceded before the Ninth Circuit that its challenged directives were not “generally applicable.” ...

A

As we have seen, the District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. On its account, Mr. Kennedy’s prayers might have been protected by the Free Exercise and Free Speech Clauses. But his rights were in “direct tension” with the competing demands of the Establishment Clause. To resolve that clash, the District reasoned, Mr. Kennedy’s rights had to “yield.” The Ninth Circuit pursued this same line of thinking, insisting that the District’s interest in avoiding an Establishment Clause violation “ ‘trump[ed]’ ” Mr. Kennedy’s rights to religious exercise and free speech.

But how could that be? It is true that this Court and others often refer to the “Establishment Clause,” the “Free Exercise Clause,” and the “Free Speech Clause” as separate units. But the three Clauses appear in the same sentence of the same Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.” A natural reading of that sentence would seem to suggest the Clauses have “complementary” purposes, not warring ones where one Clause is always sure to prevail over the others. See *Everson v. Board of Education* (1947).

The District arrived at a different understanding this way. It began with the premise that the Establishment Clause is offended whenever a “reasonable observer” could conclude that the government has “endorse[d]” religion. The District then took the view

that a “reasonable observer” could think it “endorsed Kennedy’s religious activity by not stopping the practice.” On the District’s account, it did not matter whether the Free Exercise Clause protected Mr. Kennedy’s prayer. It did not matter if his expression was private speech protected by the Free Speech Clause. It did not matter that the District never actually endorsed Mr. Kennedy’s prayer, no one complained that it had, and a strong public reaction only followed after the District sought to ban Mr. Kennedy’s prayer. Because a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Mr. Kennedy’s message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. In this way, the District effectively created its own “vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other,” placed itself in the middle, and then chose its preferred way out of its self-imposed trap. (Citations omitted).

To defend its approach, the District relied on *Lemon* and its progeny. And, to be sure, in *Lemon* this Court attempted a “grand unified theory” for assessing Establishment Clause claims. *American Legion v. American Humanist Assn.* (2019) (plurality opinion). That approach called for an examination of a law’s purposes, effects, and potential for entanglement with religion. *Lemon*. In time, the approach also came to involve estimations about whether a “reasonable observer” would consider the government’s challenged action an “endorsement” of religion.

What the District and the Ninth Circuit overlooked, however, is that the “shortcomings” associated with this “ambitiou[s],” abstract, and ahistorical approach to the Establishment Clause became so “apparent” that this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion; Town of Greece v. Galloway* (2014). The Court has explained that these tests “invited chaos” in lower courts, led to “differing results” in materially identical cases, and created a “minefield” for legislators. This Court has since made plain, too, that the Establishment Clause does not include anything like a “modified heckler’s veto, in which ... religious activity can be proscribed” based on “ ‘perceptions’ ” or “ ‘discomfort.’ ” An Establishment Clause violation does not automatically follow whenever a public school or other government entity “fail[s] to censor” private religious speech. (Citations omitted). Nor does the Clause “compel the government to purge from the public sphere” anything an objective observer could reasonably infer endorses or “partakes of the religious.” In fact, just this Term the Court unanimously rejected a city’s attempt to censor religious speech based on *Lemon* and the endorsement test.

In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by “ ‘reference to historical practices and understandings.’ ” *Town of Greece; American Legion*. “ ‘[T]he line’ ” that courts and governments “must draw between the permissible and the impermissible” has to “ ‘accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.’ ” *Town of Greece*. An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some “ ‘exception’ ” within the

“Court’s Establishment Clause jurisprudence.” (Citations omitted). The District and the Ninth Circuit erred by failing to heed this guidance.

B

Perhaps sensing that the primary theory it pursued below rests on a mistaken understanding of the Establishment Clause, the District offers a backup argument in this Court. It still contends that its Establishment Clause concerns trump Mr. Kennedy’s free exercise and free speech rights. But the District now seeks to supply different reasoning for that result. Now, it says, it was justified in suppressing Mr. Kennedy’s religious activity because otherwise it would have been guilty of coercing students to pray. And, the District says, coercing worship amounts to an Establishment Clause violation on anyone’s account of the Clause’s original meaning.

As it turns out, however, there is a pretty obvious reason why the Ninth Circuit did not adopt this theory in proceedings below: The evidence cannot sustain it. To be sure, this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, “make a religious observance compulsory.” *Zurich v. Clauson* (1952). Government “may not coerce anyone to attend church,” *ibid.*, nor may it force citizens to engage in “a formal religious exercise,” *Lee v. Weisman* (1992). No doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment. Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause. But in this case Mr. Kennedy’s private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.

Begin with the District’s own contemporaneous description of the facts. In its correspondence with Mr. Kennedy, the District never raised coercion concerns. To the contrary, the District conceded in a public 2015 document that there was “no evidence that students [were] directly coerced to pray with Kennedy.” This is consistent with Mr. Kennedy’s account too. He has repeatedly stated that he “never coerced, required, or asked any student to pray,” and that he never “told any student that it was important that they participate in any religious activity.”

Consider, too, the actual requests Mr. Kennedy made. The District did not discipline Mr. Kennedy for engaging in prayer while presenting locker-room speeches to students. That tradition predated Mr. Kennedy at the school. App. 170. And he willingly ended it, as the District has acknowledged. He also willingly ended his practice of postgame religious talks with his team. The only prayer Mr. Kennedy sought to continue was the kind he had “started out doing” at the beginning of his tenure—the prayer he gave alone. He made clear that he could pray “while the kids were doing the fight song” and “take a knee by [him]self and give thanks and continue on.” Mr. Kennedy even considered it “acceptable” to say his “prayer while the players were walking to the locker room” or “bus,” and then catch up with his team (proposing the team leave the field for the prayer).

In short, Mr. Kennedy did not seek to direct any prayers to students or require anyone else to participate. His plan was to wait to pray until athletes were occupied, and he “told everybody” that’s what he wished “to do.” It was for three prayers of this sort alone in October 2015 that the District suspended him.

Naturally, Mr. Kennedy’s proposal to pray quietly by himself on the field would have meant some people would have seen his religious exercise. Those close at hand might have heard him too. But learning how to tolerate speech or prayer of all kinds is “part of learning how to live in a pluralistic society,” a trait of character essential to “a tolerant citizenry.” *Lee*. This Court has long recognized as well that “secondary school students are mature enough ... to understand that a school does not endorse,” let alone coerce them to participate in, “speech that it merely permits on a nondiscriminatory basis.” Of course, some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But “[o]ffense ... does not equate to coercion.” *Town of Greece*.

The District responds that, as a coach, Mr. Kennedy “wielded enormous authority and influence over the students,” and students might have felt compelled to pray alongside him. To support this argument, the District submits that, after Mr. Kennedy’s suspension, a few parents told District employees that their sons had “participated in the team prayers only because they did not wish to separate themselves from the team.”

This reply fails too. Not only does the District rely on hearsay to advance it. For all we can tell, the concerns the District says it heard from parents were occasioned by the locker-room prayers that predated Mr. Kennedy’s tenure or his postgame religious talks, all of which he discontinued at the District’s request. There is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension. Nor is there any record evidence that students felt pressured to participate in these prayers. To the contrary, and as we have seen, not a single Bremerton student joined Mr. Kennedy’s quiet prayers following the three October 2015 games for which he was disciplined. On October 16, those students who joined Mr. Kennedy were “ ‘from the opposing team,’ ” and thus could not have “reasonably fear[ed]” that he would decrease their “playing time” or destroy their “opportunities” if they did not “participate,” As for the other two relevant games, “no one joined” Mr. Kennedy on October 23. And only a few members of the public participated on October 26.

The absence of evidence of coercion in this record leaves the District to its final redoubt. Here, the District suggests that *any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students. In essence, the District asks us to adopt the view that the only acceptable government role models for students are those who eschew any visible religious expression. If the argument sounds familiar, it should. Really, it is just another way of repackaging the District’s earlier submission that government may script everything a teacher or coach says in the workplace. The only added twist here is the District’s

suggestion not only that it *may* prohibit teachers from engaging in any demonstrative religious activity, but that it *must* do so in order to conform to the Constitution.

Such a rule would be a sure sign that our Establishment Clause jurisprudence had gone off the rails. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment’s double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District’s rule, a school would be *required* to do so. It is a rule that would defy this Court’s traditional understanding that permitting private speech is not the same thing as coercing others to participate in it. See *Town of Greece*. It is a rule, too, that would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been “part of learning how to live in a pluralistic society.” *Lee*. We are aware of no historically sound understanding of the Establishment Clause that begins to “mak[e] it necessary for government to be hostile to religion” in this way.

Our judgments on all these scores find support in this Court’s prior cases too. In *Zurich*, for example, challengers argued that a public school program permitting students to spend time in private religious instruction off campus was impermissibly coercive. The Court rejected that challenge because students were not required to attend religious instruction and there was no evidence that any employee had “us[ed] their office to persuade or force students” to participate in religious activity. What was clear there is even more obvious here—where there is no evidence anyone sought to persuade or force students to participate, and there is no formal school program accommodating the religious activity at issue.

Meanwhile, this case looks very different from those in which this Court has found prayer involving public school students to be problematically coercive. In *Lee*, this Court held that school officials violated the Establishment Clause by “including [a] clerical membe[r]” who publicly recited prayers “as part of [an] official school graduation ceremony” because the school had “in every practical sense compelled attendance and participation in” a “religious exercise.” In *Santa Fe School District v. Doe*, the Court held that a school district violated the Establishment Clause by broadcasting a prayer “over the public address system” before each football game. The Court observed that, while students generally were not required to attend games, attendance *was* required for “cheerleaders, members of the band, and, of course, the team members themselves.” None of that is true here. The prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And, in fact, none of Mr. Kennedy’s students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy’s discipline.

C

In the end, the District’s case hinges on the need to generate conflict between an individual’s rights under the Free Exercise and Free Speech Clauses and its own

Establishment Clause duties—and then develop some explanation why one of these Clauses in the First Amendment should “ ‘trum[p]’ ” the other two. But the project falters badly. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot even show that they are at odds. In truth, there is no conflict between the constitutional commands before us. There is only the “mere shadow” of a conflict, a false choice premised on a misconstruction of the Establishment Clause. And in no world may a government entity’s concerns about phantom constitutional violations justify actual violations of an individual’s First Amendment rights.

V

Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Mr. Kennedy is entitled to summary judgment on his First Amendment claims. The judgment of the Court of Appeals is *reversed*.

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

This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct. Since *Engel v. Vitale* (1962), this Court consistently has recognized that school officials leading prayer is constitutionally impermissible. Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment.

The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause’s protection for individual religious exercise while giving short shrift to the Establishment Clause’s prohibition on state establishment of religion. To the degree the Court portrays petitioner Joseph Kennedy’s prayers as private and quiet, it misconstrues the facts. The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy’s conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion. Under the Court’s analysis, presumably this would be a different case if the District had cited Kennedy’s repeated disruptions of

school programming and violations of school policy regarding public access to the field as grounds for suspending him. As the District did not articulate those grounds, the Court assesses only the District's Establishment Clause concerns. It errs by assessing them divorced from the context and history of Kennedy's prayer practice.

Today's decision goes beyond merely misreading the record. The Court overrules *Lemon*, and calls into question decades of subsequent precedents that it deems "offshoot[s]" of that decision. In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new "history and tradition" test. In addition, while the Court reaffirms that the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities. This decision does a disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state. I respectfully dissent.

I

As the majority tells it, Kennedy, a coach for the District's football program, "lost his job" for "pray[ing] quietly while his students were otherwise occupied." The record before us, however, tells a different story.

A

The District serves approximately 5,057 students and employs 332 teachers and 400 nonteaching personnel in Kitsap County, Washington. The county is home to Bahá'ís, Buddhists, Hindus, Jews, Muslims, Sikhs, Zoroastrians, and many denominations of Christians, as well as numerous residents who are religiously unaffiliated.

The District first hired Kennedy in 2008, on a renewable annual contract, to serve as a part-time assistant coach for the varsity football team and head coach for the junior varsity team at Bremerton High School (BHS). Kennedy's job description required him to "[a]ccompany and direct" all home and out-of-town games to which he was assigned, overseeing preparation and transportation before games, being "[r]esponsible for player behavior both on and off the field," supervising dressing rooms, and "secur[ing] all facilities at the close of each practice." His duties encompassed "supervising student activities immediately following the completion of the game" until the students were released to their parents or otherwise allowed to leave.

The District also set requirements for Kennedy's interactions with players, obliging him, like all coaches, to "exhibit sportsmanlike conduct at all times," "utilize positive motivational strategies to encourage athletic performance," and serve as a "mentor and role model for the student athletes." In addition, Kennedy's position made him responsible for interacting with members of the community. In this capacity, the District required Kennedy and other coaches to "maintain positive media relations," "always

approach officials with composure” with the expectation that they were “constantly being observed by others,” and “communicate effectively” with parents.

Finally, District coaches had to “[a]dhere to [District] policies and administrative regulations” more generally. As relevant here, the District’s policy on “Religious-Related Activities and Practices” provided that “[s]chool staff shall neither encourage or discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity” and that “[r]eligious services, programs or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored or school related activity.”

B

In September 2015, a coach from another school’s football team informed BHS’ principal that Kennedy had asked him and his team to join Kennedy in prayer. The other team’s coach told the principal that he thought it was “ ‘cool’ ” that the District “ ‘would allow [its] coaches to go ahead and invite other teams’ coaches and players to pray after a game.’ ”

The District initiated an inquiry into whether its policy on Religious-Related Activities and Practices had been violated. It learned that, since his hiring in 2008, Kennedy had been kneeling on the 50-yard line to pray immediately after shaking hands with the opposing team. Kennedy recounted that he initially prayed alone and that he never asked any student to join him. Over time, however, a majority of the team came to join him, with the numbers varying from game to game. Kennedy’s practice evolved into postgame talks in which Kennedy would hold aloft student helmets and deliver speeches with “overtly religious references,” which Kennedy described as prayers, while the players kneeled around him. The District also learned that students had prayed in the past in the locker room prior to games, before Kennedy was hired, but that Kennedy subsequently began leading those prayers too.

While the District’s inquiry was pending, its athletic director attended BHS’ September 11, 2015, football game and told Kennedy that he should not be conducting prayers with players. After the game, while the athletic director watched, Kennedy led a prayer out loud, holding up a player’s helmet as the players kneeled around him. While riding the bus home with the team, Kennedy posted on Facebook that he thought he might have just been fired for praying.

On September 17, the District’s superintendent sent Kennedy a letter informing him that leading prayers with students on the field and in the locker room would likely be found to violate the Establishment Clause, exposing the District to legal liability. The District acknowledged that Kennedy had “not actively encouraged, or required, participation” but emphasized that “school staff may not indirectly encourage students to engage in religious activity” or “endors[e]” religious activity; rather, the District explained, staff “must remain neutral” “while performing their job duties.” The District

instructed Kennedy that any motivational talks to students must remain secular, “so as to avoid alienation of any team member.”

The District reiterated that “all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities.” To avoid endorsing student religious exercise, the District instructed that such activity must be nondemonstrative or conducted separately from students, away from student activities. The District expressed concern that Kennedy had continued his midfield prayer practice at two games after the District’s athletic director and the varsity team’s head coach had instructed him to stop.

Kennedy stopped participating in locker room prayers and, after a game the following day, gave a secular speech. He returned to pray in the stadium alone after his duties were over and everyone had left the stadium, to which the District had no objection. Kennedy then hired an attorney, who, on October 14, sent a letter explaining that Kennedy was “motivated by his sincerely-held religious beliefs to pray following each football game.” The letter claimed that the District had required that Kennedy “flee from students if they voluntarily choose to come to a place where he is privately praying during personal time,” referring to the 50-yard line of the football field immediately following the conclusion of a game. Kennedy requested that the District simply issue a “clarif[ication] that the prayer is [Kennedy’s] private speech” and that the District not “interfere” with students joining Kennedy in prayer. The letter further announced that Kennedy would resume his 50-yard-line prayer practice the next day after the October 16 homecoming game.

Before the homecoming game, Kennedy made multiple media appearances to publicize his plans to pray at the 50-yard line, leading to an article in the Seattle News and a local television broadcast about the upcoming homecoming game. In the wake of this media coverage, the District began receiving a large number of emails, letters, and calls, many of them threatening.

The District responded to Kennedy’s letter before the game on October 16. It emphasized that Kennedy’s letter evinced “materia[l] misunderstand[ings]” of many of the facts at issue. For instance, Kennedy’s letter asserted that he had not invited anyone to pray with him; the District noted that that might be true of Kennedy’s September 17 prayer specifically, but that Kennedy had acknowledged inviting others to join him on many previous occasions. The District’s September 17 letter had explained that Kennedy traditionally held up helmets from the BHS and opposing teams while players from each team kneeled around him. While Kennedy’s letter asserted that his prayers “occurr[ed] ‘on his own time,’ after his duties as a District employee had ceased,” the District pointed out that Kennedy “remain[ed] on duty” when his prayers occurred “immediately following completion of the football game, when students are still on the football field, in uniform, under the stadium lights, with the audience still in attendance, and while Mr. Kennedy is still in his District-issued and District-logoed attire.” (emphasis deleted). The District further noted that “[d]uring the time following completion of the game, until

players are released to their parents or otherwise allowed to leave the event, Mr. Kennedy, like all coaches, is clearly on duty and paid to continue supervision of students.”

The District stated that it had no objection to Kennedy returning to the stadium when he was off duty to pray at the 50-yard line, nor with Kennedy praying while on duty if it did not interfere with his job duties or suggest the District’s endorsement of religion. The District explained that its establishment concerns were motivated by the specific facts at issue, because engaging in prayer on the 50-yard line immediately after the game finished would appear to be an extension of Kennedy’s “prior, long-standing and well-known history of leading students in prayer” on the 50-yard line after games. The District therefore reaffirmed its prior directives to Kennedy.

On October 16, after playing of the game had concluded, Kennedy shook hands with the opposing team, and as advertised, knelt to pray while most BHS players were singing the school’s fight song. He quickly was joined by coaches and players from the opposing team. Television news cameras surrounded the group. Members of the public rushed the field to join Kennedy, jumping fences to access the field and knocking over student band members. After the game, the District received calls from Satanists who “ ‘intended to conduct ceremonies on the field after football games if others were allowed to.’ ” To secure the field and enable subsequent games to continue safely, the District was forced to make security arrangements with the local police and to post signs near the field and place robocalls to parents reiterating that the field was not open to the public.

The District sent Kennedy another letter on October 23, explaining that his conduct at the October 16 game was inconsistent with the District’s requirements for two reasons. First, it “drew [him] away from [his] work”; Kennedy had, “until recently, ... regularly c[o]me to the locker room with the team and other coaches following the game” and had “specific responsibility for the supervision of players in the locker room following games.” Second, his conduct raised Establishment Clause concerns, because “any reasonable observer saw a District employee, on the field only by virtue of his employment with the District, still on duty, under the bright lights of the stadium, engaged in what was clearly, given [his] prior public conduct, overtly religious conduct.”

Again, the District emphasized that it was happy to accommodate Kennedy’s desire to pray on the job in a way that did not interfere with his duties or risk perceptions of endorsement. Stressing that “[d]evelopment of accommodations is an interactive process,” it invited Kennedy to reach out to discuss accommodations that might be mutually satisfactory, offering proposed accommodations and inviting Kennedy to raise others. The District noted, however, that “further violations of [its] directives” would be grounds for discipline or termination.

Kennedy did not directly respond or suggest a satisfactory accommodation. Instead, his attorneys told the media that he would accept only demonstrative prayer on the 50-yard line immediately after games. During the October 23 and October 26 games, Kennedy again prayed at the 50-yard line immediately following the game, while

postgame activities were still ongoing. At the October 23 game, Kennedy knelt on the field alone with players standing nearby. At the October 26 game, Kennedy prayed surrounded by members of the public, including state representatives who attended the game to support Kennedy. The BHS players, after singing the fight song, joined Kennedy at midfield after he stood up from praying.

In an October 28 letter, the District notified Kennedy that it was placing him on paid administrative leave for violating its directives at the October 16, October 23, and October 26 games by kneeling on the field and praying immediately following the games before rejoining the players for postgame talks. The District recounted that it had offered accommodations to, and offered to engage in further discussions with, Kennedy to permit his religious exercise, and that Kennedy had failed to respond to these offers. The District stressed that it remained willing to discuss possible accommodations if Kennedy was willing.

After the issues with Kennedy arose, several parents reached out to the District saying that their children had participated in Kennedy's prayers solely to avoid separating themselves from the rest of the team. No BHS students appeared to pray on the field after Kennedy's suspension.

In Kennedy's annual review, the head coach of the varsity team recommended Kennedy not be rehired because he "failed to follow district policy," "demonstrated a lack of cooperation with administration," "contributed to negative relations between parents, students, community members, coaches, and the school district," and "failed to supervise student-athletes after games due to his interactions with media and community" members. The head coach himself also resigned after 11 years in that position, expressing fears that he or his staff would be shot from the crowd or otherwise attacked because of the turmoil created by Kennedy's media appearances. Three of five other assistant coaches did not reapply.

C

Kennedy then filed suit. He contended, as relevant, that the District violated his rights under the Free Speech and Free Exercise Clauses of the First Amendment. Kennedy moved for a preliminary injunction, which the District Court denied based on the circumstances surrounding Kennedy's prayers. The court concluded that Kennedy had "chose[n] a time and event," the October 16 homecoming game, that was "a big deal" for students, and then "used that opportunity to convey his religious views" in a manner a reasonable observer would have seen as a "public employee ... leading an orchestrated session of faith." App. to Pet. for Cert. 303. The Court of Appeals affirmed, again emphasizing the specific context of Kennedy's prayers. The court rejected Kennedy's contention that he had been "praying on the fifty-yard line 'silently and alone.'" The court noted that he had in fact refused "an accommodation permitting him to pray ... after the stadium had emptied," "indicat[ing] that it is essential that his speech be delivered in the presence of students and spectators." This Court denied certiorari.

Following discovery, the District Court granted summary judgment to the District. The court concluded that Kennedy's 50-yard-line prayers were not entitled to protection under the Free Speech Clause because his speech was made in his capacity as a public employee, not as a private citizen. In addition, the court held that Kennedy's prayer practice violated the Establishment Clause, reasoning that "speech from the center of the football field immediately after each game ... conveys official sanction." That was especially true where Kennedy, a school employee, initiated the prayer; Kennedy was "joined by students or adults to create a group of worshippers in a place the school controls access to"; and Kennedy had a long "history of engaging in religious activity with players" that would have led a familiar observer to believe that Kennedy was "continuing this tradition" with prayer at the 50-yard line. The District Court further found that players had reported "feeling compelled to join Kennedy in prayer to stay connected with the team or ensure playing time," and that the "slow accumulation of players joining Kennedy suggests exactly the type of vulnerability to social pressure that makes the Establishment Clause vital in the high school context." The court rejected Kennedy's free exercise claim, finding the District's directive narrowly tailored to its Establishment Clause concerns and citing Kennedy's refusal to cooperate in finding an accommodation that would be acceptable to him.

The Court of Appeals affirmed, explaining that "the facts in the record utterly belie [Kennedy's] contention that the prayer was personal and private." The court instead concluded that Kennedy's speech constituted government speech, as he "repeatedly acknowledged that—and behaved as if—he was a mentor, motivational speaker, and role model to students specifically at the conclusion of the game." (emphasis deleted). In the alternative, the court concluded that Kennedy's speech, even if in his capacity as a private citizen, was appropriately regulated by the District to avoid an Establishment Clause violation, emphasizing once more that this conclusion was tied to the specific "evolution of Kennedy's prayer practice with students" over time. The court rejected Kennedy's free exercise claim for the reasons stated by the District Court. The Court of Appeals denied rehearing en banc, and this Court granted certiorari.

II

Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.

A

The Establishment Clause prohibits States from adopting laws "respecting an establishment of religion." The First Amendment's next Clause prohibits the government from making any law "prohibiting the free exercise thereof." Taken together, these two

Clauses (the Religion Clauses) express the view, foundational to our constitutional system, “that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.” *Lee*. Instead, “preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere,” which has the “freedom to pursue that mission.” *Lee*.

The Establishment Clause protects this freedom by “command[ing] a separation of church and state.” *Cutter v. Wilkinson* (2005). At its core, this means forbidding “sponsorship, financial support, and active involvement of the sovereign in religious activity.” *Walz v. Tax Comm’n of City of New York* (1970). In the context of public schools, it means that a State cannot use “its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals.” Indeed, “[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.” *Edwards v. Aguillard* (1987). The reasons motivating this vigilance inhere in the nature of schools themselves and the young people they serve. Two are relevant here.

First, government neutrality toward religion is particularly important in the public school context given the role public schools play in our society. “ ‘The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny,’ ” meaning that “ ‘[i]n no activity of the State is it more vital to keep out divisive forces than in its schools.’ ” *Id.* Families “entrust public schools with the education of their children ... on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.” *Id.* Accordingly, the Establishment Clause “proscribes public schools from ‘conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred’ ” or otherwise endorsing religious beliefs. *Lee* (emphasis deleted).

Second, schools face a higher risk of unconstitutionally “coerc[ing] ... support or participat[ion] in religion or its exercise” than other government entities. *Id.* (opinion of the Court). The State “exerts great authority and coercive power” in schools as a general matter “through mandatory attendance requirements.” *Edwards*. Moreover, the State exercises that great authority over children, who are uniquely susceptible to “subtle coercive pressure.” *Lee* (“[M]ature adults,” unlike children, may not be “ ‘readily susceptible to religious indoctrination or peer pressure’ ”). Children are particularly vulnerable to coercion because of their “emulation of teachers as role models” and “susceptibility to peer pressure.” *Edwards*. Accordingly, this Court has emphasized that “the State may not, consistent with the Establishment Clause, place primary and secondary school children” in the dilemma of choosing between “participating, with all that implies, or protesting” a religious exercise in a public school. *Lee*.

Given the twin Establishment Clause concerns of endorsement and coercion, it is unsurprising that the Court has consistently held integrating prayer into public school activities to be unconstitutional, including when student participation is not a formal

requirement or prayer is silent. See *Wallace* (mandatory moment of silence for prayer); *School List. Of Abington Township v. Schempp* (1963) (nonmandatory recitation of Bible verses and prayer); *Engel* (nonmandatory recitation of one-sentence prayer). The Court also has held that incorporating a nondenominational general benediction into a graduation ceremony is unconstitutional. *Lee*. Finally, this Court has held that including prayers in student football games is unconstitutional, even when delivered by students rather than staff and even when students themselves initiated the prayer. *Santa Fe Independent School District*.

B

Under these precedents, the Establishment Clause violation at hand is clear. This Court has held that a “[s]tate official[] direct[ing] the performance of a formal religious exercise” as a part of the “ceremon[y]” of a school event “conflicts with settled rules pertaining to prayer exercises for students.” *Lee*. Kennedy was on the job as a school official “on government property” when he incorporated a public, demonstrative prayer into “government-sponsored school-related events” as a regularly scheduled feature of those events. *Santa Fe*.

Kennedy’s tradition of a 50-yard line prayer thus strikes at the heart of the Establishment Clause’s concerns about endorsement. For students and community members at the game, Coach Kennedy was the face and the voice of the District during football games. The timing and location Kennedy selected for his prayers were “clothed in the traditional indicia of school sporting events.” Kennedy spoke from the playing field, which was accessible only to students and school employees, not to the general public. Although the football game itself had ended, the football game events had not; Kennedy himself acknowledged that his responsibilities continued until the players went home. Kennedy’s postgame responsibilities were what placed Kennedy on the 50-yard line in the first place; that was, after all, where he met the opposing team to shake hands after the game. Permitting a school coach to lead students and others he invited onto the field in prayer at a predictable time after each game could only be viewed as a postgame tradition occurring “with the approval of the school administration.”

Kennedy’s prayer practice also implicated the coercion concerns at the center of this Court’s Establishment Clause jurisprudence. This Court has previously recognized a heightened potential for coercion where school officials are involved, as their “effort[s] to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject.” *Lee*. The reasons for fearing this pressure are self-evident. This Court has recognized that students face immense social pressure. Students look up to their teachers and coaches as role models and seek their approval. Students also depend on this approval for tangible benefits. Players recognize that gaining the coach’s approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting. In addition to these pressures to please their coaches, this Court has recognized that players face “immense

social pressure” from their peers in the “extracurricular event that is American high school football.” *Santa Fe*.

The record before the Court bears this out. The District Court found, in the evidentiary record, that some students reported joining Kennedy’s prayer because they felt social pressure to follow their coach and teammates. Kennedy told the District that he began his prayers alone and that players followed each other over time until a majority of the team joined him, an evolution showing coercive pressure at work.

Kennedy does not defend his longstanding practice of leading the team in prayer out loud on the field as they kneeled around him. Instead, he responds, and the Court accepts, that his highly visible and demonstrative prayer at the last three games before his suspension did not violate the Establishment Clause because these prayers were quiet and thus private. This Court’s precedents, however, do not permit isolating government actions from their context in determining whether they violate the Establishment Clause. To the contrary, this Court has repeatedly stated that Establishment Clause inquiries are fact specific and require careful consideration of the origins and practical reality of the specific practice at issue. In *Santa Fe*, the Court specifically addressed how to determine whether the implementation of a new policy regarding prayers at football games “insulates the continuation of such prayers from constitutional scrutiny.” The Court held that “inquiry into this question not only can, but must, include an examination of the circumstances surrounding” the change in policy, the “long-established tradition” before the change, and the “ ‘unique circumstances’ ” of the school in question. This Court’s precedent thus does not permit treating Kennedy’s “new” prayer practice as occurring on a blank slate, any more than those in the District’s school community would have experienced Kennedy’s changed practice (to the degree there was one) as erasing years of prior actions by Kennedy.

Like the policy change in *Santa Fe*, Kennedy’s “changed” prayers at these last three games were a clear continuation of a “long-established tradition of sanctioning” school official involvement in student prayers. Students at the three games following Kennedy’s changed practice witnessed Kennedy kneeling at the same time and place where he had led them in prayer for years. They witnessed their peers from opposing teams joining Kennedy, just as they had when Kennedy was leading joint team prayers. They witnessed members of the public and state representatives going onto the field to support Kennedy’s cause and pray with him. Kennedy did nothing to stop this unauthorized access to the field, a clear dereliction of his duties. The BHS players in fact joined the crowd around Kennedy after he stood up from praying at the last game. That BHS students did not join Kennedy in these last three specific prayers did not make those events compliant with the Establishment Clause. The coercion to do so was evident. Kennedy himself apparently anticipated that his continued prayer practice would draw student participation, requesting that the District agree that it would not “interfere” with students joining him in the future. App. 71.

Finally, Kennedy stresses that he never formally required students to join him in his prayers. But existing precedents do not require coercion to be explicit, particularly when children are involved. To the contrary, this Court's Establishment Clause jurisprudence establishes that " 'the government may no more use social pressure to enforce orthodoxy than it may use more direct means.' " *Santa Fe*. Thus, the Court has held that the Establishment Clause "will not permit" a school " 'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game." To uphold a coach's integration of prayer into the ceremony of a football game, in the context of an established history of the coach inviting student involvement in prayer, is to exact precisely this price from students.

C

... Kennedy's free exercise claim must be considered in light of the fact that he is a school official and, as such, his participation in religious exercise can create Establishment Clause conflicts. Accordingly, his right to pray at any time and in any manner he wishes while exercising his professional duties is not absolute. See *Lee* (noting that a school official's choice to integrate a prayer is "attributable to the State"). As the Court explains, see *ante*, at 2422 - 2423, the parties agree (and I therefore assume) that for the purposes of Kennedy's claim, the burden is on the District to establish that its policy prohibiting Kennedy's public prayers was the least restrictive means of furthering a compelling state interest. *Lukumi*.

Here, the District's directive prohibiting Kennedy's demonstrative speech at the 50-yard line was narrowly tailored to avoid an Establishment Clause violation. The District's suspension of Kennedy followed a long history. The last three games proved that Kennedy did not intend to pray silently, but to thrust the District into incorporating a religious ceremony into its events, as he invited others to join his prayer and anticipated in his communications with the District that students would want to join as well. Notably, the District repeatedly sought to work with Kennedy to develop an accommodation to permit him to engage in religious exercise during or after his game-related responsibilities. Kennedy, however, ultimately refused to respond to the District's suggestions and declined to communicate with the District, except through media appearances. Because the District's valid Establishment Clause concerns satisfy strict scrutiny, Kennedy's free exercise claim fails as well.

III

Despite the overwhelming precedents establishing that school officials leading prayer violates the Establishment Clause, the Court today holds that Kennedy's midfield prayer practice did not violate the Establishment Clause. This decision rests on an erroneous understanding of the Religion Clauses. It also disregards the balance this Court's cases strike among the rights conferred by the Clauses. The Court relies on an assortment of pluralities, concurrences, and dissents by Members of the current majority to effect

fundamental changes in this Court's Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all.

A

This case involves three Clauses of the First Amendment. As a threshold matter, the Court today proceeds from two mistaken understandings of the way the protections these Clauses embody interact.

First, the Court describes the Free Exercise and Free Speech Clauses as “work[ing] in tandem” to “provid[e] overlapping protection for expressive religious activities,” leaving religious speech “doubly protect[ed].” This narrative noticeably (and improperly) sets the Establishment Clause to the side. The Court is correct that certain expressive religious activities may fall within the ambit of both the Free Speech Clause and the Free Exercise Clause, but “the First Amendment protects speech and religion by quite different mechanisms.” *Lee*. The First Amendment protects speech “by ensuring its full expression even when the government participates.” Its “method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse,” however, based on the understanding that “the government is not a prime participant” in “religious debate or expression,” whereas government is the “object of some of our most important speech.” Thus, as this Court has explained, while the Free Exercise Clause has “close parallels in the speech provisions of the First Amendment,” the First Amendment’s protections for religion diverge from those for speech because of the Establishment Clause, which provides a “specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.” Therefore, while our Constitution “counsel[s] mutual respect and tolerance,” the Constitution’s vision of how to achieve this end does in fact involve some “singl[ing] out” of religious speech by the government. This is consistent with “the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.” *Lee*.

Second, the Court contends that the lower courts erred by introducing a false tension between the Free Exercise and Establishment Clauses. The Court, however, has long recognized that these two Clauses, while “express[ing] complementary values,” “often exert conflicting pressures.” *Cutter; Locke*. The “absolute terms” of the two Clauses mean that they “tend to clash” if “expanded to a logical extreme.” *Walz*.

The Court inaccurately implies that the courts below relied upon a rule that the Establishment Clause must always “prevail” over the Free Exercise Clause. In focusing almost exclusively on Kennedy’s free exercise claim, however, and declining to recognize the conflicting rights at issue, the Court substitutes one supposed blanket rule for another. The proper response where tension arises between the two Clauses is not to ignore it, which effectively silently elevates one party’s right above others. The proper response is to identify the tension and balance the interests based on a careful analysis of “whether [the] particular acts in question are intended to establish or interfere with

religious beliefs and practices or have the effect of doing so.” *Walz*. As discussed above, that inquiry leads to the conclusion that permitting Kennedy’s desired religious practice at the time and place of his choosing, without regard to the legitimate needs of his employer, violates the Establishment Clause in the particular context at issue here.

B

For decades, the Court has recognized that, in determining whether a school has violated the Establishment Clause, “one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the [practice], would perceive it as a state endorsement of prayer in public schools.” *Santa Fe*. The Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in *Lemon*. Both of these moves are erroneous and, despite the Court’s assurances, novel.

Start with endorsement. The Court reserves particular criticism for the longstanding understanding that government action that appears to endorse religion violates the Establishment Clause, which it describes as an “offshoot” of *Lemon* and paints as a “‘modified heckler’s veto, in which ... religious activity can be proscribed’” based on “ ‘perceptions’ ” or “ ‘discomfort.’ ” This is a strawman. Precedent long has recognized that endorsement concerns under the Establishment Clause, properly understood, bear no relation to a “ ‘heckler’s veto.’ ” *Good News Club* [] explained the difference between the two: The endorsement inquiry considers the perspective not of just any hypothetical or uninformed observer experiencing subjective discomfort, but of “ ‘the reasonable observer’ ” who is “ ‘aware of the history and context of the community and forum in which the religious [speech takes place].’ ” That is because “ ‘the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from ... discomfort’ ” but concern “ ‘with the political community writ large.’ ”

Given this concern for the political community, it is unsurprising that the Court has long prioritized endorsement concerns in the context of public education. [Citations omitted]. No subsequent decisions in other contexts, including the cases about monuments and legislative meetings on which the Court relies, have so much as questioned the application of this core Establishment Clause concern in the context of public schools. In fact, *Town of Greece*, which held a prayer during a town meeting permissible, specifically distinguished *Lee* because *Lee* considered the Establishment Clause in the context of schools.

Paying heed to these precedents would not “ ‘purge from the public sphere’ anything an observer could reasonably infer endorses” religion. To the contrary, the Court has recognized that “there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.” *Lee*. These instances, the Court has said, are “often questions of accommodat[ing]” religious practices to the degree possible while respecting the Establishment Clause. In short, the endorsement inquiry dictated by precedent is a measured, practical, and

administrable one, designed to account for the competing interests present within any given community.

Despite all of this authority, the Court claims that it “long ago abandoned” both the “endorsement test” and this Court’s decision in *Lemon*. The Court chiefly cites the plurality opinion in *American Legion* to support this contention. That plurality opinion, to be sure, criticized *Lemon*’s effort at establishing a “grand unified theory of the Establishment Clause” as poorly suited to the broad “array” of diverse establishment claims. All the Court in *American Legion* ultimately held, however, was that application of the *Lemon* test to “longstanding monuments, symbols, and practices” was ill-advised for reasons specific to those contexts. The only categorical rejection of *Lemon* in *American Legion* appeared in separate writings.

The Court now goes much further, overruling *Lemon* entirely and in all contexts. It is wrong to do so. *Lemon* summarized “the cumulative criteria developed by the Court over many years” of experience “draw[ing] lines” as to when government engagement with religion violated the Establishment Clause. *Lemon* properly concluded that precedent generally directed consideration of whether the government action had a “secular legislative purpose,” whether its “principal or primary effect must be one that neither advances nor inhibits religion,” and whether in practice it “foster[s] ‘an excessive government entanglement with religion.’ ” It is true “that rigid application of the *Lemon* test does not solve every Establishment Clause problem,” but that does not mean that the test has no value.

To put it plainly, the purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause, as numerous precedents beyond *Lemon* instruct in the particular context of public schools. See *supra*, at 2441 - 2443, 2443 - 2444. Neither the critiques of *Lemon* as setting out a dispositive test for all seasons nor the fact that the Court has not referred to *Lemon* in all situations support this Court’s decision to dismiss that precedent entirely, particularly in the school context.

C

Upon overruling one “grand unified theory,” the Court introduces another: It holds that courts must interpret whether an Establishment Clause violation has occurred mainly “by ‘reference to historical practices and understandings.’ ” Here again, the Court professes that nothing has changed. In fact, while the Court has long referred to historical practice as one element of the analysis in specific Establishment Clause cases, the Court has never announced this as a general test or exclusive focus.

The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on. It should not escape notice, however, that the effects of the majority’s new rule could be profound. The problems with elevating history and tradition over purpose and precedent are well documented. (Citations omitted). For now, it suffices to say that the Court’s history-and-tradition test offers essentially no guidance for school administrators. If even judges and

Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals' rights to religious exercise above all else? Today's opinion provides little in the way of answers; the Court simply sets the stage for future legal changes that will inevitably follow the Court's choice today to upset longstanding rules.

D

Finally, the Court acknowledges that the Establishment Clause prohibits the government from coercing people to engage in religion practice, but its analysis of coercion misconstrues both the record and this Court's precedents.

The Court claims that the District "never raised coercion concerns" simply because the District conceded that there was " 'no evidence that students [were] *directly* coerced to pray with Kennedy.' " The Court's suggestion that coercion must be "direc[t]" to be cognizable under the Establishment Clause is contrary to long-established precedent. The Court repeatedly has recognized that indirect coercion may raise serious establishment concerns, and that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee*. Tellingly, *none* of this Court's major cases involving school prayer concerned school practices that required students to do any more than listen silently to prayers, and some did not even formally require students to listen, instead providing that attendance was not mandatory. See *Santa Fe*, *Lee*, *Wallace*, *Abington Township*, *Engel*. Nevertheless, the Court concluded that the practices were coercive as a constitutional matter.

Today's Court quotes the *Lee* Court's remark that enduring others' speech is " 'part of learning how to live in a pluralistic society.' " The *Lee* Court, however, expressly concluded, in the very same paragraph, that "[t]his argument cannot prevail" in the school-prayer context because the notion that being subject to a "brief" prayer in school is acceptable "overlooks a fundamental dynamic of the Constitution": its "specific prohibition on ... state intervention in religious affairs." ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means").

The Court also distinguishes *Santa Fe* because Kennedy's prayers "were not publicly broadcast or recited to a captive audience." This misses the point. In *Santa Fe*, a student council chaplain delivered a prayer over the public-address system before each varsity football game of the season. Students were not required as a general matter to attend the games, but "cheerleaders, members of the band, and, of course, the team members themselves" were, and the Court would have found an "improper effect of coercing those present" even if it "regard[ed] every high school student's decision to attend ... as purely voluntary." Kennedy's prayers raise precisely the same concerns. His prayers did not need to be broadcast. His actions spoke louder than his words. His prayers were intentionally, visually demonstrative to an audience aware of their history and no less captive than the audience in *Santa Fe*, with spectators watching and some players perhaps

engaged in a song, but all waiting to rejoin their coach for a postgame talk. Moreover, Kennedy's prayers had a greater coercive potential because they were delivered not by a student, but by their coach, who was still on active duty for postgame events.

In addition, despite the direct record evidence that students felt coerced to participate in Kennedy's prayers, the Court nonetheless concludes that coercion was not present in any event because "Kennedy did not seek to direct any prayers to students or require anyone else to participate." *Ante* at 2432, n. 7 (contending that the fact that "students might choose, unprompted, to participate" in their coach's on-the-field prayers does not "necessarily prove them coercive"). But nowhere does the Court engage with the unique coercive power of a coach's actions on his adolescent players.

In any event, the Court makes this assertion only by drawing a bright line between Kennedy's yearslong practice of leading student prayers, which the Court does not defend, and Kennedy's final three prayers, which BHS students did not join, but student peers from the other teams did. See *ante*, at 2429 - 2430 (distinguishing Kennedy's prior practice and focusing narrowly on "three prayers ... in October 2015"). As discussed above, see *supra*, at 2443 - 2444, this mode of analysis contravenes precedent by "turn[ing] a blind eye to the context in which [Kennedy's practice] arose." This Court's precedents require a more nuanced inquiry into the realities of coercion in the specific school context concerned than the majority recognizes today. The question before the Court is not whether a coach taking a knee to pray on the field would constitute an Establishment Clause violation in any and all circumstances. It is whether permitting Kennedy to continue a demonstrative prayer practice at the center of the football field after years of inappropriately leading students in prayer in the same spot, at that same time, and in the same manner, which led students to feel compelled to join him, violates the Establishment Clause. It does.

Having disregarded this context, the Court finds Kennedy's three-game practice distinguishable from precedent because the prayers were "quite[t]" and the students were otherwise "occupied." The record contradicts this narrative. Even on the Court's myopic framing of the facts, at two of the three games on which the Court focuses, players witnessed student peers from the other team and other authority figures surrounding Kennedy and joining him in prayer. The coercive pressures inherent in such a situation are obvious. Moreover, Kennedy's actual demand to the District was that he give "verbal" prayers specifically at the midfield position where he traditionally led team prayers, and that students be allowed to join him "voluntarily" and pray. App. 64, 69-71. Notably, the Court today does not embrace this demand, but it nonetheless rejects the District's right to ensure that students were not pressured to pray.

To reiterate, the District did not argue, and neither court below held, that "*any* visible religious conduct by a teacher or coach should be deemed ... impermissibly coercive on students." Nor has anyone contended that a coach may never visibly pray on the field. The courts below simply recognized that Kennedy continued to initiate prayers visible to students, while still on duty during school events, under the exact same circumstances as

his past practice of leading student prayer. It is unprecedented for the Court to hold that this conduct, taken as a whole, did not raise cognizable coercion concerns. Importantly, nothing in the Court’s opinion should be read as calling into question that Kennedy’s conduct may have raised other concerns regarding disruption of school events or misuse of school facilities that would have separately justified employment action against Kennedy.

* * *

The Free Exercise Clause and Establishment Clause are equally integral in protecting religious freedom in our society. The first serves as “a promise from our government,” while the second erects a “backstop that disables our government from breaking it” and “start[ing] us down the path to the past, when [the right to free exercise] was routinely abridged.” *Trinity Lutheran* (Sotomayor, J., dissenting).

Today, the Court once again weakens the backstop. It elevates one individual’s interest in personal religious exercise, in the exact time and place of that individual’s choosing, over society’s interest in protecting the separation between church and state, eroding the protections for religious liberty for all. Today’s decision is particularly misguided because it elevates the religious rights of a school official, who voluntarily accepted public employment and the limits that public employment entails, over those of his students, who are required to attend school and who this Court has long recognized are particularly vulnerable and deserving of protection. In doing so, the Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance. As much as the Court protests otherwise, today’s decision is no victory for religious liberty. I respectfully dissent.

Review Questions and Explanations: *Kennedy*

1. At first blush, the majority and dissent appear to disagree starkly about the basic facts of this cases. The majority describes Mr. Kennedy as engaged in a private prayer; the dissenters attached a newspaper photograph to their opinion showing him kneeling in prayer at the fifty-yard line surrounded by players and cameras. But is there a real factual disagreement here, or do the justice simply attach different significance to the same underlying situation?
2. Under the majority’s test, when if ever can a public employer prevent an employee from engaging in religious activities while working?
3. Is there anything left of the concerns articulated by the Court in *Sherbert*?