Friedman & Mortenson
Constitutional Law: An Integrated Approach

2023 Supplement

This supplement supersedes the 2022 supplement. With respect to the "major questions" doctrine, the text from the prior supplement has been revised to reflect subsequent developments. All other material from the prior supplement remains.

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Insert the following on p. 3, immediately after the discussion of the Mayflower Compact and the Plymouth Plantation colony.

Issues of government legitimacy and the relationship between rulers and ruled, so clearly presented by the Mayflower Compact, were of great concern in the 17th century. That era saw immense political upheaval in England, culminating in the final overthrow of the Stuart dynasty in the so-called Glorious Revolution. Perhaps influenced by the experiences of Pilgrims and other European colonists in the New World, many political theorists had by then gravitated towards the idea that humanity originated in a "state of nature," in which nobody owed anything to anyone except pursuant to natural law (which mostly meant rules grounded in divine obligation). On this view, it was only through and only by a social contract in which individual humans agreed to band together that governments gained legitimacy. One of the most significant of these theorists was John Locke.

Second Treatise of Government

John Locke (1689)

Sect. 13. To this strange doctrine, viz. that [any one in the state of nature may punish another for the evil he has done], I doubt not but it will be objected, that it is unreasonable for men to be judges in their own cases.... And hence nothing but confusion and disorder will follow, and that therefore God hath certainly appointed government to restrain the partiality and violence of men.

I easily grant, that civil government is the proper remedy for the inconveniencies of the state of nature.... But ... remember that absolute monarchs are but men; and if government is to be the remedy of those evils, which follow from Men's being judges in their own cases, ... I desire to know ... how much better it is than the state of nature, where one man, commanding a multitude, has the liberty to be judge in his own case, and may do to all his subjects whatever he pleases, without the least liberty to any one to question or controul those who execute his pleasure? ...

Sect. 87. Man being born ... , with a title to perfect freedom, and an uncontrouled enjoyment of all the rights and privileges of the law of nature, equally with any other man, ... hath by nature a power ... to preserve his property, that is, his life, liberty and estate,

against the injuries and attempts of other men [and] to judge of, and punish the breaches of that law in others, as he is persuaded the offence deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it.

But because no political society can be, nor subsist, without having in itself the power to … punish the offences of all those of that society; there, and there only is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community…. And thus all private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules, indifferent, and the same to all parties; and by men having authority from the community ….

Sect. 95. Men being … by nature, all free, equal, and independent, no one can be … subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, … is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it….

Sect. 97. And thus every man, by consenting with others to make one body politic under one government, … puts himself under an obligation, to every one of that society, to submit to the determination of the majority, and to be concluded by it ….

Sect. 131. But [this decision to give] up the equality, liberty, and executive power they had in the state of nature … being only with an intention in every one the better to preserve himself, his liberty and property; (for no rational creature can be supposed to change his condition with an intention to be worse) the power of the society … can never be supposed to extend farther, than the common good; but is obliged to secure every one's property, by providing against [the defects] that made the state of nature so unsafe and uneasy.

And so whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide

controversies by those laws; and to employ the force of the community at home, only in the execution of such laws, or abroad to prevent or redress foreign injuries, and secure the community from inroads and invasion. And all this to be directed to no other end, but the peace, safety, and public good of the people....

Sect. 222. [W]henever the legislators endeavour to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God hath provided for all men, against force and violence.

Whensoever therefore the legislative shall transgress this fundamental rule of society; ... by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative, (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society....

Sect. 224. But it will be said, this hypothesis lays a ferment for frequent rebellion. To which I answer, ... such revolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty, will be born by the people without mutiny or murmur. But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people ... ; it is not to be wondered, that they should then rouze themselves, and endeavour to put the rule into such hands which may secure to them the ends for which government was at first erected....

Insert the following after *District of Columbia v. Heller*, p. 250.

In *New York State Rifle & Pistol Association v. Bruen* (2022), the Supreme Court relied on *Heller* to strike down New York's "may carry" statute, which governed possession of firearms outside the home. The statute required anyone applying for a concealed carry permit to prove that "proper cause exists", and in particular to "demonstrate a special need for self-protection distinguishable from that of the general community." The *Bruen* Court, per Justice Thomas, contrasted the New York statute to those of 43 other states, which it described as "'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."

Noting that "[n]othing in the Second Amendment's text draws a home/public distinction," the Court had "little difficulty concluding" that the plain text of the Second Amendment protects [the] carrying [of] handguns publicly for self-defense." This meant that "the burden falls on [the state] to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation." The Court held that the State had failed to meet this burden, and that the proper-cause requirement was therefore unconstitutional.

The Court acknowledged that historically there were "well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms." But it concluded that, "apart from a handful of late-19th-century jurisdictions, the historical record compiled by respondents . . . does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense" nor a "historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense." This meant that "respondents have failed to meet their burden." See Supplement addition to p.1181 for more on the *Bruen* decision's historical methodology.

Justice Kavanaugh concurred, joined by Chief Justice Roberts, to emphasize that "the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense" and that it affected only six states with similar "may issue" regimes. (The dissent pointed out that those six states accounted for more than a quarter of the U.S. population.) Justice Alito also concurred, noting that the New York law had failed to prevent a recent mass shooting in Buffalo. And Justice Barrett wrote a brief concurrence noting that the Court's decision did not settle various methodological disputes internal to originalism, since they did not affect the outcome of the case.

Justice Breyer's dissent, which was joined by Justices Sotomayor and Kagan, began with a detailed exploration of the evidence regarding the harms of gun violence. As he saw

it, "the Court wrongly limits its analysis to focus nearly exclusively on history. It refuses to consider the government interests that justify a challenged gun regulation, regardless of how compelling those interests may be. The Constitution contains no such limitation, and neither do our precedents." Emphasizing that the New York licensing regime at issue had been enacted in 1913, Breyer also criticized the historical basis for the court's conclusion: "Only by ignoring an abundance of historical evidence supporting regulations restricting the public carriage of firearms can the Court conclude that New York's law is not "consistent with the Nation's historical tradition of firearm regulation." He emphasized that *Heller* had itself rested on flawed premises:

> Citing Blackstone, the [*Heller*] 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 told us 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." Brief for English/Early American Historians as Amici Curiae in *McDonald v. Chicago*. 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." . . .
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> [L]inguistics experts [also] now tell us that the majority was wrong to [reject an argument that the Founders' use of "bear arms" overwhelmingly referred to military service.] 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.'" Brief for Linguistics Professors; see also D. Baron, Corpus Evidence Illuminates the Meaning of Bear Arms, Hastings Const. L. Q. (2019) (reporting 900 instances in which "bear arms" was used to refer to military or collective use of firearms and only 7 instances that were either ambiguous or without a military connotation).

"I do not cite these arguments in order to relitigate *Heller*," Justice Breyer noted. "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." Further excerpts from his discussion of the Court's historical methodology are presented below, in the Supplement addition to p. 1181.

Insert the following on p. 256, immediately after the "Brutus XII" excerpt.

Art. I, §4, cl. 1, of the Constitution provides that "the Legislature" of each state shall determine the rules governing federal elections in that state. In *Moore v. Harper* (2023), the Supreme Court considered whether this provision precludes a state supreme court from holding that legislation creating congressional districts violates the state constitution. Chief Justice Roberts's opinion for a 6-3 majority, rejecting this "independent state legislature" theory, included this discussion:

> … Since early in our Nation's history, courts have recognized their duty to evaluate the constitutionality of legislative acts…. Before the Constitutional Convention convened in the summer of 1787, a number of state courts had already moved "in isolated but important cases to impose restraints on what the legislatures were enacting as law." G. Wood, The Creation of the American Republic (1969). Although judicial review emerged cautiously, it matured throughout the founding era. These state court decisions provided a model for James Madison, Alexander Hamilton, and others who would later defend the principle of judicial review.
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> In the 1786 case *Trevett* v. *Weeden*, for example, lawyer James Varnum challenged a Rhode Island statute on the ground that it failed to provide the right to a jury trial. Although Rhode Island lacked a written constitution, Varnum argued that the State nevertheless had a constitution reflecting the basic historical rights of the English. And, he contended, the courts must honor "the principles of the constitution in preference to any acts of the General Assembly." J. Varnum, *The Case,* Trevett *v.* Weeden. Varnum won, to the dismay of the State's legislature, which replaced four of the five judges involved. W. Treanor, Judicial Review before *Marbury* (2005). His arguments were published as a pamphlet, which "may well have been the most prominent discussion of judicial review at the time of the Philadelphia Constitutional Convention."
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> The North Carolina Supreme Court played its own part in establishing judicial review. In *Bayard v. Singleton*, the court considered the constitutionality of a 1785 Act by the State's General Assembly that prevented British loyalists from challenging property seizures before a jury. The court held the Act "abrogated and without any effect," for "it was clear" that the legislature could not pass an Act that "could by any means repeal or alter the constitution." Otherwise, the legislature "would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established." James Iredell, who would later serve as an inaugural Justice of this Court, penned at the time an open letter "To the

Public" expounding a robust concept of judicial review. Life and Correspondence of James Iredell (1846). "[T]he power of the Assembly," he wrote, "is limited and defined by the constitution." The legislature, after all, "is a *creature* of the constitution."

North Carolina and Rhode Island did not stand alone. All told, "[s]tate courts in at least seven states invalidated state or local laws under their State constitutions before 1787," which "laid the foundation for judicial review."

The Framers recognized state decisions exercising judicial review at the Constitutional Convention of 1787. On July 17, James Madison spoke in favor of a federal council of revision that could negate laws passed by the States. He lauded the Rhode Island judges "who refused to execute an unconstitutional law," lamenting that the State's legislature then "displaced" them to substitute others "who would be willing instruments of the wicked & arbitrary plans of their masters." A week later, Madison extolled as one of the key virtues of a constitutional system that "[a] law violating a constitution established by the people themselves, would be considered by the Judges as null & void." Elbridge Gerry [of Massachusetts also] noted that "[i]n some States the Judges had [actually] set aside laws as being agst. the Constitution." Such judicial review, he noted, was met "with general approbation."

Writings in defense of the proposed Constitution echoed these comments. In the Federalist Papers, Alexander Hamilton maintained that "courts of justice" have the "duty … to declare all acts contrary to the manifest tenor of the Constitution void." The Federalist No. 78. "[T]his doctrine" of judicial review, he also wrote, was "equally applicable to most if not all the State governments." The Federalist No. 81.

Insert at the bottom of p. 524, after *Reno v. Condon*.

In *Haaland v. Brackeen* (2023), the Supreme Court declined to hold that the Indian Child Welfare Act (ICWA) was beyond congressional authority; *see below*, insert onto p. 607. It also rejected an array of challenges based on the 10th Amendment.

One group of ICWA provisions imposes threshold requirements for involuntary proceedings initiated by "[a]ny party" to terminate parental rights or place a child in foster care. Most notably, the statute requires such parties to show that "active efforts" have failed to provide remedial services and rehabilitative programs that might prevent the breakup of a Native family. The Court held that the 10th Amendment was not violated by applying this requirement to state litigants, noting that ICWA's generally applicable requirements do not depend on the identity of the initiating party and that such involuntary proceedings are in fact often brought by private actors.

ICWA also sets up a hierarchy of placement preferences for adoption of Indian children, designed to keep them in Indian families. Among other protections, ICWA requires initiating parties to conduct a "diligent search" for satisfactory placements consistent with that goal. The Court upheld this provision against challenge too. As with the threshold requirements, this requirement applies to private as well as state initiating parties; moreover, the Court had previously held that the preference provisions do not apply unless a party that would be preferred has formally come forward to seek adoption. The Court found it untroubling that ICWA requires state courts to follow these placement preferences; under the Supremacy Clause, federal law may modify a state-law clause of action.

Finally, ICWA imposes some record-keeping responsibilities on state courts. But, drawing on a suggestion in *Printz*, the *Haaland* Court held: "Congress may impose ancillary recordkeeping requirements related to state-court proceedings without violating the Tenth Amendment."

Insert the following Questions on p. 556, following Question (2) on NFIB's Commerce Clause discussion.

(3) Would the following requirements be constitutional under *NFIB*'s interpretation of the Commerce Clause, if enacted as congressional legislation?

(a) "All employers with at least 100 employees must require workers to obtain a Covid test each week at their own expense, and to wear a mask at work. This requirement does not apply to any employee who has received a Covid-19 vaccine." Cf. *National Federation of Independent Businesses v. Department of Labor* (2022) (holding that the Occupational Safety and Health Administration did not have power to impose such a rule under its organic statute).

(b) "No landlord may evict any tenant who lives in a county that is experiencing high levels of Covid-19 transmission and who makes a sufficient declaration of financial need." Cf. *Alabama Association of Realtors v. Department of Health & Human Services* (2021) (holding that the Center for Disease Control and Prevention did not have power to impose such a rule under its organic statute).

Insert the following Question on p. 585, immediately prior to the "f. Severability" header.

> **Question.** Imagine the following requirement were enacted by Congress pursuant to its spending power: "Any medical facility that receives federal funding must ensure that its staff is vaccinated against Covid-19." Would this requirement be constitutional? Cf. *Biden v. Missouri* (2022) (holding that the Department of Health and Human Services did have power to impose such a rule for facilities participating in the Medicare and Medicaid programs under its organic statute).

Insert the following at the bottom of p. 607, after *Bond*.

Ordinarily, of course, the federal government does not regulate adoption and foster care of children. But the Indian Child Welfare Act (ICWA), passed in 1978, creates a complex mechanism doing just that if the child involved is a member of an Indian tribe (or is eligible to be a member and is the child of a member). Designed to keep Native American children with Native American families, the statute often overrides state law precedent limited to consideration of "the child's best interests." In *Haaland v. Brackeen* (2023), a 7-2 majority of the Supreme Court held, or at least declined to overturn an appellate decision holding, that Congress has constitutional authority to regulate these matters.

The Court's analysis of this issue began by relying on ample precedent establishing that Congress has "plenary power over Indian affairs." "Congress's power in this field," wrote Justice Barrett, "is muscular, superseding both tribal and state authority." While cautioning that "Congress's authority to regulate Indians must derive from the Constitution, not the atmosphere," she asserted that "precedent traces that power to multiple sources."

One is the Indian Commerce Clause, Art. I, § 8, cl. 3, under which "'virtually all authority over Indian commerce and Indian tribes' lies with the Federal Government"; the power reaches "not only trade, but certain 'Indian affairs' too."

A second source of federal power over Indian affairs is the Treaty Clause, Art. II, § 2, cl. 2. Although the treaty power, located in Art. II, does not literally authorize Congressional action, and "though the United States formally ended the practice of entering new treaties with the Indian tribes in 1871," old treaties made pursuant to the power can authorize Congress to deal with matters that would otherwise lie beyond its reach.

Third, "principles inherent in the Constitution's structure empower Congress to act in the field of Indian affairs." At the founding, Indian affairs were treated more as aspects of military and foreign policy than domestic or municipal law. Thus, drawing on *Curtiss-Wright*, the Court suggested that the Constitution adopted preconstitutional powers that were "necessary concomitants of nationality."

Finally, because "the Federal Government has '"charged itself with moral obligations of the highest responsibility and trust"' toward Indian tribes," that "' trust relationship . . . ' informs the exercise of legislative power," though "[t]he contours of this 'special relationship' are undefined."

Applying these principles in the context of ICWA, the Court acknowledged that "Congress lacks a general power over domestic relations." But, it said, "the Constitution

does not erect a firewall around family law"; as in other contexts, state law would be preempted if Congress had legislated validly pursuant to its Art. I powers. Moreover, the challengers bore the burden of establishing ICWA's unconstitutionality.

The Court rejected the challengers' argument that the Indian Commerce Clause authorized legislation only with respect to the tribes as government entities, not Indians as individuals; precedent had established that commerce with the tribes means commerce with the individuals composing them. Moreover, the Clause had been held to encompass "not only trade but also 'Indian affairs.'" As for principles inherent in constitutional structure, the Court found that they are not limited to matters of war and peace. To the contrary, power inherent in a national government had been long been understood to extend to such matters as creating departments of Indian affairs.

In letting stand the court of appeals' holding that "ICWA is consistent with Article I," the Court did not rely on either the treaty power or the "trust relationship." Nor did it attempt to show why the particular exercises of power in ICWA fell within the commerce power or inherent structural principles. Indeed, though the Court asserted that "Congress's power to legislate with respect to Indians is well established and broad"—indeed, "plenary within its sphere"—it conceded difficulty in discerning limits on that power because precedent "rarely ties a challenged statute to a specific source of authority." "[W]e have insisted that Congress's power has limits," it recognized, "without saying what they are." And it did exactly that once again.

Justice Gorsuch wrote a long, historically oriented concurrence. He explained that ICWA was passed in response to longstanding assimilationist policies that had been intended to erase Indian identity. He stressed that understanding the scope of federal power with respect to Indian affairs depended on recognizing the sovereignty of the tribes, akin to that of foreign nations; thus, he regarded it as a mistake to characterize federal power as plenary (though he joined in full the majority opinion doing just that), because the federal government cannot divest the tribes of their rights of self-government. He also stressed a policy deeply rooted in national history that "responsibility for managing interactions with the Tribes rests exclusively with the federal government." He was therefore untroubled by the fact that "ICWA sharply limits the ability of States to impose their own family-law policies on tribal members." As he saw it, "restrict[ing] how non-Indians (States and private individuals) may engage with private individuals . . . falls in the heartland of Congress's constitutional authority."

In dissent, Justice Thomas presented a very different historical view. He argued that "given the limited nature of the Federal Government's authority, state laws . . . played a significant role in regulating Indians within the territorial limits of States." He concluded that there is "no evidence" for "some sort of free-floating, unlimited [federal] power over all things related to Indians" in the text or original understanding of the

Constitution. Rather, in this context, as in others, "the Federal Government can exercise only its constitutionally enumerated powers," and none of them suggest "a power to regulate U.S. citizens outside of Indian lands merely because those individuals happen to be Indians." In particular, the framers' rejection of a power over "Indian affairs" "shows that there is no basis to stretch the Commerce Clause beyond its normal limits." And Justice Thomas found unjustified Chief Justice Marshall's characterization of the tribes in *Cherokee Nation v. Georgia* (1831) as "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian," a conceptualization that underlay much subsequent discourse.

Justice Alito also dissented. He emphasized that domestic relations are "a virtually exclusive province of the States"; while federal legislation regulating some "economic aspects of domestic relations" may preempt state law, the Court had never held that Congress "may regulate the very nature of those relations or dictate their creation, dissolution, or modification." It appears that Justice Alito regarded this limitation as one of the "fundamental constitutional constraints" that should be deemed to confine Congress's power over Indian affairs.

The case also presented issues under the Tenth Amendment. See above, insert onto p. 524. Standing problems prevented the Court from reaching nondelegation and equal protection challenges, but Justice Kavanaugh wrote a brief concurrence indicating the seriousness of the latter issue.

Replace the two paragraphs on sovereign immunity, pp. 633-634, with the following.

To fully appreciate the stakes of the judicial battles over the scope of the § 5 power, it is important to have a basic understanding of state sovereign immunity. The Eleventh Amendment expressly prohibits some suits against states in federal court. The Supreme Court has interpreted the Amendment to reflect a much broader concept of sovereign immunity already implicit in the Constitution that goes well beyond the text of the amendment itself. *Alden v. Maine* (1999) (applying sovereign immunity principle to a claim under federal law brought in state-court lawsuit). State sovereign immunity does not prohibit suits against individual state officers, *Ex parte Young* (1908), though in some circumstances such "officer suits" are limited by other legal barriers like qualified immunity, *Harlow v. Fitzgerald* (1982) (presented *supra* at pp. 913-916). But where Eleventh Amendment immunity applies, Congress cannot authorize a cause of action against the states unless it is acting pursuant to constitutional authority that conveys the power to eliminate—or "abrogate"—that immunity.

Not all enumerated congressional authorities have been interpreted to convey this ancillary power of abrogation. On one hand, the Court has held that Congress may not abrogate state sovereign immunity if it is acting under the Commerce Clause. *Seminole Tribe of Florida v. Florida* (1996). On the other hand, Congress may abrogate sovereign immunity if it is acting under § 5 of the Fourteenth Amendment, which "sanctioned intrusions by Congress . . . into the . . . spheres of autonomy previously reserved to the States. . . ." *Fitzpatrick v. Bitzer* (1976). That means that a federal civil rights statute's validity under the Commerce Clause is not independently sufficient to support a private right of action if the alleged violator is a state. Rather, insofar as the statute is said to authorize judicial action against the states, courts must determine whether it can be justified as an exercise of § 5 authority. For two important cases further exploring the scope of that authority, see *Kimel v. Florida Board of Regents* (2000) and *Nevada Department of Human Resources v. Hibbs* (2003), both of which are in the online supplement.

Current doctrine on state sovereign immunity, in short, has become complex to the point of arcanity. For the latest authoritative summary of the relevant caselaw, see *Torres v. Texas Department of Public Safety* (2022) (holding that Congress can abrogate state sovereign immunity under its power to "raise and support Armies" and "provide and maintain a Navy"):

> The Constitution forged a Union, but it also protected the sovereign prerogatives of States within our government. Generally speaking, "the States entered the federal system with their sovereignty," including their sovereign immunity, "intact." *Blatchford v. Native Village of Noatak*

(1991). Basic tenets of sovereign immunity teach that courts may not ordinarily hear a suit brought by any person against a nonconsenting State. See ibid.

But States still remain subject to suit in certain circumstances. States may, of course, consent to suit. *Sossamon v. Texas* (2011). Congress may also enact laws abrogating their immunity under the Fourteenth Amendment. *Fitzpatrick v. Bitzer* (1976). And, as relevant here, States may be sued if they agreed their sovereignty would yield as part of the "plan of the [Philadelphia drafting] Convention," *PennEast Pipeline Co. v. New Jersey* (2021)—that is, if "the structure of the original Constitution itself" reflects a waiver of States' sovereign immunity. . . .

Alexander Hamilton described three circumstances where the "plan of the Convention" implied that the States waived their sovereign immunity: "where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant." Federalist 32 (A. Hamilton).

Consistent with these principles, this Court has found structural waiver as to suits between States, in *South Dakota v. North Carolina* (1904), and suits by the United States against a State, in *United States v. Texas* (1892). The States, we said, must have recognized that these waivers of immunity from suit were "a necessary feature of the formation of a more perfect Union" and thus "inherent in the constitutional plan." The alternative to consenting to litigation between sovereigns, after all, could be civil war.

A century later, in *Central Va. Community College v. Katz* (2006), the Court recognized another structural waiver. We held that States could not assert sovereign immunity to block suits by private parties pursuant to federal bankruptcy laws. There, too, we based our holding on the constitutional structure. We noted the text's insistence on "uniform Laws on the subject of Bankruptcies," U. S. Const., Art. I, § 8, cl. 4, the Framers' concerns about States' passing patchwork legislation and refusing to discharge the debts of noncitizens (as had happened under the Articles of Confederation), and the history of habeas laws related to bankruptcy. . . .

For several years, both before and after *Katz*, the Court declined to acknowledge additional waivers of sovereign immunity under Congress'

> Article I powers or to find Article I authority to abrogate immunity. See, *e.g.*, *Seminole Tribe of Fla. v. Florida* (1996) [(no power to abrogate under the Indian Commerce Clause)]; *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank* (1999) [(no power to abrogate under the Patent Clause)]. Two Terms ago, we even described *Katz*'s analysis as "good for one clause only," suggesting we would not find further waivers under Article I. *Allen v. Cooper* (2020).
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> Last Term, in *PennEast*, we considered whether Congress could, pursuant to its eminent domain power, authorize private parties to sue States to enforce federally approved condemnations necessary to build interstate pipelines. We held that "when the States entered the federal system, they renounced their right to the 'highest dominion in the[ir] lands,'" meaning they agreed their "eminent domain power would yield to that of the Federal Government." Congress could therefore authorize private actions against States.
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> *PennEast* defined the test for structural waiver as whether the federal power at issue is "complete in itself, and the States consented to the exercise of that power—in its entirety—in the plan of the Convention." Where that is so, the States implicitly agreed that their sovereignty "would yield to that of the Federal Government 'so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.'" By committing not to "thwart" or frustrate federal policy, the States accepted upon ratification that their "consent," including to suit, could "never be a condition precedent to" Congress' chosen exercise of its authority. The States simply "have no immunity left to waive or abrogate."

Applying the *PennEast* test, the *Torres* Court then concluded that "Congress' power to build and maintain the Armed Forces fits *PennEast*'s test. The Constitution's text, its history, and this Court's precedents show that 'when the States entered the federal system, they renounced their right' to interfere with national policy in this area."

Insert the following at the bottom of p. 654.

Probably the leading modern-era case on the Dormant Commerce Clause is *Pike v. Bruce Church, Inc.* (1970), in which the Court invalidated an Arizona administrative order that required a grower of high-quality cantaloupes to pack the fruit, and identify it as having been grown in Arizona, before shipping it out of state. Justice Sotomayor recently summarized the standard that Justice Stewart articulated in *Pike:*

> In *Pike*, the Court distilled a general principle from its prior cases. "Where [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Further, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

National Pork Producers Council v. Ross (2023), see *infra* Supplement addition to p. 677. As you read the following materials, consider whether this standard is helpful, and whether the Court has adhered to it.

Delete the *City of Philadelphia v. New Jersey* and *Kassel v. Consolidated Freightways* cases (pp. 655-672) and insert the following on p. 677, after *Maine v. Taylor*.

National Pork Producers Council v. Ross

Supreme Court of the United States, 2023.

143 S.Ct. 1142

Justice Gorsuch announced the judgment of the Court, and delivered the opinion of the Court, except as to Parts IV–B, IV–C, and IV–D.

… Recently, California adopted … a law banning the in-state sale of certain pork products derived from breeding pigs confined in stalls so small they cannot lie down, stand up, or turn around. In response, two groups of out-of-state pork producers filed this lawsuit, arguing that the law unconstitutionally interferes with their preferred way of doing business in violation of this Court's dormant Commerce Clause precedents. Both the district court and court of appeals dismissed the producers' complaint for failing to state a claim. We affirm.…

I

… States (and their predecessors) have long enacted laws aimed at protecting animal welfare. As far back as 1641, the Massachusetts Bay Colony prohibited "Tirranny or Crueltie towards any bruite Creature." Today, Massachusetts prohibits the sale of pork products from breeding pigs (or their offspring) if the breeding pig has been confined "in a manner that prevents [it] from lying down, standing up, fully extending [its] limbs or turning around freely." Nor is that State alone.… Florida's Constitution prohibits "any person [from] confin[ing] a pig during pregnancy … in such a way that she is prevented from turning around freely." Arizona, Maine, Michigan, Oregon, and Rhode Island, too, have laws regulating animal confinement practices within their borders.

This case involves a challenge to a California law known as Proposition 12. In November 2018 and with the support of about 63% of participating voters, California adopted a ballot initiative that revised the State's existing standards for the in-state sale of eggs and announced new standards for the in-state sale of pork and veal products. As relevant here, Proposition 12 forbids the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are "confined in a cruel manner." Subject to certain exceptions, the law deems confinement "cruel" if it prevents a pig from "lying down, standing up, fully extending [its] limbs, or turning around freely." Since Proposition 12's adoption, the State has begun developing "proposed regulations" that

would permit compliance "certification[s]" to be issued "by non-governmental third parties, many used for myriad programs (*e.g.*, 'organic') already." …

Shortly after Proposition 12's adoption, … the National Pork Producers Council ["NPRC"]… filed this lawsuit on behalf of [its] members who raise and process pigs. [NPRC] alleged that Proposition 12 violates the U. S. Constitution by impermissibly burdening interstate commerce….

II

… Everyone agrees that Congress may seek to exercise [the commerce] power to regulate the interstate trade of pork, much as it has done with various other products. Everyone agrees, too, that congressional enactments may preempt conflicting state laws. See Art. VI, cl. 2. But everyone also agrees that we have nothing like that here. Despite the persistent efforts of certain pork producers, Congress has yet to adopt any statute that might displace Proposition 12 or laws regulating pork production in other States. [The Court cites a series of failed proposals to do so.]

That has led petitioners to resort to litigation, pinning their hopes on what has come to be called the *dormant* Commerce Clause….

Today, [the] antidiscrimination principle lies at the "very core" of our dormant Commerce Clause jurisprudence. In its "modern" cases, this Court has said that the Commerce Clause prohibits the enforcement of state laws "driven by … 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.' "

… [U]nder our received dormant Commerce Clause case law, petitioners begin in a tough spot. They do not allege that California's law seeks to advantage in-state firms or disadvantage out-of-state rivals. In fact, petitioners *disavow* any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state ones….

III

Having conceded that California's law does not implicate the antidiscrimination principle at the core of this Court's dormant Commerce Clause cases, petitioners are left to pursue two more ambitious theories. In the first, petitioners invoke what they call "extraterritoriality doctrine." They contend that our dormant Commerce Clause cases suggest an additional and "almost *per se*" rule forbidding enforcement of state laws that have the "practical effect of controlling commerce outside the State," even when those laws do not purposely discriminate against out-of-state economic interests. Petitioners further insist that Proposition 12 offends this "almost *per se*" rule because the law will

impose substantial new costs on out-of-state pork producers who wish to sell their products in California….

This argument falters out of the gate. Put aside what problems may attend the minor (factual) premise of this argument. Focus just on the major (legal) premise. Petitioners say the "almost *per se*" rule they propose follows ineluctably from three cases[, including] *Baldwin v. G.A.F. Seelig, Inc.* (1935). A close look at [*Baldwin*], however, reveals nothing like the rule petitioners posit. Instead, [it] typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests.

… [In *Baldwin*], this Court refused to enforce New York laws that barred out-of-state dairy farmers from selling their milk in the State "unless the price paid to" them matched the minimum price New York law guaranteed in-state producers. In that way, the challenged laws deliberately robbed out-of-state dairy farmers of the opportunity to charge lower prices in New York thanks to whatever "natural competitive advantage" they might have enjoyed over in-state dairy farmers—for example, lower cost structures, more productive farming practices, or "lusher pasturage." D. Regan, The Supreme Court and State Protectionism, 84 Mich. L. Rev. 1091 (1986). The problem with New York's laws was thus a simple one: They "plainly discriminate[d]" against out-of-staters by "erecting an economic barrier protecting a major local industry against competition from without the State." Really, the laws operated like "a tariff or customs duty." See *Baldwin* (condemning the challenged laws for seeking to "protec[t]" New York dairy farmers "against competition from without")….

Consider, too, the strange places petitioners' alternative interpretation could lead. In our interconnected national marketplace, many (maybe most) state laws have the "practical effect of controlling" extraterritorial behavior. State income tax laws lead some individuals and companies to relocate to other jurisdictions. Environmental laws often prove decisive when businesses choose where to manufacture their goods. Add to the extraterritorial-effects list all manner of "libel laws, securities requirements, charitable registration requirements, franchise laws, tort laws," and plenty else besides. Nor, as we have seen, is this a recent development. Since the founding, States have enacted an "immense mass" of "[i]nspection laws, quarantine laws, [and] health laws of every description" that have a "considerable" influence on commerce outside their borders. *Gibbons*. Petitioners' "almost *per se*" rule against laws that have the "practical effect" of "controlling" extraterritorial commerce would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers. It would provide neither courts nor litigants with meaningful guidance in how to resolve disputes over them. Instead, it would invite endless litigation and inconsistent results….

IV

Failing in their first theory, petitioners retreat to a second they associate with *Pike v. Bruce Church*, Inc. (1970). Under *Pike*, they say, a court must at least assess "'the burden imposed on interstate commerce'" by a state law and prevent its enforcement if the law's burdens are "'clearly excessive in relation to the putative local benefits.'" Petitioners then rattle off a litany of reasons why they believe the benefits Proposition 12 secures for Californians do not outweigh the costs it imposes on out-of-state economic interests. We see problems with this theory too.

A

In the first place, petitioners overstate the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of our dormant Commerce Clause jurisprudence. As this Court has previously explained, "no clear line" separates the *Pike* line of cases from our core antidiscrimination precedents.... In other words, if some of our cases focus on whether a state law discriminates on its face, the *Pike* line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose.... See, *e.g.*, R. Fallon, The Dynamic Constitution (2013) (observing that *Pike* serves to "'smoke out' a hidden" protectionism).

... [Petitioners] not only disavow any claim that Proposition 12 discriminates on its face. They nowhere suggest that an examination of Proposition 12's practical effects in operation would disclose purposeful discrimination against out-of-state businesses. While this Court has left the "courtroom door open" to challenges premised on "even nondiscriminatory burdens," and while "a small number of our cases have invalidated state laws ... that appear to have been genuinely nondiscriminatory,"[2] petitioners' claim falls well outside *Pike*'s heartland. That is not an auspicious start.

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[2] Most notably, ... petitioners briefly allude to ... a line of cases that originated before *Pike* in which this Court refused to enforce certain state regulations on instrumentalities of interstate transportation—trucks, trains, and the like. See, *e.g.*, *Bibb v. Navajo Freight Lines* (1959) (concerning a state law specifying [curved] mud flaps for trucks and trailers [rather than straight flaps, which were legal in at least 45 states and required by at least one]); *Southern Pacific Co. v. Arizona ex rel. Sullivan* (1945) (addressing a state law [that limited passenger and freight trains to 14 and 70 cars, respectively]). Petitioners claim these cases support something like the extraterritoriality or balancing rules they propose. But ... this Court "has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede *the flow* of interstate goods." Nothing like that exists here. We do not face a law that impedes the flow of commerce. Pigs are not trucks or trains.

B

WORTH NOTING

Parts IV-B, -C, and -D of Justice Gorsuch's opinion speak only for a plurality of the Court.

Matters do not improve from there. While *Pike* has traditionally served as another way to test for purposeful discrimination against out-of-state economic interests, and while some of our cases associated with that line have expressed special concern with certain state regulation of the instrumentalities of interstate transportation, petitioners would have us retool *Pike* for a much more ambitious project. They urge us to read *Pike* as authorizing judges to strike down duly enacted state laws regulating the in-state sale of ordinary consumer goods (like pork) based on nothing more than their own assessment of the relevant law's "costs" and "benefits."

That we can hardly do. Whatever other judicial authorities the Commerce Clause may imply, that kind of freewheeling power is not among them.... [O]ur cases have expressly cautioned against judges using the dormant Commerce Clause as "a roving license for federal courts to decide what activities are appropriate for state and local government to undertake." While "[t]here was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause," we have long refused pleas like petitioners' "to reclaim that ground" in the name of the dormant Commerce Clause.

... This Court has also recognized that judges often are "not institutionally suited to draw reliable conclusions of the kind that would be necessary ... to satisfy [the] *Pike*" test as petitioners conceive it.

Our case illustrates the problem. On the "cost" side of the ledger, petitioners allege they will face increased production expenses because of Proposition 12. On the "benefits" side, petitioners acknowledge that Californians voted for Proposition 12 to vindicate a variety of interests, many noneconomic. How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any juridical principle. Really, the task is like being asked to decide "whether a particular line is longer than a particular rock is heavy."

Faced with this problem, petitioners reply that we should heavily discount the benefits of Proposition 12. They say that California has little interest in protecting the welfare of animals raised elsewhere and the law's health benefits are overblown. But along the way, petitioners offer notable concessions too. They acknowledge that States may sometimes ban the in-state sale of products they deem unethical or immoral without regard to where those products are made (for example, goods manufactured with child labor). And, at least arguably, Proposition 12 works in just this way—banning from the State all whole pork products derived from practices its voters consider "cruel."

Petitioners also concede that States may often adopt laws addressing even "imperfectly understood" health risks associated with goods sold within their borders. And, again, no one disputes that some who voted for Proposition 12 may have done so with just that sort of goal in mind. See, *e.g.*, USDA Proposed Rule To Amend Organic Livestock and Poultry Production Requirements (2022) (affording animals more space "may result in healthier livestock products for human consumption").

So even accepting everything petitioners say, we remain left with a task no court is equipped to undertake. On the one hand, some out-of-state producers who choose to comply with Proposition 12 may incur new costs. On the other hand, the law serves moral and health interests of some (disputable) magnitude for in-state residents. Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? The competing goods are incommensurable. Your guess is as good as ours.

More accurately, your guess is *better* than ours. In a functioning democracy, policy choices like these usually belong to the people and their elected representatives. They are entitled to weigh the relevant "political and economic" costs and benefits for themselves, and "try novel social and economic experiments" if they wish. Judges cannot displace the cost-benefit analyses embodied in democratically adopted legislation guided by nothing more than their own faith in "Mr. Herbert Spencer's Social Statics," *Lochner v. New York* (1905)—or, for that matter, Mr. Wilson Pond's Pork Production Systems, see W. Pond, et al., Pork Production Systems: Efficient Use of Swine and Feed Resources (1991).

If, as petitioners insist, California's law really does threaten a "massive" disruption of the pork industry—if pig husbandry really does " 'imperatively demand' " a single uniform nationwide rule—they are free to petition Congress to intervene. Under the (wakeful) Commerce Clause, that body enjoys the power to adopt federal legislation that may preempt conflicting state laws. That body is better equipped than this Court to identify and assess all the pertinent economic and political interests at play across the country. And that body is certainly better positioned to claim democratic support for any policy choice it may make. But so far, Congress has declined the producers' sustained entreaties for new legislation. And with that history in mind, it is hard not to wonder whether petitioners have ventured here only because winning a majority of a handful of judges may seem easier than marshaling a majority of elected representatives across the street.

C

Even as petitioners conceive *Pike*, they face a problem. As they read it, *Pike* requires a plaintiff to plead facts plausibly showing that a challenged law imposes "substantial burdens" on interstate commerce *before* a court may assess the law's competing benefits or weigh the two sides against each other. And, tellingly, the complaint

before us fails to clear even that bar….

… Here, farmers and vertically integrated processors have [a] choice: They may provide all their pigs the space the law requires; they may segregate their operations to ensure pork products entering California meet its standards; or they may withdraw from that State's market…. Here, the law presents a choice primarily—but not exclusively—for out-of-state businesses; California does have some pork producers affected by Proposition 12…. Here, the pleadings allow for the [possibility] that California market share previously enjoyed by one group of profit-seeking, out-of-state businesses (farmers who stringently confine pigs and processors who decline to segregate their products) will be replaced by another (those who raise and trace Proposition 12-compliant pork). [S]ome may question the "wisdom" of a law that threatens to disrupt the existing practices of some industry participants and may lead to higher consumer prices. But the dormant Commerce Clause does not protect a "particular structure or metho[d] of operation."

… [T]he complaint plausibly alleges that *some* out-of-state firms may face difficulty complying (or may choose not to comply) with Proposition 12. But from all anyone can tell, *other* out-of-state competitors seeking to enhance their own profits may choose to modify their existing operations or create new ones to fill the void.[3]

Of course, as the complaint alleges, a shift from one set of production methods to another promises some costs. But the complaint concedes that complying producers will be able to "pas[s] along" at least "some" of their increased costs to consumers. And no one thinks that costs ultimately borne by in-state consumers thanks to a law they adopted counts as a cognizable harm under our dormant Commerce Clause precedents. Nor does the complaint allege facts plausibly suggesting that out-of-state consumers indifferent to pork production methods will have to pick up the tab (let alone explain how petitioners might sue to vindicate their interests). Instead, at least one declaration incorporated by reference into the complaint avers that some out-of-state consumers will "not value these changes and will not pay an increased price." See also Brief for Agricultural and Resource Economics Professors as *Amici Curiae* (suggesting negligible effect on out-of-state prices for consumers not interested in Proposition 12-compliant pork). Further experience may yield further facts. But the facts pleaded in this complaint merely allege harm to some

[3] Though it is unnecessary to adorn the point, we note that a number of smaller out-of-state pork producers have filed an amicus brief in this Court hailing the "opportunities" Proposition 12 affords them to compete with vertically integrated firms with "'concentrated market power'" that are wedded to their existing processing practices. Brief for Small and Independent Farming Businesses et al. as Amici Curiae. Other *amici* have noted that even some large vertically integrated processing firms have already begun to modify (or else have indicated their intention to modify) their operations to comply with Proposition 12.

producers' favored "methods of operation." A substantial harm to interstate commerce remains nothing more than a speculative possibility.

D

The Chief Justice's concurrence in part and dissent in part (call it "the lead dissent") … seems to advance a reading of *Pike* that would permit judges to enjoin the enforcement of any state law restricting the sale of an ordinary consumer good if the law threatens an " 'excessive' " "har[m] to the interstate market" for that good. It is an approach that would go much further than our precedents permit. So much further, in fact, that it isn't clear what separates the lead dissent's approach from others it purports to reject….

[T]he lead dissent … suggests that the burdens of Proposition 12 are particularly "substantial" because California's law "carr[ies] implications for producers as far flung as Indiana and North Carolina." Why is that so? Justice Kavanaugh … says the quiet part aloud: California's market is so lucrative that almost any in-state measure will influence how out-of-state profit-maximizing firms choose to operate. But if that makes all the difference, it means voters in States with smaller markets are constitutionally entitled to greater authority to regulate in-state sales than voters in States with larger markets. So much for the Constitution's "fundamental principle of *equal* sovereignty among the States." *Shelby County v. Holder* (2013)….

Justice Sotomayor, joined by Justice Kagan, concurring in part.

I join all but Parts IV–B and IV–D of Justice GORSUCH's opinion. Given the fractured nature of Part IV, I write separately to clarify my understanding of why petitioners' *Pike* claim fails. In short, I vote to affirm the judgment because petitioners fail to allege a substantial burden on interstate commerce as required by *Pike*, not because of any fundamental reworking of that doctrine….

As the Court's opinion here explains, *Pike*'s balancing and tailoring principles are most frequently deployed to detect the presence or absence of latent economic protectionism. That is no surprise. Warding off state discrimination against interstate commerce is at the heart of our dormant Commerce Clause jurisprudence.

As the Court's opinion also acknowledges, however, the Court has "generally le[ft] the courtroom door open" to claims premised on "even nondiscriminatory burdens." Indeed, "a small number" of this Court's cases in the *Pike* line "have invalidated state laws … that appear to have been genuinely nondiscriminatory" in nature. Often, such cases have addressed state laws that impose burdens on the arteries of commerce, on "trucks, trains, and the like." Yet, there is at least one exception to that tradition. See *Edgar v.*

MITE Corp. (1982) (invalidating a nondiscriminatory [Illinois] law that regulated tender offers to shareholders [of corporations with designated Illinois affiliations]).

Pike claims that do not allege discrimination or a burden on an artery of commerce are further from *Pike*'s core. As The Chief Justice recognizes, however, the Court today does not shut the door on all such *Pike* claims. Thus, petitioners' failure to allege discrimination or an impact on the instrumentalities of commerce does not doom their *Pike* claim.

Nor does a majority of the Court endorse the view that judges are not up to the task that *Pike* prescribes. Justice Gorsuch, for a plurality, concludes that petitioners' *Pike* claim fails because courts are incapable of balancing economic burdens against noneconomic benefits. I do not join that portion of Justice Gorsuch's opinion. I acknowledge that the inquiry is difficult and delicate, and federal courts are well advised to approach the matter with caution. Yet, I agree with The Chief Justice that courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with some frequency. The means-ends tailoring analysis that *Pike* incorporates is likewise familiar to courts and does not raise the asserted incommensurability problems that trouble Justice Gorsuch.

In my view, and as Justice Gorsuch concludes for a separate plurality of the Court, petitioners' *Pike* claim fails for a much narrower reason[:] the complaint fails to allege a substantial burden on interstate commerce….

Justice Barrett, concurring in part.

A state law that burdens interstate commerce in clear excess of its putative local benefits flunks *Pike* balancing. In most cases, *Pike*'s "general rule" reflects a commonsense principle: Where there's smoke, there's fire. Under our dormant Commerce Clause jurisprudence, one State may not discriminate against another's producers or consumers. A law whose burdens fall incommensurately and inexplicably on out-of-state interests may be doing just that.

But to weigh benefits and burdens, it is axiomatic that both must be judicially cognizable and comparable. I agree with Justice Gorsuch that the benefits and burdens of Proposition 12 are incommensurable. California's interest in eliminating allegedly inhumane products from its markets cannot be weighed on a scale opposite dollars and cents—at least not without second-guessing the moral judgments of California voters or making the kind of policy decisions reserved for politicians. None of our *Pike* precedents requires us to attempt such a feat.

That said, I disagree with my colleagues who would hold that petitioners have

failed to allege a substantial burden on interstate commerce. The complaint plausibly alleges that Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California. For this reason, I do not join Part IV–C of Justice Gorsuch's opinion. If the burdens and benefits were capable of judicial balancing, I would permit petitioners to proceed with their *Pike* claim.

Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Jackson, concurring in part and dissenting in part.

I agree with the Court's view in its thoughtful opinion that many of the leading cases invoking the dormant Commerce Clause are properly read as invalidating statutes that promoted economic protectionism. I also agree with the Court's conclusion that our precedent does not support a *per se* rule against state laws with "extraterritorial" effects. But I cannot agree with the approach adopted by [the justices in the majority] to analyzing petitioners' claim based on *Pike*.

Pike provides that nondiscriminatory state regulations are valid under the Commerce Clause "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." … I would find that petitioners have plausibly alleged a substantial burden against interstate commerce, and would therefore vacate the judgment and remand the case for the court below to decide whether petitioners have stated a claim under *Pike*.

I

The Ninth Circuit stated that "[w]hile the dormant Commerce Clause is not yet a dead letter, it is moving in that direction." Today's majority does not pull the plug. For good reason: Although *Pike* is susceptible to misapplication as a freewheeling judicial weighing of benefits and burdens, it also reflects the basic concern of our Commerce Clause jurisprudence that there be "free private trade in the national marketplace." "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them." *H.P. Hood & Sons v. Du Mond* (1949).

The majority's discussion of our *Pike* jurisprudence highlights two types of cases: those involving discriminatory state laws and those implicating the "instrumentalities of interstate transportation." But *Pike* has not been so narrowly typecast. As a majority of the Court acknowledges, "we generally leave the courtroom door open to plaintiffs

invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice." *Dept. of Revenue of Kentucky v. Davis* (2008). Nor have our cases applied *Pike* only where a State regulates the instrumentalities of transportation. *Pike* itself addressed an Arizona law regulating cantaloupe packaging. And we have since applied *Pike* to invalidate nondiscriminatory state laws that do not concern transportation. *Edgar v. MITE Corp*. (1982) As a majority of the Court agrees, *Pike* extends beyond laws either concerning discrimination or governing interstate transportation. See *ante* (opinion of Sotomayor, J.); *post* (opinion of Kavanaugh, J.).

Speaking for three Members of the Court, Justice Gorsuch objects that balancing competing interests under *Pike* is simply an impossible judicial task. I certainly appreciate the concern, but sometimes there is no avoiding the need to weigh seemingly incommensurable values. See, *e.g.*, *Schneider v. State (Town of Irvington)* (1939) (weighing "the purpose to keep the streets clean and of good appearance" against the "the constitutional protection of the freedom of speech and press"); *Winston v. Lee* (1985) ("The reasonableness" under the Fourth Amendment "of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure."). Here too, a majority of the Court agrees that it is possible to balance benefits and burdens under the approach set forth in *Pike*. See *ante* (opinion of Sotomayor, J.); *post* (opinion of Kavanaugh, J.).

II

This case comes before us on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss.... The Ninth Circuit reasoned that "[f]or dormant Commerce Clause purposes, laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce." The panel then dismissed petitioners' claim under *Pike* by concluding that the complaint alleged only an increase in compliance costs due to Proposition 12. But, as I read it, the complaint alleges more than simply an increase in "compliance costs" .... Petitioners identify broader, market-wide *consequences* of compliance—economic harms that our precedents have recognized can amount to a burden on interstate commerce. I would therefore find that petitioners have stated a substantial burden against interstate commerce, vacate the judgment below, and remand this case for the Ninth Circuit to consider whether petitioners have plausibly claimed that the burden alleged outweighs any "putative local interests" under *Pike*.

A

Our precedents have long distinguished the costs of complying with a given state

regulation from other economic harms to the interstate market. *Bibb v. Navajo Freight Lines* (1959) illustrates the point. In that case, we considered an Illinois law requiring that trucks and trailers use a particular kind of mudguard. The "cost of installing" the mudguards was "$30 or more per vehicle," amounting to "$4,500 to $45,840" for the trucking companies at issue. But beyond documenting those direct costs of complying with the Illinois law, we also noted other derivative harms flowing from the regulation. The mudguard rule threatened "significant delay in an operation where prompt movement may be of the essence." Also, changing mudguard types when crossing into Illinois from a State with a different standard would require "two to four hours of labor" and could prove "exceedingly dangerous." We concluded that "[c]ost taken into consideration" together with those "*other* factors" could constitute a burden on interstate commerce. Subsequent cases followed *Bibb*'s logic by analyzing economic impact to the interstate market separately from immediate costs of compliance. See *Kassel v. Consolidated Freightways Corp.* (1981) (plurality opinion) (separating "increas[ed] ... costs" from the fact that the challenged "law may aggravate ... the problem of highway accidents" in describing the burden on interstate commerce); *Raymond Motor Transp., Inc. v. Rice* (1975) (analyzing an increase in "cost" independently of other consequential effects, such as "slow[ing] the movement of goods")....

The derivative harms we have long considered in this context are in no sense "noneconomic." *Ante* (opinion of Gorsuch, J.). Regulations that "aggravate ... the problem of highway accidents" or "slow the movement of goods" impose economic burdens, even if those burdens may be difficult to quantify and may not arise immediately. Our cases provide no license to chalk up *every* economic harm—no matter how derivative—to a mere cost of compliance....

Nor can the foregoing cases be dismissed because they ... involved the instrumentalities of transportation... The *Pike* balance may well come out differently when it comes to interstate transportation, an area presenting a strong interest in "national uniformity." But the error below does not concern a particular balancing of interests under *Pike*; it concerns how to analyze the burden on interstate commerce in the first place.

B

As in our prior cases, petitioners here allege both compliance costs and consequential harms to the interstate market. With respect to compliance costs, petitioners allege that Proposition 12 demands significant capital expenditures for farmers who wish to sell into California. "Producers ... will need to spend" between $290 and $348 million "of additional capital in order to reconstruct their sow housing and overcome the productivity loss that Proposition 12 imposes." All told, compliance will "increase production costs per pig by over $13 dollars per head, a 9.2% cost increase at

the farm level."

Separate and apart from those costs, petitioners assert harms to the interstate market itself. The complaint alleges that the interstate pork market is so interconnected that producers will be "forced to comply" with Proposition 12, "even though some or even most of the cuts from a hog are sold in other States." Proposition 12 may not expressly regulate farmers operating out of State. But due to the nature of the national pork market, California has enacted rules that carry implications for producers as far flung as Indiana and North Carolina, whether or not they sell in California. The panel below acknowledged petitioners' allegation that, "[a]s a practical matter, given the interconnected nature of the nationwide pork industry, all or most hog farmers will be forced to comply with California requirements." We have found such sweeping extraterritorial effects, even if not considered as a *per se* invalidation, to be pertinent in applying *Pike*....

The complaint further alleges other harms that cannot fairly be characterized as mere costs of compliance but that the panel below seems to have treated as such. Because of Proposition 12's square footage requirements, farms will be compelled to adopt group housing, which is likely to produce "worse health outcome[s]" and "sprea[d] pathogens and disease." Such housing changes will also "upen[d] generations of animal husbandry, training, and knowledge." And "[b]y preventing the use of breeding stalls during the 30 to 40 day period between weaning and confirmation of pregnancy, Proposition 12 puts sows at greater risk of injury and stress during the vulnerable stages of breeding and gestation." These consequential threats to animal welfare and industry practice are difficult to quantify and are not susceptible to categorization as mere costs of compliance....

Justice Gorsuch asks what separates my approach from the *per se* extraterritoriality rule I reject. It is the difference between mere cross-border effects and broad impact requiring, in this case, compliance even by producers who do not wish to sell in the regulated market. And even then, we only invalidate a regulation if that burden proves "clearly excessive in relation to the putative local benefits." ...

Justice Kavanaugh, concurring in part and dissenting in part.

In today's fractured decision, six Justices of this Court affirmatively retain the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations. *Ante* (Sotomayor, J. joined by Kagan, J., concurring in part); *ante* (Roberts, C.J., joined by Alito, Kavanaugh, and Jackson, JJ., concurring in part and dissenting in part). Although Parts IV–B and IV–D of Justice Gorsuch's opinion would essentially overrule the *Pike* balancing test, those subsections are not controlling precedent, as I understand it.

But Part IV–C of Justice Gorsuch's opinion is controlling precedent for purposes of the Court's judgment as to the plaintiffs' *Pike* claim. There, a four-Justice plurality of the Court applies *Pike* and rejects the plaintiffs' dormant Commerce Clause challenge under *Pike*. The plurality reasons that the plaintiffs' complaint did not sufficiently allege that the California law at issue here imposed a substantial burden on interstate commerce under *Pike*. I respectfully disagree with that conclusion….

This case involves the American pork industry, which today is a $20 billion-plus industry that generates hundreds of thousands of American jobs and serves millions of American consumers. Importantly for this case, the vast majority of pig farms are located in States other than California…. And the vast majority of pork is likewise produced in States other than California.

In 2018, California voters nonetheless passed a ballot initiative, Proposition 12, that not only regulates pig farming and pork production in California, but also in effect regulates pig farming and pork production *throughout the United States*….

California's requirements for pig farms and pork production depart significantly from common agricultural practices that are lawful in major pig-farming and pork-producing States such as Iowa, Minnesota, Illinois, Indiana, and North Carolina…. [A]bsent California's Proposition 12, relatively few pig farmers and pork producers in the United States would follow the practices that California now demands. Yet American pig farmers and pork producers have little choice but to comply with California's regulatory dictates. It would be prohibitively expensive and practically all but impossible for pig farmers and pork producers to segregate individual pigs based on their ultimate marketplace destination in California or elsewhere. And California's 13-percent share of the consumer pork market makes it economically infeasible for many pig farmers and pork producers to exit the California market.

California's required changes to pig-farming and pork-production practices throughout the United States will cost American farmers and pork producers hundreds of millions (if not billions) of dollars. And those costs for pig farmers and pork producers will be passed on, in many cases, to American consumers of pork via higher pork prices nationwide. The increased costs may also result in lower wages and reduced benefits (or layoffs) for the American workers who work on pig farms and in meatpacking plants.

In short, through Proposition 12, California is forcing massive changes to pig-farming and pork-production practices throughout the United States. Proposition 12 therefore substantially burdens the interstate pork market.

… In the absence of action by Congress, each State may of course adopt health and safety regulations for products sold *in that State*. And each State may regulate as it sees fit with respect to farming, manufacturing, and production practices *in that State*.

Through Proposition 12, however, California has tried something quite different and unusual. It has attempted, in essence, to unilaterally impose its moral and policy preferences for pig farming and pork production on the rest of the Nation. It has sought to deny market access to out-of-state pork producers unless their farming and production practices in those other States comply with California's dictates. The State has aggressively propounded a "California knows best" economic philosophy—where California in effect seeks to regulate pig farming and pork production in *all* of the United States. California's approach undermines federalism and the authority of individual States by forcing individuals and businesses in one State to conduct their farming, manufacturing, and production practices in a manner required by the laws of a *different* State.

Notably, future state laws of this kind might not be confined to the pork industry. [W]hat if a state law prohibits the sale of fruit picked by noncitizens who are unlawfully in the country? What if a state law prohibits the sale of goods produced by workers paid less than $20 per hour? Or as those States suggest, what if a state law prohibits "the retail sale of goods from producers that do not pay for employees' birth control or abortions" (or alternatively, that do pay for employees' birth control or abortions)?

If upheld against all constitutional challenges, California's novel and far-reaching regulation could provide a blueprint for other States. California's law thus may foreshadow a new era where States shutter their markets to goods produced in a way that offends their moral or policy preferences—and in doing so, effectively force other States to regulate in accordance with those idiosyncratic state demands. That is not the Constitution the Framers adopted in Philadelphia in 1787....

Questions

(1) New Jersey, which lies across rivers from both New York City and Philadelphia, has extensive waste-processing facilities. The New Jersey legislature, deciding that the Garden State should not be the garbage dump for the region, passed a Waste Control Act that prohibited the importation of most solid or liquid waste that originated or was collected outside the state. The City of Philadelphia challenged this statute under the dormant Commerce Clause. How should that case have been decided? Is Philadelphia's victory in the actual case consistent with *National Pork Producers?* See *City of Philadelphia v. New Jersey* (1978)

(2) It is certainly not true that Iowa exists just to be driven through. But the facts are that it has well under 1% of the nation's population and that if you drive from New York to San Francisco you will spend about one-sixth of your time on I-80 in Iowa. At one time, Iowa required most truck combinations driven in the state to be no more than 55 feet long. What further facts would you want to know to determine whether this law should have survived attack under the dormant Commerce Clause? It didn't. *Kassel v. Consolidated Freightways Corp.* (1981). Is that outcome consistent with *National Pork Producers*?

(3) In *Mallory v. Norfolk Southern Railway Co.* (2023), the Court held that a Pennsylvania law did not violate Due Process by requiring companies registering to do business in the Commonwealth to agree to appear in its courts on "any cause of action" against them, even ones without a connection to Pennsylvania. Justice Alito, concurring in part and concurring in the judgment, suggested that such a law should be held to violate the dormant Commerce Clause. Was he right? Would your answer depend at all on the facts of the particular case?

Insert the following on p. 747, after the FOR DISCUSSION box.

The Supreme Court explored an alternative statutory ground—expressly reflecting separation-of-powers principles—for limiting the scope of delegations in *West Virginia v. Environmental Protection Agency* (2022). Section 111 of the Clean Air Act authorizes the Agency to prescribe standards of performance for power plants that implement "the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [Agency] determines has been adequately demonstrated." Under the Obama Administration, the EPA adopted a Clean Power Plan that would have effectively required a wholesale shift in electricity production from coal to natural gas and renewables. The Supreme Court stayed implementation of the Plan in 2016, and the Trump Administration repealed it. Challenges to that repeal ultimately reached the Supreme Court. In a 6-3 decision, with Chief Justice Roberts writing for the majority, the Court held that the Plan exceeded the statutory power of the EPA.

The Court based its decision on what it called "the major questions doctrine." As explained by the Chief Justice, in "'extraordinary cases' . . . the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority," requiring that the agency "point to 'clear congressional authorization' for the authority it claims." The Court made clear that its decision was based on "both separation of powers principles and a practical understanding of legislative intent."

Justice Gorsuch, joined by Justice Alito, concurred, arguing that the "major questions" doctrine had constitutional underpinnings. The doctrine was, he said, meant "to ensure that the government does 'not inadvertently cross constitutional lines.' . . . At stake is not just a question of retroactive liability or sovereign immunity, but basic questions about self-government, equality, fair notice, federalism, and the separation of powers."

In dissent, Justice Kagan, joined by Justices Breyer and Sotomayor, emphasized that "Congress has always delegated[—]including on important policy issues." She believed that an "anti-administrative-state stance," which "suffuse[d] the concurrence," motivated the majority to disregard authority that Congress had given the Agency: "The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."

The "major questions" doctrine again played an important role in *Biden v. Nebraska* (2023). The Secretary of Education had forgiven some $500 million of student

loans by invoking a federal statute that authorized the agency, in an emergency (here the COVID pandemic), to "waive or modify any statutory or regulatory provision applicable to the [relevant] student financial assistance programs." A 6-3 majority of the court held that the statute did not authorize this decision. Relying heavily on *West Virginia*, the majority reasoned that the government's argument would "effec[t] a 'fundamental revision of the statute," and that "the 'economic and political significance' of the Secretary's action is staggering by any measure.... It amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending."

Justice Kagan dissented, joined by Justices Jackson and Sotomayor. In her view, "[t]he statute provides the Secretary with broad authority to give emergency relief to student-loan borrowers, including by altering usual discharge rules. What the Secretary did fits comfortably within that delegation." Also citing *West Virginia,* she argued that "the rules of the game change when Congress enacts broad delegations allowing agencies to take substantial regulatory measures. Then, as in this case, the Court reads statutes unnaturally, seeking to cabin their evident scope. And the Court applies heightened-specificity requirements, thwarting Congress's efforts to ensure adequate responses to unforeseen events."

Replace pp. 1136-1177 with the following, inserted after the block quote from the *City of New York Disparity Study* on p. 1136.

The debates over race-conscious remedial action continued after *Croson* and *Adarand*, perhaps most persistently in the context of higher education. As noted above, the paradigm for such litigation was initially set by Justice Powell's controlling concurrence in *Regents of University of California v. Bakke* (1978). That opinion's touchstone was a willingness to approve the consideration of race where used as just one element of a larger effort to achieve campus diversity. Twenty-five years later, this rationale was put to the test in two companion cases involving affirmative action at the University of Michigan: *Grutter v. Bollinger* (law school admissions) and *Gratz v. Bollinger* (undergraduate college admissions).

The Law School policy at issue in *Grutter* drew on Justice Powell's endorsement in *Bakke* of diversity as a compelling reason to consider race in higher-education admissions. The policy noted that diversity "has the potential to enrich everyone's education" and sought to achieve "classes both diverse and academically outstanding." It emphasized in particular "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." The Law School accordingly sought to enroll a "critical mass" of underrepresented minority students. Perhaps careful not to appear to be creating a quota, the administration was never very precise about what constituted a critical mass, beyond saying that it was a number sufficient so that minority students would not feel isolated.

The Court granted certiorari to determine whether in fact "diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities." In a 5-4 decision, per Justice O'Connor, it held in the affirmative. It reaffirmed that "all racial classifications imposed by government" are subject to strict judicial scrutiny. At the same time, it stressed the Law School's "experience and expertise" and the "special niche" that universities occupy in our constitutional tradition, because of "the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment." And so it deferred to "[t]he Law School's educational judgment" that student-body diversity is "essential to its educational mission" and "that a 'critical mass' of underrepresented minorities is necessary" to further that "compelling interest."

Drawing on findings by the District Court, Justice O'Connor emphasized that "the Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different

races,'" making classroom "livelier, more spirited, and simply more enlightening and interesting." The Court relied especially on *amicus* briefs of major businesses and of high-ranking retired officers and civilian leaders of the military, concluding that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.

The Court concluded that, because the Law School engaged "in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment," its use of race as a "plus" factor was narrowly tailored to achieve its compelling interest. In reaching this conclusion, the Court emphasized the similarity of the Law School's program to that of Harvard College, which Justice Powell had held out in *Bakke* as an example of a constitutionally viable admissions program that took account of race.

But because "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti* (1984), the Court asserted that "race-conscious admissions policies must be limited in time." Noting that it had been 25 years since *Bakke*, the Court declared: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas all dissented from at least the principal conclusions of the *Grutter* majority. In *Gratz*, Justice O'Connor joined them to form a majority pointing in the other direction, with Justice Breyer also concurring in the judgment; Justices Stevens, Souter, and Ginsburg dissented. The undergraduate admissions program at issue in *Gratz*, unlike the holistic Law School program, operated on a points scale. A maximum of 150 points was available, 100 guaranteed admission, and candidates with totals below 100 but reasonably close were still viable. Points were allocated on the basis of various factors, including high school GPA, standardized test scores, and alumni relationship. A candidate could get up to 20 points for athletic ability or socioeconomic disadvantage. And every candidate who was a member of an underrepresented racial or ethnic minority group received an automatic 20 points. The Court, per Chief Justice Rehnquist, concluded that this program was not sufficiently narrowly tailored to

For Discussion

It's easy enough to see the appeal of a holistic approach, and the unappealing aspect of an automatic award of points for being a member of a given race. But did the Court get things precisely backwards, in that under a holistic approach it is very difficult at least to determine how much weight admissions officers are giving to race, while under the points system the weight is carefully prescribed?

achieve the asserted interest in diversity.

Though the University had said during litigation that the undergraduate admissions operation was too large to apply a version of the Law School program, immediately after the decisions came down the president of the University proclaimed victory, declaring that the University would modify its undergraduate program to comply with the Court's rulings, and that it would use the "road map" offered by the Court to "find the route that continues [its] commitment to a richly diverse student body."

In the 2006 election, however, the people of Michigan adopted an amendment to the state constitution prohibiting public educational institutions from discriminating against, or granting preferential treatment, to any person in public education, employment, or contracting, on the basis of "race, sex, color, ethnicity, or national origin." In *Schuette v. Coalition to Defend Affirmative Action* (2014), the Court considered a challenge to this provision, based on the claim that it was an unconstitutional restructuring of the political system. The challengers based their argument in large part on *Hunter v. Erickson* (1969) and *Washington v. Seattle School Dist. No. 1* (1982). *Hunter* had held invalid an Akron city charter amendment that prevented the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of the city's voters. *Seattle* invalidated a state law passed by voters' initiative that effectively prohibited busing (unless court-ordered) for desegregative purposes. In *Schuette*, however, the Court rejected this argument by a 6-2 vote.

The *Parents Involved* Case

The Michigan cases involved higher education. In *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), the Supreme Court considered race-conscious remedies adopted by school districts in Seattle and Louisville. According to Chief Justice Roberts, who wrote the lead opinion, both presented the question "whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments."

In Seattle, some high schools were oversubscribed, and the district used a series of tiebreakers to allocate spots. The first was preference for students with a sibling in the school. The second was race. The district was 41% white overall, with 59% classified as "other." If the racial makeup of the school was not within 10% of this allocation, then the

district would choose students whose race "will serve to bring the school into balance." A third tie-breaker was geographical proximity to the school. According to the Chief Justice,

> Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation. It nonetheless employs the racial tiebreaker in an attempt to address the effects of racially identifiable housing patterns on school assignments. Most white students live in the northern part of Seattle, most students of other racial backgrounds in the southern part.

As for the Louisville district, it had operated under a desegregation decree from 1975 to 2000 pursuant to a judicial finding that it had been segregated by law. In 2000, the District Court dissolved the decree after finding that the district had achieved unitary status by eliminating "[t]o the greatest extent practicable" the vestiges of its prior policy of segregation. The next year, the County adopted the voluntary student assignment plan at issue in this case. Approximately 34 percent of the district's 97,000 students were black; most of the remaining 66 percent were white. The plan required all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent. Elementary schools were grouped into clusters. Parents could indicate a choice of school within their cluster, but if a school had reached the "extremes of the racial guidelines," a student whose race would contribute to the school's racial imbalance would not be assigned there.

By a 5–4 vote, the Supreme Court struck down both plans.

The Chief Justice reiterated that distribution of "burdens or benefits on the basis of individual racial classifications is subject to "strict scrutiny," because such classifications "are simply too pernicious to permit any but the most exact connection between justification and classification." The Chief Justice noted that the Court's cases had recognized two compelling interests for the use of race.

One was "remedying the effects of past intentional discrimination." But that did not apply in either case before the Court: the Seattle schools had never been segregated by law, and the Louisville schools had been found by a district court to have achieved "unitary status" after decades under the desegregation decree. The Chief Justice emphasized that "the Constitution is not violated by racial imbalance in the schools, without more." This meant that "[o]nce Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis."

The second compelling interest was "the interest in diversity in higher education."

The Court relied on various distinctions, however, to hold that *Grutter* did not provide a good precedent for the practices here: the First Amendment overtones of *Grutter* were said not to be present outside the context of higher education; the school districts' plans did not provide for individualized consideration; and by viewing race exclusively in binary terms, the school districts had approached the question too simplistically.

In a portion of the opinion with which Justice Kennedy did not concur (and which therefore spoke only for a plurality), the Chief Justice rejected an argument based on the "educational and broader socialization benefits [that] flow from a racially diverse learning environment." Whatever those benefits may be, he wrote, "In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate." The plans were tailored not to achieving the degree of diversity necessary to produce the asserted benefits, but to approximate the respective district's overall demographics, as measured by a binary division.

The Chief Justice also suggested that the relative modesty and amorphousness of the plans (they did not result in many reassignments, and their goals were relatively wide-open) actually counted against them being considered narrowly tailored.

The Chief Justice closed with the following passage:

> The parties and their amici debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." Brief for Appellants in *Brown I*. What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? . . . Before *Brown*, school-children were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons.
>
> For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," *Brown II*, is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race. . . .

Concurring in part and concurring in the judgment, Justice Kennedy wrote a separate opinion to defend school districts' use of race-conscious mechanisms in at least some cases. He rejected in particular the plurality's claim that "'[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,'" calling this argument "too dismissive" and "not sufficient to decide these cases." As Kennedy saw things, "avoiding racial isolation" and "achiev[ing] a diverse student population"—of which race was one component—were compelling interests. For at least some of the reasons discussed by Chief Justice Roberts, however, Kennedy concluded that the Seattle and Louisville school districts were not actually using race in a narrowly tailored way. He went on to discuss some alternative possibilities for promoting diversity and reducing racial isolation. These included strategic selection of sites for new schools, drawing attendance zones with demographic factors in mind, and targeted recruitment of faculty and students.

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented at great length. He argued that the school district plans were narrowly tailored to three compelling interests:

> a historical and remedial element: an interest in setting right the consequences of prior conditions of segregation. . . .
>
> an educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools. . . .
>
> [and] a democratic element: an interest in producing an educational environment that reflects the "pluralistic society" in which our children will live. It is an interest in helping our children learn to work and play together with children of different racial backgrounds. It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation.

Breyer closed by joining the battle over the legacy of *Brown*:

> [S]egregation policies did not simply tell schoolchildren "where they could and could not go to school based on the color of their skin"; they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination. The lesson of history is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a

> cruel distortion of history to compare Topeka, Kansas in the 1950s to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). This is not to deny that there is a cost in applying "a state-mandated racial label." But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation. . . .

Justice Thomas concurred, suggesting that much of Justice Breyer's opinion was irrelevant, because addressed to situations involving *de jure* rather than *de facto* segregation. He also emphasized social science data indicating that black students can succeed in majority-black institutions, and cautioned that "[i]f our history has taught us anything it has taught us to beware of elites bearing racial theories."

Justice Stevens wrote a brief dissent responding that the majority's treatment of *Brown* reminded him of Anatole France's observation: "[T]he majestic equality of the la[w], . . . forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." He emphasized that *School Comm. of Boston v. Board of Education* (1968) had dismissed for want of a substantial federal question an appeal from the decision of the Supreme Judicial Court of Massachusetts upholding a state statute mandating racial integration in the Massachusetts school system in circumstances and for purposes that he suggested were directly comparable here; he was convinced that no member of the Court he joined in 1975 "would have agreed with today's decision."

The Supreme Court returned to the question of affirmative action in higher education when it considered a challenge to the University of Texas's undergraduate admissions program. A Texas statute guaranteed admission to the state's public university to all students who finished in the top 10% of their Texas high school, so long as it complied with certain standards. On top of that state statute, the University also instituted its own separate program meant to follow the *Grutter* road map. A challenger contended that the latter program could not survive strict scrutiny, because the 10% Plan had achieved sufficient diversity without racial classification. On its second trip to the Supreme Court, the program won approval. Justice Kennedy, voting for his first and only time in favor of an affirmative action program, wrote for a 4-3 majority—Justice Scalia having died, and Justice Kagan being recused. *Fisher v. University of Texas ("Fisher II")* (2016). Drawing on prior comments by Justice Ginsburg, he noted that the 10% Plan,

though facially neutral, had to be understood in light of its aim to boost minority enrollment. Because that Plan was not in the University's control, however, it was not at issue in the case. And the majority concluded that the University had reasonably concluded that the Plan had not achieved its goals.

The Texas litigation yielded only a narrow opinion turning on its unusual facts. In *Students for Fair Admissions v. President & Fellows of Harvard College* (2023), however, a full frontal assault on affirmative action in higher education reached the Court. The case challenged racially conscious admissions policies adopted by two universities, one private (Harvard) and the other public (the University of North Carolina). The Court applied the standards of the 14th Amendment's Equal Protection Clause to both institutions, because Title VI of the 1964 Civil Rights Act had previously been held to impose those requirements—as a statutory matter—on any private institution that accepts federal funds. Thus, if the Equal Protection Clause would prevent a public institution from adopting Harvard's policies, then the Civil Rights Act prohibits Harvard from adopting those policies too. The excerpts below focus principally on the Harvard case. As you read the majority opinion, ask yourself whether you think the decision applies *Grutter* or overrules it.

Students for Fair Admissions v. President & Fellows of Harvard College

Supreme Court of the United States, 2023.
2023 WL 4239254.

Chief Justice Roberts delivered the opinion of the Court.

[W]e consider whether the admissions system[] used by Harvard College [is] lawful under the Equal Protection Clause of the Fourteenth Amendment.

I

… Gaining admission to Harvard is … no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. It can also depend on your race.

The admissions process at Harvard works as follows. Every application is initially screened by a "first reader," who assigns scores in six categories: academic, extracurricular, athletic, school support, personal, and overall.… In assigning the overall

rating, the first readers "can and do take an applicant's race into account."

Once the first read process is complete, Harvard convenes admissions subcommittees. Each subcommittee meets for three to five days and evaluates all applicants from a particular geographic area. The subcommittees are responsible for making recommendations to the full admissions committee. The subcommittees can and do take an applicant's race into account when making their recommendations.

The next step of the Harvard process is the full committee meeting. The committee has 40 members, and its discussion centers around the applicants who have been recommended by the regional subcommittees. At the beginning of the meeting, the committee discusses the relative breakdown of applicants by race. The "goal," according to Harvard's director of admissions, "is to make sure that [Harvard does] not hav[e] a dramatic drop-off" in minority admissions from the prior class. Each applicant considered by the full committee is discussed one by one, and every member of the committee must vote on admission. Only when an applicant secures a majority of the full committee's votes is he or she tentatively accepted for admission. At the end of the full committee meeting, the racial composition of the pool of tentatively admitted students is disclosed to the committee.

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

III

… "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving v. Virginia* (1967). Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo v. Hopkins* (1886). For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Calif. v. Bakke* (1978) (opinion of Powell, J.).

Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." *Adarand Constructors v. Pena* (1995). Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." *Grutter v. Bollinger* (2003). Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest. *Fisher v. Univ. of Texas at Austin* (2013).

Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. See, *e.g.*, *Parents Involved v. Seattle* (2007). The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. See *Johnson v. California* (2005).

WORTH NOTING

The Court acknowledged that in *Korematsu v. United States* (1994) internment of Japanese-Americans had been determined to survive "the most rigid scrutiny," but it noted that *Trump v.* Hawaii, p. 998, had since "recogniz[e]d that [*Korematsu*] was 'gravely wrong the day it was decided.'"

[In] *Grutter v. Bollinger* (2003), … the Court for the first time "endorse[d] [the] view that student body diversity is a compelling state interest that can justify the use of race in university admissions." … In achieving that goal, however, the Court made clear . . . that the law school was limited in the means that it could pursue. The school could not "establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks." …

Grutter [also] imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. This requirement was critical, and *Grutter* emphasized it repeatedly….

IV

Twenty years later, no end is in sight. "Harvard's view about when [race-based admissions will end] doesn't have a date on it." Tr. of Oral Arg. Yet [Harvard] insist[s] that the use of race in [its] admissions programs must continue.

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

the Fourteenth Amendment.

A

Because "[r]acial discrimination [is] invidious in all contexts," we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny, *Fisher v. Univ. of Texas at Austin* (2016). "Classifying and assigning" students based on their race "requires more than … an amorphous end to justify it." *Parents Involved.*

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

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

Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature…. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class "whole for [the] injuries [they] suffered." And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students "compar[able] to what it would have been in the absence of such

FOR DISCUSSION

Do you agree with the Court that the goals it identifies in the workplace discrimination and school segregation cases are more measurable and tractable to judicial inquiry than the goals offered by Harvard in this case?

constitutional violations."

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

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

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. See, *e.g.*, Pew Research Center, Who is Hispanic? (Sept. 15, 2022) (referencing the "long history of changing labels [and] shifting categories … reflect[ing] evolving cultural norms about what it means to be Hispanic or Latino in the U. S. today")….

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

The universities' main response to these criticisms is, essentially, "trust us." None of the questions recited above need answering, they say, because universities are "owed deference" when using race to benefit some applicants but not others…. Universities may

define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review.... The programs at issue here do not satisfy that standard.[5]

B

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

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

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

Respondents also suggest that race is not a negative factor because it does not impact many admissions decisions. Yet, at the same time, respondents also maintain that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned. And they acknowledge that race is determinative for at least some—if not many—of the students they admit. How else but "negative" can race be

[5] For that reason, one dissent candidly advocates abandoning the demands of strict scrutiny. See (opinion of Jackson, J.) (arguing the Court must "get out of the way," "leav[e] well enough alone," and defer to universities and "experts" in determining who should be discriminated against). An opinion professing fidelity to history (to say nothing of the law) should surely see the folly in that approach.

described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been? …

Respondents' admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*…. Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake…. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke* (opinion of Powell, J.).

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

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

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

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

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

Share of Students Admitted to Harvard by Race			
	African-American Share of Class	Hispanic Share of Class	Asian-American Share of Class
Class of 2009	11%	8%	18%
Class of 2010	10%	10%	18%
Class of 2011	10%	10%	19%
Class of 2012	10%	9%	19%
Class of 2013	10%	11%	17%
Class of 2014	11%	9%	20%
Class of 2015	12%	11%	19%
Class of 2016	10%	9%	20%
Class of 2017	11%	10%	20%
Class of 2018	12%	12%	19%

Harvard's focus on numbers is obvious....

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

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

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

Finally, respondents argue that their programs need not have an end point at all because they frequently review them to determine whether they remain necessary. Respondents point to language in *Grutter* that, they contend, permits "the durational requirement [to] be met" with "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional. To the contrary, the Court made clear that race-based admissions programs eventually had to end—despite whatever periodic review universities conducted.

Here, however, Harvard concedes that its race-based admissions program has no end point. Brief for Respondent (Harvard "has not set a sunset date" for its program). And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. Tr. of Oral Arg.…. In short, there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon….

VI

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

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority

opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name." A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice….

Justice Thomas, concurring.

[Thomas wrote separately "to explain further the flaws of the Court's *Grutter* jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination." Arguing that "*Grutter* is, for all intents and purposes, overruled," he concluded as follows:]

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

Justice Gorsuch, joined by Justice Thomas, concurring.

… Today, the Court holds that the Equal Protection Clause of the Fourteenth Amendment does not tolerate this practice. I write to emphasize that Title VI of the Civil Rights Act of 1964 does not either. [Gorsuch argued that Title VI has "independent force," creating a flat and symmetrical rule prohibiting covered institutions from treating some applicants worse than others because of their race. In reaching this conclusion, he relied heavily on the logic of his majority opinion in *Bostock v. Clayton County* (2020) (holding that the Civil Rights Act's sex discrimination protections apply to and prohibit

discrimination on the basis of sexual orientation or transgender status.]

Justice Kavanaugh, concurring.

[Kavanaugh argued that the *Grutter* majority's reference to an expectation that affirmative action would no longer be necessary in 25 years had in fact been a holding of the Court, imposing a hard stop on such practices. He concluded that] [i]n light of the Constitution's text, history, and precedent, the Court's decision today appropriately respects and abides by *Grutter*'s explicit temporal limit on the use of race-based affirmative action in higher education.

Justice Sotomayor, joined by Justices Kagan and Jackson, dissenting.

The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind....

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

I

A

... Proponents of the [Fourteenth] Amendment declared that one of its key goals was to "protec[t] the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." Cong. Globe (1866) (statement of Sen. Howard).... To promote this goal, Congress enshrined a broad guarantee of equality in the Equal Protection Clause of the Amendment. That Clause commands that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

Congress chose its words carefully, opting for expansive language that focused on

equal protection and rejecting "proposals that would have made the Constitution explicitly color-blind." A. Kull, The Color-Blind Constitution (1992); see also, *e.g.*, Cong. Globe (rejecting proposed language providing that "no State ... shall ... recognize any distinction between citizens ... on account of race or color"). This choice makes it clear that the Fourteenth Amendment does not impose a blanket ban on race-conscious policies.

Simultaneously with the passage of the Fourteenth Amendment, Congress enacted a number of race-conscious laws to fulfill the Amendment's promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race to achieve its goal. One such law was the Freedmen's Bureau Act, enacted in 1865 and then expanded in 1866, which established a federal agency to provide certain benefits to refugees and newly emancipated freedmen. For the Bureau, education "was the foundation upon which all efforts to assist the freedmen rested." E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877 (1988). Consistent with that view, the Bureau provided essential "funding for black education during Reconstruction."

Black people were the targeted beneficiaries of the Bureau's programs, especially when it came to investments in education in the wake of the Civil War. Each year surrounding the passage of the Fourteenth Amendment, the Bureau "educated approximately 100,000 students, nearly all of them black," and regardless of "degree of past disadvantage." The Bureau also provided land and funding to establish some of our Nation's Historically Black Colleges and Universities (HBCUs). In 1867, for example, the Bureau provided Howard University tens of thousands of dollars to buy property and construct its campus in our Nation's capital. Howard University was designed to provide "special opportunities for a higher education to the newly enfranchised of the south," but it was available to all Black people, "whatever may have been their previous condition." Bureau of Refugees, Freedmen and Abandoned Lands, Sixth Semi-Annual Report on Schools for Freedmen (July 1, 1868). The Bureau also "expended a total of $407,752.21 on black colleges, and only $3,000 on white colleges" from 1867 to 1870.

Indeed, contemporaries understood that the Freedmen's Bureau Act benefited Black people. Supporters defended the law by stressing its race-conscious approach.... Opponents argued that the Act created harmful racial classifications that favored Black people and disfavored white Americans. See, *e.g.*, Cong. Globe (Sen. Willey) (the Act makes "a distinction on account of color between the two races"), *id.* (Taylor) (the Act is "legislation for a particular class of the blacks to the exclusion of all whites"), *id.* (statement of Rep. Rousseau) ("You raise a spirit of antagonism between the black race and the white race in our country, and the law-abiding will be powerless to control it"). President Andrew Johnson vetoed the bill on the basis that it provided benefits "to a

particular class of citizens," but Congress overrode his veto. Thus, rejecting those opponents' objections, the same Reconstruction Congress that passed the Fourteenth Amendment eschewed the concept of colorblindness as sufficient to remedy inequality in education....

Congress similarly appropriated federal dollars explicitly and solely for the benefit of racial minorities. For example, it appropriated money for "'the relief of destitute colored women and children,'" without regard to prior enslavement. Several times during and after the passage of the Fourteenth Amendment, Congress also made special appropriations and adopted special protections for the bounty and prize money owed to "colored soldiers and sailors" of the Union Army. In doing so, it rebuffed objections to these measures as "class legislation" "applicable to colored people and not ... to the white people." Cong. Globe (Sen. Grimes). This history makes it "inconceivable" that race-conscious college admissions are unconstitutional. *Bakke* (opinion of Marshall, J.)

D

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

After more than a century of government policies enforcing racial segregation by law, society remains highly segregated. About half of all Latino and Black students attend a racially homogeneous school with at least 75% minority student enrollment. The share of intensely segregated minority schools (*i.e.*, schools that enroll 90% to 100% racial minorities) has sharply increased.... Moreover, underrepresented minority students are more likely to live in poverty and attend schools with a high concentration of poverty. When combined with residential segregation and school funding systems that rely heavily on local property taxes, this leads to racial minority students attending schools with fewer resources. See *San Antonio Independent School Dist. v. Rodriguez* (1973) (Marshall J., dissenting) (noting school funding disparities that result from local property taxation). In turn, underrepresented minorities are more likely to attend schools with less qualified teachers, less challenging curricula, lower standardized test scores, and fewer extracurricular activities and advanced placement courses. It is thus unsurprising that there are achievement gaps along racial lines, even after controlling for income differences.

Systemic inequities disadvantaging underrepresented racial minorities exist beyond school resources. Students of color, particularly Black students, are disproportionately disciplined or suspended, interrupting their academic progress and increasing their risk of involvement with the criminal justice system. Underrepresented minorities are less likely to have parents with a postsecondary education who may be familiar with the college application process. Further, low-income children of color are less likely to attend preschool and other early childhood education programs that increase educational attainment. All of these interlocked factors place underrepresented minorities multiple steps behind the starting line in the race for college admissions….

These opportunity gaps "result in fewer students from underrepresented backgrounds even applying to" college, particularly elite universities. Brief for Massachusetts Institute of Technology et al. as *Amici Curiae*…. Consistent with this reality, Latino and Black students are less likely to enroll in institutions of higher education than their white peers.

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

2

… Harvard [also has a] sordid legac[y] of racial exclusion…. From Harvard's founding, slavery and racial subordination were integral parts of the institution's funding, intellectual production, and campus life. Harvard and its donors had extensive financial ties to, and profited from, the slave trade, the labor of enslaved people, and slavery-related investments. As Harvard now recognizes, the accumulation of this wealth was "vital to the University's growth" and establishment as an elite, national institution. Harvard & the Legacy of Slavery, Report by the President and Fellows of Harvard College (2022). Harvard suppressed antislavery views, and enslaved persons "served Harvard presidents and professors and fed and cared for Harvard students" on campus.

Exclusion and discrimination continued to be a part of campus life well into the 20th century. Harvard's leadership and prominent professors openly promoted "'race science,'" racist eugenics, and other theories rooted in racial hierarchy…. The university also "prized the admission of academically able Anglo-Saxon students from elite backgrounds—including wealthy white sons of the South." By contrast, an average of three Black students enrolled at Harvard each year during the five decades between 1890 and 1940. Those Black students who managed to enroll at Harvard "excelled academically,

earning equal or better academic records than most white students," but faced the challenges of the deeply rooted legacy of slavery and racism on campus....

... It is against this historical backdrop that Harvard [has] reckoned with [its] past and its lingering effects....

II

The Court today ... turn[s] a blind eye to these truths and overrul[es] decades of precedent, "content for now to disguise" its ruling as an application of "established law and move on." As Justice Thomas puts it, "*Grutter* is, for all intents and purposes, overruled."

It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*. The Court simply moves the goalposts, upsetting settled expectations and throwing admissions programs nationwide into turmoil. In the end, however, it is clear why the Court is forced to change the rules of the game to reach its desired outcome: Under a faithful application of the Court's settled legal framework, Harvard['s] admissions program [is]constitutional ....

.... Harvard has already implemented many of SFFA's proposals, such as increasing recruitment efforts and financial aid for low-income students.... SFFA's argument before this Court is that Harvard should adopt a plan designed by SFFA's expert for purposes of trial, which increases preferences for low-income applicants and eliminates the use of race and legacy preferences. Under SFFA's model, however, Black representation would plummet by about 32%, and the admitted share of applicants with high academic ratings would decrease, as would the share with high extracurricular and athletic ratings.... Neither this Court's precedents nor common sense impose that type of burden on colleges and universities.

... The Court has explained that a university can consider a student's race in its admissions process so long as that use is "contextual and does not operate as a mechanical plus factor." The Court has also repeatedly held that race, when considered as one factor of many in the context of holistic review, "can make a difference to whether an application is accepted or rejected." After all, race-conscious admissions seek to improve racial diversity. Race cannot, however, be "'decisive' for virtually every minimally qualified underrepresented minority applicant."

That is precisely how Harvard's program operates. In recent years, Harvard has received about 35,000 applications for a class with about 1,600 seats. The admissions process is exceedingly competitive; it involves six different application components.

Those components include interviews with alumni and admissions officers, as well as consideration of a whole range of information, such as grades, test scores, recommendation letters, and personal essays, by several committees. Consistent with that "individualized, holistic review process," admissions officers may, but need not, consider a student's self-reported racial identity when assigning overall ratings. Even after so many layers of competitive review, Harvard typically ends up with about 2,000 tentative admits, more students than the 1,600 or so that the university can admit. To choose among those highly qualified candidates, Harvard considers "plus factors," which can help "tip an applicant into Harvard's admitted class." To diversify its class, Harvard awards "tips" for a variety of reasons, including geographic factors, socioeconomic status, ethnicity, and race.

There is "no evidence of any mechanical use of tips." Consistent with the Court's precedents, Harvard properly "considers race as part of a holistic review process," "values all types of diversity," "does not consider race exclusively," and "does not award a fixed amount of points to applicants because of their race." Indeed, Harvard's admissions process is so competitive and the use of race is so limited and flexible that, as "SFFA's own expert's analysis" showed, "Harvard rejects more than two-thirds of Hispanic applicants and slightly less than half of all African-American applicants who are among the top 10% most academically promising applicants." …

WORTH NOTING

The Harvard admissions policy now found unconstitutional is in fact substantively very similar to what it was when Justice Powell held it up as a model in *Bakke*.

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

The Court ignores these careful findings and concludes that Harvard engages in racial balancing because its "focus on numbers is obvious." Because SFFA failed to offer an expert and to prove its claim below, the majority is forced to reconstruct the record and conduct its own factual analysis. It thus relies on a single chart from SFFA's brief that truncates relevant data in the record. That chart cannot displace the careful factfinding by the District Court, which the First Circuit upheld on appeal under clear error review.

In any event, the chart is misleading and ignores "the broader context" of the underlying data that it purports to summarize. As the First Circuit concluded, what the data actually show is that admissions have increased for all racial minorities, including Asian American students, whose admissions numbers have "increased roughly five-fold since 1980 and roughly two-fold since 1990." The data also show that the racial shares of admitted applicants fluctuate more than the corresponding racial shares of total applicants, which is "the opposite of what one would expect if Harvard imposed a quota." Even looking at the Court's truncated period for the classes of 2009 to 2018, "the same pattern holds." The fact that Harvard's racial shares of admitted applicants "varies relatively little in absolute terms for [those classes] is unsurprising and reflects the fact that the racial makeup of Harvard's applicant pool also varies very little over this period." Thus, properly understood, the data show that Harvard "does not utilize quotas and does not engage in racial balancing." …

* * *

… Today, this Court overrules decades of precedent and imposes a superficial rule of race blindness on the Nation. The devastating impact of this decision cannot be overstated. The majority's vision of race neutrality will entrench racial segregation in higher education because racial inequality will persist so long as it is ignored.…

Justice Jackson, joined by Justices Sotomayor and Kagan, dissenting.

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

WORTH NOTING

Justice Jackson, formerly a member of the Harvard Board of Overseers, was recused from participating in the Harvard case, so as a formal matter her participation applied only to the North Carolina case. Given that the cases were decided together, should she have recused herself completely?

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

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

These stories are not every student's story. But they are many students' stories. To demand that colleges ignore race in today's admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters. It also condemns our society to never escape the past that explains *how and why* race matters to the very concept of who "merits" admission….

UNC's program permits, but does not require, admissions officers to value both John's and James's love for their State, their high schools' rigor, and whether either has overcome obstacles that are indicative of their "persistence of commitment." It permits, but does not require, them to value John's identity as a child of UNC alumni (or, perhaps, if things had turned out differently, as a first-generation White student from Appalachia whose family struggled to make ends meet during the Great Recession). And it permits, but does not require, them to value James's race—not in the abstract, but as an element of who he is, no less than his love for his State, his high school courses, and the obstacles he has overcome.

Understood properly, then, what SFFA caricatures as an unfair race-based preference cashes out, in a holistic system, to a personalized assessment of the advantages and disadvantages that every applicant might have received by accident of birth plus all that has happened to them since. It ensures a full accounting of everything that bears on the individual's resilience and likelihood of enhancing the UNC campus. It also forecasts his potential for entering the wider world upon graduation and making a meaningful contribution to the larger, collective, societal goal that the Equal Protection Clause embodies (its guarantee that the United States of America offers genuinely equal treatment to every person, regardless of race)…..

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does

not make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems.

No one benefits from ignorance. Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today's ruling makes things worse, not better. The best that can be said of the majority's perspective is that it proceeds (ostrich-like) from the hope that preventing consideration of race will end racism. But if that is its motivation, the majority proceeds in vain. If the colleges of this country are required to ignore a thing that matters, it will not just go away. It will take *longer* for racism to leave us. And, ultimately, ignoring race just makes it matter more....

Insert the following after the discussion of tiers of scrutiny on p. 1181, immediately after the Rehnquist excerpt from *Sugarman v. Dougall*.

In recent years, the "tiers of scrutiny" framework has come under increasingly close scrutiny from skeptics on the Supreme Court. In *New York State Rifle & Pistol Association v. Bruen* (2022), *supra* Supplement addition to p. 250, the Court responded to a Second Amendment challenge to a New York State licensing law by dropping the tiers of scrutiny entirely. En route to finding the state statute unconstitutional, Justice Thomas's opinion for the majority offered the following methodological observations:

> Since *Heller* and *McDonald*, the two-step test that Courts of Appeals have developed to assess Second Amendment claims proceeds as follows. At the first step, the government may justify its regulation by "establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood." But if the historical evidence at this step is "inconclusive or suggests that the regulated activity is not categorically unprotected," the courts generally proceed to step two. At the second step, courts often analyze "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right." If a "core" Second Amendment right is burdened, courts apply "strict scrutiny" .... Otherwise, they apply intermediate scrutiny ....
>
> Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms....
>
> *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." *Heller*....

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

The Court acknowledged that this inquiry would often be difficult, but argued that it was better than the alternative:

> To be sure, "[h]istorical analysis can be difficult . . . ." 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. *McDonald* (plurality opinion).
>
> The dissent claims that … 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. W. Baude & S. Sachs, Originalism and the Law of the Past, 37 L. & Hist. Rev. 80 (2019). For example, "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith* (2020). Courts are thus entitled to decide a case based on the historical record compiled by the parties.

The Court then offered some guidelines about the process by which its version of historical inquiry was expected to proceed:

> In some cases, [the] 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.

Heller itself exemplifies this kind of straightforward historical inquiry. One of the District's regulations challenged in *Heller* "totally ban[ned] handgun possession in the home." The District in *Heller* addressed a perceived societal problem—firearm violence in densely populated communities—and it employed a regulation—a flat ban on the possession of handguns in the home—that the Founders themselves could have adopted to confront that problem. Accordingly, after considering "founding-era historical precedent," including "various restrictive laws in the colonial period," and finding that none was analogous to the District's ban, *Heller* concluded that the handgun ban was unconstitutional.

[O]ther 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. . . . 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. See, e.g., *United States v. Jones* ([holding unconstitutional the use by law enforcement of a tracking device]). . . . 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. Cf. *Caetano v. Massachusetts* (2016) (stun guns).

[C]onsideration of modern regulations that were unimaginable at the founding . . . will often involve reasoning by analogy—a commonplace task for any lawyer or judge. . . . [D]etermining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar." C. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741 (1993). . . . For instance, a green truck and a green hat are relevantly similar if one's metric is "things that are green." They are not relevantly similar if the applicable metric is "things you can wear." . . .

As we stated in *Heller* and repeated in *McDonald*, "individual self-defense is 'the central component' of the Second Amendment right." Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is

> comparably justified are "'central'" considerations when engaging in an analogical inquiry. . . .
>
> 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.

The Court closed its methodological section with a discussion of "sensitive places" for which historical regulations might offer persuasive analogies warranting restrictions:

> 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. . . .
>
> [We] think respondents err in their attempt to characterize New York's proper-cause requirement as a "sensitive-place" law. . . . [E]xpanding the category of "sensitive places" simply to all places of public congregation that are not isolated from law enforcement defines the category of "sensitive places" far too broadly. Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below. 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.

Justice Breyer dissented in *Bruen*, writing an opinion that was joined by Justices Sotomayor and Kagan. He took sharp issue with the methodology adopted by Thomas's majority opinion.

> [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." As the Court points out, we do look to history in the First Amendment context to determine "whether the expressive conduct falls outside of the category of protected speech." But, if 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. See, e.g., *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011) (applying strict scrutiny to laws that burden political speech); *Ward v. Rock Against Racism* (1989) (applying intermediate scrutiny to time, place, and manner restrictions); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.* (1980) (applying intermediate scrutiny to laws that burden commercial speech).
>
> Additionally, beyond the right to freedom of speech, we regularly use means-end scrutiny in cases involving other constitutional provisions. [*Justice Breyer here discusses the Court's precedent under the Free Exercise and Equal Protection Clauses, as well as the Fourth Amendment*.] 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. . . .

Breyer then argued that the majority's exclusively historical approach created a number of serious problems. First,

> [t]he 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. . . .

After the passage contending that *Heller* was marred by pervasive historiographical errors (which is presented above in the Supplement addition to p. 250), and after citing a lengthy list of scholarship criticizing *Heller*'s historical conclusions, Breyer concluded that 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."

The second problem with the majority's approach, Breyer argued, was its blithe embrace of analogical reasoning.

> . . . 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.

This challenge, Breyer predicted, would make history "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. . . .

This problem is all the more acute when it comes to "modern-day circumstances that [the Framers] could not have anticipated." How can we expect laws and cases that are over a century old to dictate the legality of regulations targeting "ghost guns" constructed with the aid of a three-dimensional printer? Or modern laws requiring all gun shops to offer smart guns, which can only be fired by authorized users? Or laws imposing additional criminal penalties for the use of bullets capable of piercing body armor? . . .

Even seemingly straightforward historical restrictions on firearm use may prove surprisingly difficult to apply to modern circumstances. The Court affirms *Heller*'s recognition that States may forbid public carriage in "sensitive places." But what, in 21st-century New York City, may properly be considered a sensitive place? [W]here does [the Court's discussion of "analogical reasoning"] leave the many locations in a modern city with no obvious 18th- or 19th-century analogue? What about subways, nightclubs, movie theaters, and sports stadiums? The Court does not say. . . .

Laws addressing repeating crossbows, launcegays, dirks, dagges, skeines, stilladers, and other ancient weapons will be of little help to courts confronting modern problems. And as technological progress pushes our society ever further beyond the bounds of the Framers' imaginations, attempts at "analogical reasoning" will become increasingly tortured. In short, a standard that relies solely on history is unjustifiable and unworkable.

Questions

1. Who do you think has the better of the debate about methodology in *Bruen*:
    a. . . . as a matter of consistency with doctrine in other areas?
    b. . . . as a matter of reining in the possibility of judicial policymaking, whether intentional or otherwise?
    c. . . . as a matter of judicial competence?
    d. . . . as a matter of seeking the least-worst approach to judicial interpretation?

Insert the following on p. 1188, after *Palmore v. Sidoti*.

FOR DISCUSSION

In an attempt to keep Native American children connected to Native American families, the Indian Child Welfare Act (ICWA) sets up a system of preferences that apply absent good cause in adoption and foster-care proceedings involving an Indian child (defined to include not only one who is a member of a tribe but also one who is eligible for membership and the biological child of a member). Indian families and institutions from any tribe outrank unrelated non-Indians and non-Indian institutions. ICWA thus displaces the "best interests" determination that governs most state law adoption and foster-care proceedings. In addition, in an action seeking to terminate an Indian's parental rights or to remove a child from an unsafe environment, ICWA imposes stringent procedural prerequisites and precludes relief absent a demonstration (with expert testimony and under a heightened burden of proof) that the child is otherwise likely to suffer "serious emotional or physical damage." Do these provisions violate Equal Protection principles? *See Haaland v. Brackeen* (2023) (not reaching the issue, on standing grounds).

Insert the following after *McDonald v. Chicago*, p. 1330.

Notes and Questions.

1. "*Jot for jot*" - Justice Stevens's dissent argues that the states and the federal government should at least sometimes be governed by different constitutional standards for the rights that are incorporated by the Fourteenth Amendment. As the *McDonald* majority notes, the Court's own precedent has long since rejected this "two-tier" approach to incorporation in favor of what is usually known as the "jot for jot" approach, under which the right is interpreted identically for both state and federal action.

   A decade later, the Court offered the following succinct summary of the situation in striking down a New York State gun control law in *New York State Rifle & Pistol Association v. Bruen* (2022):

   > Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. See, e.g., Barron v. Mayor of Baltimore (1833) (Bill of Rights applies only to the Federal Government) [p. 61 of the casebook]. 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. And we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791.

2. *1789 vs 1868* - The *Bruen* Court went on to note that a related methodological issue remained unsettled:

   > We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government). See, e.g., A. Amar, The Bill of Rights: Creation and Reconstruction (1998); K. Lash, Re-Speaking the Bill of Rights: A New Doctrine of Incorporation (2021) (manuscript) ("When the people adopted the Fourteenth Amendment into existence, they readopted the original Bill of Rights, and did so in a manner that invested those original

> 1791 texts with new 1868 meanings"). We need not address this issue today because, as we explain below, the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry.

For originalists, which understanding of the right to keep and bear arms should matter most: the one dominant in 1868 or the one dominant in 1789? Does your answer change depending on which government is regulating? Should it? If it does, how that consistent with the "jot for jot" view?

Replace pp. 1407-60 with the following.

c. SDP—Abortion

In many ways, the issue of abortion has dominated American constitutional law for the last half century. When people talk about rights of privacy, they are talking about abortion. When they talk about judicial activism, they are talking (at least in large part) about abortion. When they talk about respect for precedent, they are talking about abortion. Even when abortion hasn't been the formal focus of Supreme Court nominations and confirmations, it has been heard loudly from just offstage. And so the issue has played a crucial role in presidential elections as well. If the justices who formed the majority in *Roe v. Wade* (1973) and *Planned Parenthood v.* Casey (1992) thought they were resolving a great national issue, they proved to be very wrong; the issue never quieted down, and few if any issues arouse such intense passion on both sides of the debate. In 2022, the Court overruled *Roe* and *Casey* in a case called *Dobbs v. Jackson Women's Health Organization*. And so, for now at least, the main battle will move away from the constitutional arena and be concentrated in the political realm—but further constitutional issues are likely to arise even in the near term.

Before *Roe*

Under the common law, abortion was a crime if performed after "quickening"—the first recognizable movement of the fetus in the uterus, which usually occurs between the 16th and 18th weeks of pregnancy; some authorities condemned it even if performed before quickening, but it does not appear to have been an indictable offense. In 1803, Lord Ellenborough's Act in England made abortion of a quick fetus a capital crime and provided lesser penalties for abortion before quickening. In the United States, the middle years of the 19th century saw most states make abortion a crime whenever performed, unless necessary to preserve the life of the mother. Over time, penalties were generally increased, with distinctions based on quickening gradually disappearing. In 1868, when the Fourteenth Amendment was adopted, abortion limitations were in effect in 36 states and territories—including Texas, where *Roe* originated and which had not substantially changed its law since 1857—and there was apparently no question concerning their validity.

As late as 1967, the American Medical Association (AMA) passed a resolution opposing abortion except in very restrictive circumstances. But by then a liberalizing trend had begun. By the time the Supreme Court decided *Roe v. Wade* in 1973, fourteen states had adopted some form of a model ALI statute, which prohibited abortion unless a licensed physician concluded that there was a "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the

child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse." And a few states more generally decriminalized abortions performed early in pregnancy. Perhaps the most notable statute was New York's, enacted by a Republican legislature and signed by a Republican governor, which permitted physician-performed abortions within the first 24 weeks of pregnancy as well as to preserve the life of the mother. By the time the Supreme Court decided *Roe*, several lower courts, including the district court in *Roe* itself, had held some of the restrictive statutes unconstitutional.

Roe v. Wade

Roe concerned a Texas statute that was typical of abortion restrictions then in force: it prohibited abortion unless performed, on medical advice, "for the purpose of saving the life of the mother." But the effect of the decision, which held 7-2 that the Constitution's Due Process Clauses significantly limits the ability of governments to prohibit abortion, was to render the law of every state invalid at least in part. Five members of the majority, including Justice Blackmun, author of the Court's opinion, had been appointed by Republican presidents; one dissenter (Justice Rehnquist) was a Republican appointee, and one (Justice White) was a Democratic appointee.

Justice Blackmun conducted an extensive history of the regulation of abortion, going back to the ancient Persians, Greeks, and Romans. His aim was to show that the "restrictive criminal abortion laws" then in effect in most states were "of relatively recent vintage." He also examined at length the evolving positions of the AMA, the American Public Health Association, and the American Bar Association, each of which had very recently—in the 1970s—taken positions in favor of making abortion services available, at least early in pregnancy.

The Court perceived two significant interests that could, depending on the circumstances, justify restrictions on the availability of abortion. One was the health risks of the procedure. Justice Blackmun noted that modern medical techniques had made early-term abortions "relatively safe," with mortality rates for women[*]—as low as or lower than those for "normal childbirth"—at least where the procedure was legal. But the State retained "a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." And the risk to the woman's health and safety increased as the pregnancy continued.

[*] Ed. note – Throughout this section, we follow the Court's use of "woman" in referring to people seeking abortions.

The other significant state interest was in protecting prenatal life. This interest did not depend on acceptance of the view that human life begins at conception, or even before; the State retained an interest at least in "potential life."

Against these interests stood "a right of personal privacy, or a guarantee of certain areas or zones of privacy" that the Court had recognized under the Constitution; among other cases the Court cited for this proposition were several that have featured in this casebook: *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Palko v. Connecticut*, *Skinner v. Oklahoma*, *Griswold v. Connecticut*, *Loving v. Virginia*, and *Eisenstadt v. Baird*.

This right, which the Court saw as "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action," was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Court highlighted several harms caused by the denial of choice:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

And so the Court concluded that "the right of personal privacy includes the abortion decision." In light of the state interests it had articulated, however, the Court declined to hold that there was an absolute right of abortion that would allow a woman "to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." Rather, as where other "fundamental rights" were involved, the Court sought to determine the circumstances in which a "compelling state interest" would support a "narrowly drawn" enactment.

In attempting to solve this problem, the Court noted "the wide divergence of thinking on [the] most sensitive and difficult question" of when life begins, and it declined to provide an answer:

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

The Court did hold clearly, however, that the fetus is not "a 'person' within the language and meaning of the Fourteenth Amendment" and that "the unborn have never been recognized in the law as persons in the whole sense." The Court noted that most of the Constitution's uses of the word "person" were "such that it has application only postnatally," and that none indicated "with any assurance" a possible prenatal application. "In areas other than criminal abortion," it pointed out, "the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth, or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth." Thus, an action brought by the parents of a stillborn child for wrongful death because of prenatal injuries—even where allowed—sought "to vindicate the parents' interest" and so was "consistent with the view that the fetus, at most, represents only the potentiality of life." And though unborn children could acquire interests in property, perfection of the interests was generally "contingent upon live birth."

The Court then concluded that, "in the light of present medical knowledge," the State's interest in the health of the mother became compelling "at approximately the end of the first trimester," because before that point "mortality in abortion may be less than mortality in normal childbirth." Until then, "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. And after that point, a regulation that "reasonably relates to the preservation and protection of maternal health" would be permissible.

WORTH NOTING

Does the primacy given the physician seem odd? Perhaps at least part of an explanation lies in the fact that from 1950 to 1959, before Justice Blackmun became a judge, he was resident counsel for the Mayo Clinic.

Further, the State's interest in protecting potential life became compelling at viability (around the start of the third trimester with then-current medical technology), because at that point "the fetus then presumably has the capability of meaningful life outside the mother's womb." From then on, the State could prohibit abortion, "except when it is necessary to preserve the life or health of the mother."

After repeating and summarizing this three-stage framework, the Court emphasized that "up to the points where important state interests provide compelling justifications for intervention[,] the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."

There were three concurring opinions, by Chief Justice Burger and Justices Douglas and Stewart, and two dissenting ones, by Justices White and Rehnquist; all but Justice Stewart's applied as well to a companion case from Georgia, *Doe v. Bolton*.

After conceding that *Ferguson v. Skrupa* had "purported to sound the death knell for the doctrine of substantive due process" in 1963, Justice Stewart characterized *Griswold* (from which he had dissented) as "one in a long line of pre-*Skrupa* cases" decided under that doctrine, and declared, "I now accept it as such." In his view, the decisions had made clear that "freedom of personal choice in matters of marriage and family life" was one of the liberties protected by Due Process, and it necessarily included the decision whether to terminate a pregnancy. The State's interests were "amply sufficient" to support some regulation, but not "the broad abridgement of personal liberty worked by the existing Texas law."

Emphasizing that "the vast majority of physicians . . . act only on the basis of carefully deliberated medical judgments relating to life and health," Chief Justice Burger asserted, "Plainly, the Court today rejects any claim that the Constitution requires abortions on demand."

Justice Douglas gave a long catalogue of rights that he believed came within the meaning of "liberty" as used in the Fourteenth Amendment. These included "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children," and "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf." The "basic decision whether to bear an unwanted child" came within this realm, but the State also had "interests to protect," and "voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society."

In dissent, Justice White, joined by Justice Rehnquist, said:

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers . . . . The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but, in my view, its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

> The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

In a separate dissent, Justice Rehnquist challenged the conclusion that a right of "privacy" was involved: "A transaction resulting in an operation such as this is not 'private' in the ordinary usage of the word." If the Court meant a claim "to be free from unwanted state regulation of consensual transactions," then the test would be the ordinary one of rational-basis scrutiny, whether the challenged law had "a rational relation to a valid state objective." *Williamson v. Lee Optical* (1955). Thus, he would have "little doubt" that a statute prohibiting abortion even where the mother's life was in jeopardy "would lack a rational relation to a valid state objective under the test stated in *Williamson*." But the Court's "sweeping invalidation of any restrictions on abortion during the first trimester" was "impossible to justify under that standard," and the Court's "conscious weighing of competing factors" and the resulting three-part structure were "far more appropriate to a legislative judgment than to a judicial one." Moreover, the prevalence and long standing of state restrictions on abortion were, to him, "a strong indication . . . that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"

From *Roe to Casey*

The decision in *Roe v. Wade* had many effects. One, beginning immediately with the companion case of *Doe v. Bolton* and continuing for nearly half a century, was the development of a large and contentious body of caselaw determining which abortion regulations were acceptable and which were not. (In *Doe*, the Court invalidated several Georgia regulations, one of which required that the abortion be performed in an accredited hospital.) Another was a powerful and durable political backlash, especially from the political right. By 1984, the Republican Party platform provided that "the unborn child has a fundamental individual right to life which cannot be infringed," called for "legislation to make clear that the Fourteenth Amendment's protections apply to unborn

children," and promised "the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."

On the backdrop of this political focus on judicial nominations, Republican presidents were able to replace three members of the *Roe* majority who retired from 1988 to 1991. Many expected the new justices—Anthony Kennedy, David Souter, and Clarence Thomas—to form the heart of a voting bloc that would overrule *Roe v. Wade*. That expectation was put to the test in *Planned Parenthood v. Casey* (1992), which seemed a plausible vehicle for a decision overruling *Roe* and abandoning the constitutional protection of abortion rights.

Planned Parenthood of Southeastern Pennsylvania v. Casey

This case was a challenge to various provisions of the Pennsylvania Abortion Control Act of 1982. For example, one provision required that prospective patients be provided with certain information at least 24 hours before performance of an abortion. Another required that, unless certain exemptions applied, a married woman seeking an abortion sign a statement indicating that she had notified her husband of her intent. The prevailing opinion was signed by two of the Court's new members, Justices Kennedy and Souter, and also by a third Republican appointee, Justice O'Connor. In parts it spoke for a majority of the Court and in other parts not, but it held the balance of power on all questions. Ultimately, it upheld most of the restrictions but invalidated the spousal-consent provision.

First, though, the joint opinion reaffirmed what it referred to as "*Roe*'s essential holding"—while substantially revising and softening the test that had been enunciated by *Roe* itself. According to the joint opinion, that "essential holding" had three parts: (1) "a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State"; (2) "a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health"; and (3) "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."

The joint opinion offered a meditation on "the controlling word" in the case, "liberty":

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

The opinion acknowledged that abortion "is an act fraught with consequences for others" but asserted that "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." These considerations, combined with the force of *stare decisis*, outweighed "the reservations any of us may have in reaffirming the central holding of *Roe*."

The opinion then presented an extended discussion of *stare decisis*. It asked

> whether *Roe*'s central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left Roe's central rule a doctrinal anachronism discounted by society; and whether Roe's premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

The opinion answered each of these questions on the side of invoking *stare decisis* and "affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have." With respect to reliance, it emphasized that

> for two decades of economic and social developments, people have 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. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

The joint opinion compared the situations that had warranted abandoning *Lochner* and *Plessy*; the decisions overruling those cases, the opinion said, were justifiable as the application of "constitutional principle to facts as they had not been seen by the Court before." In the context of *Roe*'s central holding, by contrast, there had been no comparable change in "factual underpinnings" or in the Court's understanding of them. Therefore, while in the other settings a "terrible price . . . would have been paid if the Court had not overruled as it did," here "the terrible price would be paid for overruling." This, the opinion pronounced, was the rare context in which "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."

Up to this point, the joint opinion had spoken for a majority of the Court, with Justices Blackmun and Stevens joining the trio of authors. Much of the rest of the opinion spoke only for the trio. They reaffirmed the aspect of *Roe* that guaranteed the right to choose to terminate pregnancies before viability. (No mention of the physician here.) But they explicitly rejected the "rigid trimester framework of *Roe*"; they believed it "undervalue[d] the State's interest in potential life and that it was not "part of the essential holding of *Roe*." "Even in the earliest stage of pregnancy," they said, a State might take steps to ensure that the decision to terminate a pregnancy was "thoughtful and informed," to make sure the woman understood the arguments in favor of carrying the pregnancy to full term and the options and support available to her if she did, and to protect her health and safety. A regulation that served a valid state purpose would be valid, even if it made procuring an abortion more difficult or expensive, unless it imposed "an undue burden" on the woman's free choice; "undue burden," they explained, was "a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

Notably, they acknowledged that this standard was incompatible with post-*Roe* decisions that had struck down "some abortion regulations which in no real sense deprived women of the ultimate decision." Thus, they explicitly concluded that two decisions, *Akron v. Akron Center for Reproductive Health* (1983) (*Akron I*) and *Thornburgh v. American College of Obstetricians and Gynecologists* (1986), had to be overruled to the extent they found "a constitutional violation when the government requires . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus."

Having enunciated these general principles, the joint opinion turned to the particular provisions of the Pennsylvania law. With the support of Chief Justice Rehnquist and Justices White, Scalia, and Thomas, the joint opinion upheld most of the law, including an informed-consent provision. And, with the concurrence of Justices Blackmun and Stevens, the joint opinion rejected the provision that presumptively required a married woman to have the consent of her husband before having an abortion.

Four justices wrote separate opinions. Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, contended that *Roe* should be overruled outright. He chided the joint opinion for "retain[ing] the outer shell" of *Roe* while "beat[ing] a wholesale retreat from the substance of that case." *Roe*, he said,

> stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis,

> without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion.

Justice Scalia, joined by the Chief Justice and Justices White and Thomas, also wrote in support of overruling *Roe*. Acknowledging that the abortion decision was a liberty of great importance to many people, he denied that it was protected by the Constitution—any more than "homosexual sodomy, polygamy, adult incest, and suicide"—because "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."

On the other side, Justice Stevens wrote that "*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women"; he thought that some of the provisions of the Pennsylvania law violated the principle that "[a] woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term." And Justice Blackmun expressed his "steadfast . . . belief" that the "full protection" of the Court's strict-scrutiny standard should be applied to the right to reproductive choice. He expressed "fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light." He noted that he was 83 years old, and that when he left the Court the confirmation process for his successor might well focus on the abortion issue: "That, I regret, may be exactly where the choice between the two worlds will be made."

From *Casey* to *Dobbs*

Justice Blackmun accurately predicted that over the ensuing years the abortion issue played a large role in the process for selecting and confirming Supreme Court justices. But for nearly three decades a kind of equilibrium prevailed, with some restrictions upheld and others invalidated, depending in large part on the precise membership of the Court. For example, in *Stenberg v. Carhart* (2000), a 5-4 majority struck down a Nebraska statute that flatly prohibited "partial birth abortions," which the statute defined as abortions in which the physician "partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." But in *Gonzales v. Carhart* (2007), a new 5-4 majority upheld the federal Partial-Birth Abortion Ban Act of 2003; Justice Kennedy's opinion for the majority asserted that the federal statute was less vague than the Nebraska one. No justice who had voted to invalidate the Nebraska statute voted to uphold the federal one, but in the interim Justice O'Connor, a member of the *Stenberg* majority, had been replaced by Justice Alito.

Justice Ginsburg's dissent in *Gonzales* was particularly notable in suggesting a path toward grounding abortion jurisprudence in equal protection values:

> As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." … Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature….
>
> [T]he Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from "[s]evere depression and loss of esteem." Because of women's fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D & E procedure…. This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited….

See also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, U.N.C. L. Rev. (1985).

The equilibrium was disrupted when President Trump was able to appoint three new members of the Court, two of them replacing justices who were opposed to overruling *Roe* and *Casey* (Justice Kavanaugh for Justice Kennedy and Justice Barrett for Ginsburg). *Dobbs v. Jackson Women's Health Organization* followed soon after.

QUESTIONS FOR DISCUSSION

1. Which of the following do you regard as the best argument in favor of a right to abortion at least before viability? Which, if any, do you regard as persuasive?
   (a) The abortion decision is an aspect of liberty protected by the Due Process Clauses.
   (b) The abortion decision is a right retained by the people within the meaning of the Ninth Amendment.
   (c) Prohibiting abortions amounts to an imposition of involuntary servitude within the meaning of the Thirteenth Amendment.

(d) Prohibiting abortions is a denial of equal protection.

2. Is viability an appropriate *constitutional* line determining when a state may prohibit abortion?

Dobbs v. Jackson Women's Health Organization
Supreme Court of the United States, 2022.
2022 WL 2276808.

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*. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. . . . [T]he opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature. . . . One prominent constitutional scholar [John Hart Ely] 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." 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]

Eventually, in *Planned Parenthood of Southeastern Pa.* v. *Casey* (1992), the Court revisited *Roe*[. The controlling] opinion did not endorse *Roe*'s reasoning, and it even

[4] See R. Ginsburg, *Speaking in a Judicial Voice*, N. Y. U. L. Rev. (1992) ("*Roe* ... halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue").

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 [*Akron v. Akron Center for Reproductive Health, Inc.* (1983) and *Thornburgh v. American College of Obstetricians and Gynecologists* (1986)] were overruled *in toto*, and *Roe* itself was overruled in part. *Casey* threw out *Roe*'s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman's right to have an abortion. The decision provided no clear guidance about the difference between a "due" and an "undue" burden. But the three Justices who authored the controlling opinion "call[ed] the contending sides of a national controversy to end their national division" by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. . . . The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as "viable" outside the womb. In defending this law, the State's primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. . . .

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

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

[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."

reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession."

Respondents are an abortion clinic, Jackson Women's Health Organization, and one of its doctors. [They contend] 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.

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

A

1

Constitutional analysis must begin with "the language of the instrument," *Gibbons* v. *Ogden*, which offers a "fixed standard" for ascertaining what our founding document means, J. Story, Commentaries on the Constitution of the United States (1833). 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.

. . . *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. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other." *Geduldig* v. *Aiello* (1974). And as the Court has stated, the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women. *Bray* v. *Alexandria Women's Health Clinic* (1993). Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.

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

2

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

The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. The second

* Ed. note – The majority is quoting the following sentence in Roe: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

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* (2019); *McDonald* v. *Chicago* (2010); *Glucksberg*. And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue. [*The Court notes that Justice Ginsburg's opinion for the Court in* Timbs *reviewed history going back to Magna Carta in concluding that the Eighth Amendment's protection against excessive fines is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition," and that* McDonald *also conducted a historical survey before concluding that the right to keep and bear arms was "among those fundamental rights necessary to our system of ordered liberty."*] *Timbs* and *McDonald* concerned the question whether the Fourteenth Amendment protects rights that are expressly set out in the Bill of Rights, and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution. Thus, in *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of "Anglo-American common law tradition," and made clear that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition."

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

In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been "reluctant" to recognize rights that are not mentioned in the Constitution. . . .

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." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.[22]

B

1

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.[23]

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

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

2

a

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

The "eminent common-law authorities (Blackstone, Coke, Hale, and the like)," *Kahler* v. *Kansas* (2020), *all* describe abortion after quickening as criminal. Henry de

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[22] That is true regardless of whether we look to the Amendment's Due Process Clause or its Privileges or Immunities Clause. . . .

[23] See R. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, N. C. L. Rev. (1968) . . . .

Bracton's 13th-century treatise explained that if a person has "struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide."[25]

Sir Edward Coke's 17th-century treatise likewise asserted that abortion of a quick child was "murder" if the "childe be born alive" and a "great misprision" if the "childe dieth in her body." Two treatises by Sir Matthew Hale likewise described abortion of a quick child who died in the womb as a "great crime" and a "great misprision." And writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a "quick" child was "by the ancient law homicide or manslaughter" (citing Bracton), and at least a very "heinous misdemeanor" (citing Coke).

English cases dating all the way back to the 13th century corroborate the treatises' statements that abortion was a crime. In 1732, for example, Eleanor Beare was convicted of "destroying the Foetus in the Womb" of another woman and "thereby causing her to miscarry." For that crime and another "misdemeanor," Beare was sentenced to two days in the pillory and three years' imprisonment.

Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*. Quite to the contrary, in the 1732 case mentioned above, the judge said of the charge of abortion (with no mention of quickening) that he had "never met with a case so barbarous and unnatural." Similarly, an indictment from 1602, which did not distinguish between a pre-quickening and post-quickening abortion, described abortion as "pernicious" and "against the peace of our Lady the Queen, her crown and dignity." . . .

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

b

In this country, the historical record is similar. . . . The few cases available from the early colonial period corroborate that abortion was a crime. In Maryland in 1652, for example, an indictment charged that a man "Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb." *Proprietary* v. *Mitchell* (1652). And by

[25] Even before Bracton's time, English law imposed punishment for the killing of a fetus. See Leges Henrici Primi (imposing penalty for any abortion and treating a woman who aborted a "quick" child "as if she were a murderess").

the 19th century, courts frequently explained that the common law made abortion of a quick child a crime.

c

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. . . . The Solicitor General offers a different explanation of the basis for the quickening rule, namely, that before quickening the common law did not regard a fetus "as having a 'separate and independent existence.'" But the case on which the Solicitor General relies for this proposition also suggested that the criminal law's quickening rule was out of step with the treatment of prenatal life in other areas of law, noting that "to many purposes, in reference to civil rights, an infant *in ventre sa mere* is regarded as a person in being."

At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. . . . In 1803, the British Parliament made abortion a crime at all stages of pregnancy and authorized the imposition of severe punishment. See Lord Ellenborough's Act. . . .

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.[34] Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910. [*The Court refers in this paragraph to Appendix A to its opinion, which presents in chronological order "statutes criminalizing abortion at all stages of pregnancy in the States existing in 1868," beginning with a Missouri statute of 1825.*]

The trend in the Territories that would become the last 13 States was similar: All of them criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico). [*The Court here refers to Appendix B to its opinion, which presents these statutes and one, from 1901, of the District of Columbia.*] By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother."

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

d

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

3

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

Neither respondents nor the Solicitor General disputes the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy. . . . The earliest sources called to our attention [that support the existence of an abortion right] are a few district court and state court decisions decided shortly before *Roe* and a small number of law review articles from the same time period. . . .

The Solicitor General . . . suggests that history supports an abortion right because the common law's failure to criminalize abortion before quickening means that "at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages." But the insistence on quickening was not universal, see *Mills* v. *Commonwealth* (Pa. 1850); *State* v. *Slagle* (N.C. 1880), and regardless, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so. When legislatures began to exercise that authority as the century wore on, no one, as far as we are aware, argued that the laws they enacted violated a fundamental right. . . .

. . . According to [the account of the American Historical Association, on which respondents rely,] which is based almost entirely on statements made by one prominent proponent of the statutes, important motives for the laws were the fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading White Protestant women to "shir[k their] maternal duties."

Resort to this argument is a testament to the lack of any real historical support for the right that *Roe* and *Casey* recognized. This Court has long disfavored arguments based on alleged legislative motives. . . . Here, the argument about legislative motive is not even based on statements by legislators, but on statements made by a few supporters of the new 19th-century abortion laws, and it is quite a leap to attribute these motives to all the legislators whose votes were responsible for the enactment of those laws. . . . Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?

There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being. . . . One may disagree with this belief (and our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests), but even *Roe* and *Casey* did not question the good faith of abortion opponents. And we see no reason to discount the significance of the state laws in question based on these *amici*'s suggestions about legislative motive.[41]

C

1

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, and *Casey* described it as the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy." . . .

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free *to think* and *to say* what they wish about "existence," "meaning," the "universe," and "the mystery of human life," they are not always free *to act* in accordance with those thoughts. . . .

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

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, *Loving* v. *Virginia* (1967); the right to marry while in prison, *Turner* v. *Safley* (1987); the right to obtain contraceptives, *Griswold* v. *Connecticut* (1965), *Eisenstadt* v. *Baird* (1972), *Carey* v. *Population Services Int'l* (1977); the right to reside with relatives, *Moore* v. *East Cleveland* (1977); the right to make decisions about the education of one's children, *Pierce*

[41] Other *amicus* briefs present arguments about the motives of proponents of liberal access to abortion. They note that some such supporters have been motivated by a desire to suppress the size of the African-American population. And it is beyond dispute that *Roe* has had that demographic effect. A highly disproportionate percentage of aborted fetuses are Black. For our part, we do not question the motives of either those who have supported or those who have opposed laws restricting abortions.

v. *Society of Sisters* (1925), *Meyer* v. *Nebraska* (1923); the right not to be sterilized without consent, *Skinner* v. *Oklahoma ex rel. Williamson* (1942); and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, lain *Winston* v. *Lee* (1985), *Washington* v. *Harper* (1990), *Rochin* v. *California* (1952). Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence* v. *Texas* (2003) (right to engage in private, consensual sexual acts), and *Obergefell* v. *Hodges* (2015) (right to marry a person of the same sex).

These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history.

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

2

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

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

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

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

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

D

1

The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a "'deeply rooted'" one, "'in this Nation's history and tradition.'" . . . Nor does the dissent dispute the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; that by the late 1950s at least 46 States prohibited abortion "however and whenever performed" except if necessary to save "the life of the mother"; and that when *Roe* was decided in 1973 similar statutes were still in effect in 30 States.[47] . . .

The dissent attempts to obscure this failure by misrepresenting our application of *Glucksberg*. The dissent suggests that we have focused only on "the legal status of abortion in the 19th century," but our review of this Nation's tradition extends well past that period. As explained, for more than a century after 1868—including "another half-century" after women gained the constitutional right to vote in 1920—it was firmly established that laws prohibiting abortion like the Texas law at issue in *Roe* were permissible exercises of state regulatory authority. And today, another half century later, more than half of the States have asked us to overrule *Roe* and *Casey*. The dissent cannot establish that a right to abortion has *ever* been part of this Nation's tradition.

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

2

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

[W]ithout support in history or relevant precedent, *Roe*'s reasoning cannot be defended even under the dissent's proposed test, and the dissent is forced to rely solely on the fact that a constitutional right to abortion was recognized in *Roe* and later decisions that accepted *Roe*'s interpretation. [But there] are occasions when past decisions should be overruled, and as we will explain, this is one of them.

3

The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. This is evident in the analogy that the dissent draws between the abortion right and the rights recognized in *Griswold* (contraception), *Eisenstadt* (same), *Lawrence* (sexual conduct with member of the same sex), and *Obergefell* (same-sex marriage). . . . The exercise of [those rights] does not destroy a "potential life," but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear: The Constitution does not permit the States to regard the destruction of a "potential life" as a matter of any significance.

That view is evident throughout the dissent. The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a State's interest in protecting prenatal life. 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 [we agree with the Chief Justice that] 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," *Pearson* v. *Callahan* (2009), and it "is at its weakest when we interpret the Constitution," *Agostini* v. *Felton* (1997). It has been said that it is sometimes more important that an issue "'be settled than that it be settled right.'" *Kimble* v. *Marvel Entertainment, LLC* (quoting *Burnet* v. *Coronado Oil & Gas Co.* (1932) (Brandeis, J., dissenting)). But when it comes to the interpretation of the Constitution—the "great charter of our liberties," which was meant "to endure through a long lapse of ages," *Martin* v. *Hunter's Lessee* (1816) —we place a high value on having the matter "settled right." In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. See Art. V.

Some of our most important constitutional decisions have overruled prior precedents. We mention three. [*The first case mentioned by the Court was* Brown v. Board of Education (1954).] *West Coast Hotel Co.* v. *Parrish* (1937) . . . 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. . . . Finally, in *West Virginia Bd. of Ed.* v. *Barnette* (1943), after the lapse of only three years, the Court overruled *Minersville School Dist.* v. *Gobitis* (1940), and held that public school students could not be compelled to salute the flag in violation of their sincere beliefs. *Barnette* stands out because nothing had changed during the intervening period other than the Court's belated recognition that its earlier decision had been seriously wrong.

On many other occasions, this Court has overruled important constitutional decisions. [*The Court here included a footnote with "a partial list" of 25 cases, going back to 1938, in which it had overruled prior cases, in whole or in part, usually explicitly but in some cases "effectively."*] Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.

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

considered in making such a decision. *Janus* v. *State, County, and Municipal Employees* (2018); *Ramos* v. *Louisiana* (2020) (Kavanaugh, J., concurring in part).

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

A

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

The infamous decision in *Plessy* v. *Ferguson*, was one such decision. . . . It was "egregiously wrong" on the day it was decided, see *Ramos* (opinion of Kavanaugh, J.), and as the Solicitor General agreed at oral argument, it should have been overruled at the earliest opportunity.

Roe was also egregiously wrong and deeply damaging. For reasons already explained, *Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed. . . .*Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but "raw judicial power," *Roe* (White, J., dissenting), the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*. . . .

B

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

1

a

The weaknesses in *Roe*'s reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation. . . . This elaborate scheme was the Court's own brainchild. Neither party advocated the trimester framework; nor did either party or any *amicus* argue that "viability" should mark the point at which the scope of the abortion right and a State's regulatory authority should be substantially transformed.

b

Not only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources on which constitutional decisions are usually based. . . .

Roe featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to explain why it was included. . . . When it came to the most important historical fact—how the States regulated abortion when the Fourteenth Amendment was adopted—the Court said almost nothing. It allowed that States had tightened their abortion laws "in the middle and late 19th century," but it implied that these laws might have been enacted not to protect fetal life but to further "a Victorian social concern" about "illicit sexual conduct."

Roe's failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong [in suggesting] that the common law had probably never really treated post-quickening abortion as a crime. . . . After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee. This included [accounts of the views of the American Medical Association, the American Public Health Association, and the American Bar Association, and of developments in British law.] The Court did not explain why these sources shed light on the meaning of the Constitution, and not one of them adopted or advocated anything like the scheme that *Roe* imposed on the country.

Finally, after all this, the Court turned to precedent. Citing a broad array of cases, the Court found support for a constitutional "right of personal privacy," but it conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, and some of the cases in that category involved personal decisions that were obviously very, very far afield. See *Pierce* (right to send children to religious school); *Meyer* (right to have children receive German language instruction).

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

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

c

What *Roe* did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a woman's health? The Court's only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth. But [m]any health and safety regulations aim to avoid adverse health consequences short of death. And the Court did not explain why it departed from the normal rule that courts defer to the judgments of legislatures "in areas fraught with medical and scientific uncertainties." *Marshall* v. *United States* (1974).

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

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

As Professor Laurence Tribe has written, "[c]learly, this mistakes 'a definition for a syllogism.'" The definition of a "viable" fetus is one that is capable of surviving outside the womb, but why is this the point at which the State's interest becomes compelling? 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"? *Webster* v. *Reproductive Health Services* (1989) (plurality opinion) (quoting *Thornburgh* (White, J., dissenting)). *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. . . . 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?

Viability also depends on the "quality of the available medical facilities." *Colautti* v. *Franklin* (1979). . . . On what ground could the constitutional status of a fetus depend on the pregnant woman's location? And if viability is meant to mark a line having universal moral significance, can it be that a fetus that is viable in a big city in the United States has a privileged moral status not enjoyed by an identical fetus in a remote area of a poor country?

In addition, as the Court once explained [*id.*], viability is not really a hard-and-fast line. 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. It is thus "only with difficulty" that a physician can estimate the "probability" of a particular fetus's survival. 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. 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"?

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.[52] 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.

d

. . . Despite *Roe*'s weaknesses, its reach was steadily extended in the years that followed. The Court struck down laws requiring that second-trimester abortions be performed only in hospitals; that minors obtain parental consent; that women give written consent after being informed of the status of the developing prenatal life and the risks of abortion; that women wait 24 hours for an abortion; that a physician determine viability in a particular manner; that a physician performing a post-viability abortion use the technique most likely to preserve the life of the fetus; and that fetal remains be treated in a humane and sanitary manner. [T]he United States as *amicus curiae* asked the Court to overrule *Roe* five times in the decade before *Casey*, and then asked the Court to overrule it once more in *Casey* itself.

2

When *Casey* revisited *Roe* almost 20 years later, very little of *Roe*'s reasoning was defended or preserved. [W]ith respect to the standard grounds for constitutional decisionmaking—text, history, and precedent—*Casey* did not attempt to bolster *Roe*'s reasoning. . . . The controlling opinion criticized and rejected *Roe*'s trimester scheme, and substituted a new "undue burden" test, but the basis for this test was obscure. And as we will explain, the test is full of ambiguities and is difficult to apply. . . .

C

Workability. Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and

[52] According to the Center for Reproductive Rights, only the United States and the Netherlands use viability as a gestational limit on the availability of abortion on-request.

predictable manner. *Casey*'s "undue burden" test has scored poorly on the workability scale.

1

Problems begin with the very concept of an "undue burden." As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is "due" or "undue" is "inherently standardless."

The *Casey* plurality tried to put meaning into the "undue burden" test by setting out three subsidiary rules, but these rules created their own problems. The first rule is that "a provision of law is invalid, if its purpose or effect is to place a *substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." But whether a particular obstacle qualifies as "substantial" is often open to reasonable debate. . . . Huge burdens are plainly "substantial," and trivial ones are not, but in between these extremes, there is a wide gray area.

[T]he 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.

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 . . . 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."

2

The difficulty of applying *Casey*'s new rules surfaced in that very case. The controlling opinion found that Pennsylvania's 24-hour waiting period requirement and its informed-consent provision did not impose "undue burden[s]," but Justice Stevens, applying the same test, reached the opposite result. That did not bode well. . . .

The ambiguity of the "undue burden" test also produced disagreement in later cases. [*The Court notes that in* Whole Woman's Health v. Hellerstedt *(2016), the majority adopted an approach under which courts should consider a law's benefits as well as its burden, but that in* June Medical Services L.L.C. v. Russo *(2020) the Chief Justice, who cast the deciding vote, and the four dissenters rejected that cost-benefit approach.*] This Court's experience applying *Casey* has confirmed Chief Justice Rehnquist's prescient diagnosis that the undue-burden standard was "not built to last."

3

. . . *Casey* has generated a long list of Circuit conflicts. [*The Court addresses some of these.*] *Casey*'s "undue burden" test has proved to be unworkable. . . . Continued adherence to that standard would undermine, not advance, the "evenhanded, predictable, and consistent development of legal principles." *Payne* v. *Tennessee* (1991).

D

Effect on other areas of law. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. See *Ramos* (opinion of Kavanaugh, J.); *Janus*. . . .

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

When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine "has failed to deliver the 'principled and intelligible' development of the law that *stare decisis* purports to secure." *June Medical* (Thomas, J., dissenting).

E

Reliance interests. We last consider whether overruling *Roe* and *Casey* will upend substantial reliance interests. See *Ramos* (opinion of Kavanaugh, J.); *Janus*.

1

Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." . . . In *Casey*, the controlling opinion conceded that . . . 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.

2

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

. . . [T]he novel and intangible form of reliance endorsed by the *Casey* plurality . . . 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. . . .

Our decision returns the issue of abortion to . . . legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women

who register to vote and cast ballots is consistently higher than the percentage of men who do so. . . .

3

Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." That is not correct for reasons we have already discussed. . . . [T]o ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

IV

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

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

This analysis starts out on the right foot but ultimately veers off course. The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work. Cf. *Texas* v. *Johnson* (1989) [(holding that burning the American flag was constitutionally protected symbolic speech)]; *Brown*. That is true both when we initially decide a constitutional issue *and* when we consider whether to overrule a prior decision. . . .

The *Casey* plurality "call[ed] the contending sides of a national controversy to end their national division," and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. . . . The Court has no authority to decree that an erroneous precedent is *permanently*

exempt from evaluation under traditional *stare decisis* principles. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* and *Lochner* would still be the law. That is not how *stare decisis* operates.

The *Casey* plurality also misjudged the practical limits of this Court's influence. *Roe* certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* "inflamed" a national issue that has remained bitterly divisive for the past half century. *Casey* (opinion of Scalia, J.); see also R. Ginsburg, Speaking in a Judicial Voice (1992) (*Roe* may have "halted a political process," "prolonged divisiveness," and "deferred stable settlement of the issue"). And for the past 30 years, *Casey* has done the same. . . .

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

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

V

A

1

The dissent argues that we have "abandon[ed]" *stare decisis*, but we have done no such thing, and it is the dissent's understanding of *stare decisis* that breaks with tradition. The dissent's foundational contention is that the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless the Court can "poin[t] to major legal or factual changes undermining [the] decision's original basis." To support this contention, the dissent claims that *Brown* v. *Board of Education*, and other landmark cases overruling prior precedents "responded to changed law and to changed facts and attitudes that had taken hold throughout society." The unmistakable implication of this argument is that only the passage of time and new developments justified those decisions. Recognition that the cases they overruled were egregiously wrong on the day they were handed down was not enough.

The Court has never adopted this strange new version of *stare decisis*—and with good reason. Does the dissent really maintain that overruling *Plessy* was not justified until

the country had experienced more than a half-century of state-sanctioned segregation and generations of Black school children had suffered all its effects?

Here is another example. On the dissent's view, it must have been wrong for *West Virginia Bd. of Ed.* v. *Barnette* to overrule *Minersville School Dist.* v. *Gobitis* a bare three years after it was handed down. In both cases, children who were Jehovah's Witnesses refused on religious grounds to salute the flag or recite the pledge of allegiance. The *Barnette* Court did not claim that its reexamination of the issue was prompted by any intervening legal or factual developments, so if the Court had followed the dissent's new version of *stare decisis,* it would have been compelled to adhere to *Gobitis* and countenance continued First Amendment violations for some unspecified period.

Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket. And indeed, the dissent eventually admits that a decision *could* "be overruled just because it is terribly wrong," though the dissent does not explain when that would be so. . . .

3

Finally, the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed "potential life." Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by "appeals to a broader right to autonomy." It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.

[*The Court here responds to the Chief Justice's opinion, which concurred only in the judgment. This portion of the Court's opinion is presented after the Chief Justice's.*]

VI

. . .

A

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

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson* v. *Skrupa* (1963) . . . . A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." *Heller* v. *Doe* (1993). It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

B

These legitimate interests justify Mississippi's Gestational Age Act. Except "in a medical emergency or in the case of a severe fetal abnormality," the statute prohibits abortion "if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." The Mississippi Legislature's findings recount the stages of "human prenatal development" and assert the State's interest in "protecting the life of the unborn." The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure "for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail.

VII

We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives. The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Thomas, concurring.

I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. . . .

I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. . . . [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." . . . The resolution of this case is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion. . . .

. . . [I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," *Ramos* v. *Louisiana* (2020) (Thomas, J., concurring in judgment), we have a duty to "correct the error" established in those precedents, *Gamble* v. *United States* (2019) (Thomas, J., concurring). After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment. To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights. That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach.

. . . [A]part from being a demonstrably incorrect reading of the Due Process Clause, the "legal fiction" of substantive due process is "particularly dangerous." *McDonald* (opinion of Thomas, J.). . . . "[S]ubstantive due process exalts judges at the expense of the People from whom they derive their authority." . . . Nowhere is this exaltation of judicial policymaking clearer than this Court's abortion jurisprudence. . . . Respondents and the United States propose no fewer than three different interests that supposedly spring from the Due Process Clause. They include "bodily integrity," "personal autonomy in matters of family, medical care, and faith," Brief for Respondents, and "women's equal citizenship," Brief for United States as *Amicus Curiae*. That 50 years have passed since *Roe* and abortion advocates still cannot coherently articulate the right (or rights) at stake

proves the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification. . . .

[Moreover, s]ubstantive due process is often wielded to "disastrous ends." *Gamble*, (Thomas, J., concurring). For instance, in *Dred Scott* v. *Sandford*, the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories. . . . Now today, the Court rightly overrules *Roe* and *Casey* . . . after more than 63 million abortions have been performed. The harm caused by this Court's forays into substantive due process remains immeasurable.

* * *

Because the Court properly applies our substantive due process precedents to reject the fabrication of a constitutional right to abortion, and because this case does not present the opportunity to reject substantive due process entirely, I join the Court's opinion. . . . Substantive due process conflicts with [the Constitution's] textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.

Justice Kavanaugh, concurring.

I write separately to explain my additional views about why *Roe* was wrongly decided, why *Roe* should be overruled at this time, and the future implications of today's decision.

I

Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty. . . .

The issue before this Court, however, is not the policy or morality of abortion. The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion. To be sure, this Court has held that the Constitution protects unenumerated rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty. But a right to abortion is not deeply rooted in American history and tradition, as the Court today thoroughly explains.

On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.

Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral. The nine unelected Members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States.

Instead of adhering to the Constitution's neutrality, the Court in *Roe* took sides on the issue and unilaterally decreed that abortion was legal throughout the United States up to the point of viability (about 24 weeks of pregnancy). The Court's decision today properly returns the Court to a position of neutrality and restores the people's authority to address the issue of abortion through the processes of democratic self-government established by the Constitution.

Some *amicus* briefs argue that the Court today should not only overrule *Roe* and return to a position of judicial neutrality on abortion, but should go further and hold that the Constitution *outlaws* abortion throughout the United States. No Justice of this Court has ever advanced that position. I respect those who advocate for that position, just as I respect those who argue that this Court should hold that the Constitution legalizes pre-viability abortion throughout the United States. But both positions are wrong as a constitutional matter, in my view. The Constitution neither outlaws abortion nor legalizes abortion.

To be clear, then, 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. Through that democratic process, the people and their representatives may decide to allow or limit abortion. . . .

This Court therefore does not possess the authority either to declare a constitutional right to abortion *or* to declare a constitutional prohibition of abortion.

II

The more difficult question in this case is *stare decisis*—that is, whether to overrule the *Roe* decision.

The principle of *stare decisis* requires respect for the Court's precedents and for the accumulated wisdom of the judges who have previously addressed the same issue.

Stare decisis is rooted in Article III of the Constitution and is fundamental to the American judicial system and to the stability of American law.

Adherence to precedent is the norm, and *stare decisis* imposes a high bar before this Court may overrule a precedent. This Court's history shows, however, that *stare decisis* is not absolute, and indeed cannot be absolute.

In his canonical *Burnet* opinion in 1932, Justice Brandeis stated that in "cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Burnet* v. *Coronado Oil & Gas Co.* (1932) (dissenting opinion). That description of the Court's practice remains accurate today. Every current Member of this Court has voted to overrule precedent. And over the last 100 years beginning with Chief Justice Taft's appointment in 1921, every one of the 48 Justices appointed to this Court has voted to overrule precedent. Many of those Justices have voted to overrule a substantial number of very significant and longstanding precedents. See, *e.g., Obergefell* (overruling *Baker* v. *Nelson*); *Brown* v. *Board of Education* (overruling *Plessy* v. *Ferguson*); *West Coast Hotel Co.* v. *Parrish* (1937) (overruling *Adkins* v. *Children's Hospital of D. C.* and in effect *Lochner* v. *New York*).

But that history alone does not answer the critical question: When precisely should the Court overrule an erroneous constitutional precedent? The history of *stare decisis* in this Court establishes that a constitutional precedent may be overruled only when (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, and (iii) overruling the prior decision would not unduly upset legitimate reliance interests. See *Ramos* v. *Louisiana* (2020) (Kavanaugh, J., concurring in part). Applying those factors, I agree with the Court today that *Roe* should be overruled. . . . [3]

[3] I also agree with the Court's conclusion today with respect to reliance. Broad notions of societal reliance have been invoked in support of *Roe*, but the Court has not analyzed reliance in that way in the past. For example, American businesses and workers relied on *Lochner* v. *New York* and *Adkins* v. *Children's Hospital of D. C.* to construct a laissez-faire economy that was free of substantial regulation. In *West Coast Hotel Co.* v. *Parrish*, the Court nonetheless overruled *Adkins* and in effect *Lochner*. An entire region of the country relied on *Plessy* v. *Ferguson* to enforce a system of racial segregation. In *Brown* v. *Board of Education*, the Court overruled *Plessy*. Much of American society was built around the traditional view of marriage that was upheld in *Baker* v. *Nelson*, and that was reflected in laws ranging from tax laws to estate laws to family laws. In *Obergefell*, the Court nonetheless overruled *Baker*.

[T]he *stare decisis* analysis here is somewhat more complicated because of *Casey*. . . But as has become increasingly evident over time, *Casey*'s well-intentioned effort did not resolve the abortion debate. [T]he question of whether to overrule *Roe* cannot be dictated by *Casey* alone. To illustrate that *stare decisis* point, consider an example. Suppose that in 1924 this Court had expressly reaffirmed *Plessy* v. *Ferguson* and upheld the States' authority to segregate people on the basis of race. Would the Court in *Brown* some 30 years later in 1954 have reaffirmed *Plessy* and upheld racially segregated schools simply because of that intervening 1924 precedent? Surely the answer is no.

III

[T]he 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*, *Eisenstadt*, *Loving,* and *Obergefell*. 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.

. . . 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. 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. . . .

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

None of this, however, requires that we also take the dramatic step of altogether eliminating the abortion right first recognized in *Roe*. Mississippi itself previously argued as much to this Court in this litigation.

When the State petitioned for our review, its basic request was straightforward: "clarify whether abortion prohibitions before viability are always unconstitutional." . . . And it went out of its way to make clear that it was *not* asking the Court to repudiate entirely the right to choose whether to terminate a pregnancy: "To be clear, the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*." . . . After we granted certiorari, however, Mississippi changed course. In its principal brief, the State bluntly announced that the Court should overrule *Roe* and *Casey*. The Constitution does not protect a right to an abortion, it argued, and a State should be able to prohibit elective abortions if a rational basis supports doing so.

The Court now rewards that gambit, noting three times that the parties presented "no half-measures" and argued that "we must either reaffirm or overrule *Roe* and *Casey*." Given those two options, the majority picks the latter.

[But] there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all. Of course, such an approach would not be available if the rationale of *Roe* and *Casey* was inextricably entangled with and dependent upon the viability standard. It is not. Our precedents in this area ground the abortion right in a woman's "right to choose." . . . And there is nothing inherent in the right to choose that requires it to extend to viability or any other point, so long as a real choice is provided. . . .

To be sure, in reaffirming the right to an abortion, *Casey* termed the viability rule *Roe*'s "central holding." Other cases of ours have repeated that language. But simply declaring it does not make it so. . . . *Roe* adopted two distinct rules of constitutional law:

one, that a woman has the right to choose to terminate a pregnancy; two, that such right may be overridden by the State's legitimate interests when the fetus is viable outside the womb. The latter is obviously distinct from the former. I would abandon that timing rule, but see no need in this case to consider the basic right. . . .

Overruling the subsidiary rule is sufficient to resolve this case in Mississippi's favor. The law at issue allows abortions up through fifteen weeks, providing an adequate opportunity to exercise the right *Roe* protects. By the time a pregnant woman has reached that point, her pregnancy is well into the second trimester. Pregnancy tests are now inexpensive and accurate, and a woman ordinarily discovers she is pregnant by six weeks of gestation. Almost all know by the end of the first trimester. Safe and effective abortifacients, moreover, are now readily available, particularly during those early stages. Given all this, it is no surprise that the vast majority of abortions happen in the first trimester. Presumably most of the remainder would also take place earlier if later abortions were not a legal option. Ample evidence thus suggests that a 15-week ban provides sufficient time, absent rare circumstances, for a woman "to decide for herself" whether to terminate her pregnancy. . . .

III

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

* * *

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.* (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.

[*Here are portions of the Court's response to the Chief Justice's opinion, which it referred to as "the concurrence."*]

1

[I]t is revealing that nothing like [the Chief Justice's approach] was recommended by either party [or by any of the *amici*.] The concurrence would do exactly what it criticizes *Roe* for doing: pulling "out of thin air" a test that "[n]o party or *amicus* asked the Court to adopt."

2

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

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

3

The concurrence would "leave for another day whether to reject any right to an abortion at all," but "another day" would not be long in coming. . . . If we held only that Mississippi's 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. . . .

In sum, the concurrence's quest for a middle way would only put off the day when we would be forced to confront the question we now decide. The turmoil wrought by *Roe* and *Casey* would be prolonged. It is far betterCfor this Court and the countryCto face up to the real issue without further delay.

Justice Breyer, Justice Sotomayor, and Justice Kagan, dissenting.

For half a century, *Roe* and *Casey* have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. See *Casey*; *Gonzales* v. *Carhart* (2007) (Ginsburg, J., dissenting). 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. . . . 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." So the Court struck a balance, as it often does when values and goals compete. . . .

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. . . . 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.*

. . . Above all others, women lacking financial resources will suffer from today's decision. In any event, interstate restrictions will also soon be in the offing. 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. . . .

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*. But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work— will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. . . . 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." *Ante* (Thomas, J., concurring) (advocating

* *Ed. note* - The dissent is referring to a 2021 Texas statute that authorized private citizens to bring civil damages suits against anyone who "performed or assisted with prohibited abortions." See *Whole Women's Health v. Jackson* (2021).

the overruling of *Griswold*, *Lawrence*, and *Obergefell*). 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.

. . . The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. *Casey* is a precedent about precedent. It reviewed the same arguments made here in support of overruling *Roe*, and it found that doing so was not warranted. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. . . .

I

We start with *Roe* and *Casey*, and with their deep connections to a broad swath of this Court's precedents. To hear the majority tell the tale, *Roe* and *Casey* are aberrations: They came from nowhere, went nowhere—and so are easy to excise from this Nation's constitutional law. That is not true. . . . *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*. 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

. . . The [*Roe*] 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 "valid interest[s]" of the State "in regulating the abortion decision." The Court noted in particular "important interests" in "protecting potential life," "maintaining medical standards," and "safeguarding [the] health" of the woman. No "absolut[ist]" account of the woman's right could wipe away those significant state claims. The Court therefore struck a balance, turning on the stage of the pregnancy at which the abortion would occur. . . .

In the 20 years between *Roe* and *Casey*, the Court expressly reaffirmed *Roe* on two occasions, and applied it on many more. . . .

Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*'s core precepts. *Casey* is in significant measure a precedent about the doctrine of precedent—until today, one of the Court's most important. But we leave for later that aspect of the Court's decision. The key thing now is the substantive aspect of the Court's considered conclusion that "the essential holding of *Roe* v. *Wade* should be retained and once again reaffirmed.'

Central to that conclusion was a full-throated restatement of a woman's right to choose. . . . "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." Especially important in this web of precedents protecting an individual's most "personal choices" were those guaranteeing the right to contraception. . . .

So *Casey* again struck a balance, differing from *Roe*'s in only incremental ways. It retained *Roe*'s "central holding" that the State could bar abortion only after viability. The viability line, *Casey* thought, was "more workable" than any other in marking the place where the woman's liberty interest gave way to a State's efforts to preserve potential life. . . .

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. . . . *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman's liberty after viability. But what *Roe* and *Casey* also recognized—which today's majority does not—is that a woman's freedom and equality are likewise involved. That fact—the presence of countervailing interests—is what made the abortion question hard, and what necessitated balancing. . . . 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. . . . Second—and embarrassingly for the majority—early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before "quickening"-- the point when the fetus moved in the womb. And early American law followed the common-law rule.[3] So the criminal law of that early time might be taken as roughly consonant with *Roe*'s and *Casey*'s different treatment of early and late abortions. Better, then, to move forward in time. On the other side of 1868, the majority occasionally notes that many States barred abortion up to the time of *Roe*. That is convenient for the majority, but it is window dressing. As the same majority (plus one) just informed us, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *New York State Rifle & Pistol Assn., Inc. v. Bruen* (2022) [(striking down state regulation of carrying firearms outside of the home)]. 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.

[3] The majority offers no evidence to the contrary—no example of a founding-era law making prequickening abortion a crime (except when a woman died). And even in the mid-19th century, more than 10 States continued to allow pre-quickening abortions.

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did . . . : If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

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

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

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. "The Founders," we recently wrote, "knew they were writing a document designed to apply to ever-changing circumstances over centuries." *NLRB* v. *Noel Canning* (2014). . . . And over the course of our history, this Court . . . 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. [*Obergefell* specifically rejected the view, based on *Glucksberg*,] 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. . . . 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* read the Fourteenth Amendment to embrace the Lovings' union. . . . 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. . . . [A]pplications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State's ban on contraceptive use. Judges, he said, are not "free to roam where unguided speculation might take them." *Poe* v. *Ullman* (1961) (dissenting opinion). 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, to go back to Justice Harlan's case, Americans have a right to use contraceptives so they can choose for themselves whether to have children.

All that is what *Casey* understood. *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."[5] . . . 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."

. . . 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

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[5] In a perplexing paragraph in its opinion, the majority declares that it need not say whether that statement from *Casey* is true. But how could that be? Has not the majority insisted for the prior 30 or so pages that the "specific practice[ ]" respecting abortion at the time of the Fourteenth Amendment precludes its recognition as a constitutional right? It has. And indeed, it has given no other reason for overruling *Roe* and *Casey*. We are not mindreaders, but here is our best guess as to what the majority means. It says next that "[a]bortion is nothing new." So apparently, the Fourteenth Amendment might provide protection for things wholly unknown in the 19th century; maybe one day there could be constitutional protection for, oh, time travel. But as to anything that was known back then (such as abortion or contraception), no such luck.

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? . . . What . . . 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 . . . these examples is that 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. . . .

Consider first, then, the line of this Court's cases protecting "bodily integrity." . . . 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. See, *e.g.*, *Winston* v. *Lee* (1985) (forced surgery); *Rochin* v. *California* (forced stomach pumping); *Washington* v. *Harper* (1990) (forced administration of antipsychotic drugs).

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. . . . 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. . . .

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. . . . 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. See *Griswold*; *Eisenstadt*; *Carey* v. *Population Services Int'l* (1977). . . . *Casey* saw *Roe* as of a piece: In "critical respects the abortion decision is of the same character." . . . 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." . . .

Faced with all these connections between *Roe/Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) Today's decision, the majority first says, "does not undermine" the decisions cited by *Roe* and *Casey*—the ones involving "marriage, procreation, contraception, [and] family relationships"—"in any way." Note that this first assurance does not extend to rights recognized after *Roe* and *Casey*, and partly based on them—in particular, rights to same-sex intimacy and marriage. On its later tries, though, the majority includes those too: "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." That right is unique, the majority asserts, "because [abortion] terminates life or potential life." So the majority depicts today's decision as "a restricted railroad ticket, good for this day and train only." *Smith* v. *Allwright* (1944) (Roberts, J.,

dissenting). Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

The first problem with the majority's account comes from Justice Thomas's concurrence—which makes clear he is not with the program. . . . [A]t 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. . . .[7] . . . 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* (1942), not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong, and . . . 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.[8]

Nor does it even help just to take the majority at its word. Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. Scout's honor. Still, the future significance of today's opinion will be decided in the future. And law often has a way of evolving without regard to original intentions—a way of actually following where logic leads, rather than tolerating hard-to-explain lines. . . . Dissenting in *Lawrence*, Justice Scalia explained why he took no comfort in the Court's statement that a decision recognizing the right to same-sex intimacy did "not involve" same-sex

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[7] [The majority does not argue that *Roe* and *Casey*] overrated a woman's constitutional liberty interest in choosing an abortion . . . and we can see why. Taking that route would have prevented the majority from claiming that it means only to leave this issue to the democratic process—that it does not have a dog in the fight. And indeed, doing so might have suggested a revolutionary proposition: that the fetus is itself a constitutionally protected "person," such that an abortion ban is constitutionally *mandated*.

[8] The majority briefly (very briefly) gestures at the idea that some *stare decisis* factors might play out differently with respect to these other constitutional rights. But the majority gives no hint as to why. And the majority's (mis)treatment of *stare decisis* in this case provides little reason to think that the doctrine would stand as a barrier to the majority's redoing any other decision it considered egregiously wrong.

marriage. That could be true, he wrote, "only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court." Score one for the dissent, as a matter of prophecy. . . .

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

II

By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. . . . *Stare decisis* is, of course, not an "inexorable command"; it is sometimes appropriate to overrule an earlier decision. But the Court must have a good reason to do so over and above the belief "that the precedent was wrongly decided." . . .

The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling *Roe* and *Casey*. But none does, as further described below and in the Appendix. In some, the Court only partially modified or clarified a precedent. And in the rest, the Court relied on one or more of the traditional *stare decisis* factors in reaching its conclusion. The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. [*The Appendix, not presented here, reviews the cases and expands on this argument*.] . . . 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 any event "[w]hether or not we … agree" with a prior precedent is the beginning, not the end, of our analysis—and the remaining "principles of *stare decisis* weigh heavily against overruling" *Roe* and *Casey*. *Dickerson* v. *United States* (2000). *Casey* itself applied those principles, in one of this Court's most important precedents about precedent. After assessing the traditional *stare decisis* factors, *Casey* reached the only

conclusion possible—that *stare decisis* operates powerfully here. It still does. The standards *Roe* and *Casey* set out are perfectly workable. No changes in either law or fact have eroded the two decisions. And tens of millions of American women have relied, and continue to rely, on the right to choose. So under traditional *stare decisis* principles, the majority has no special justification for the harm it causes.

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

A

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

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." . . . 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. See . . . generally D. Cohen, G. Donley, & R. Rebouché, The New Abortion Battleground, 123 Colum. L. Rev. (forthcoming 2023). 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. . . . Certainly, that was so of the main examples the majority cites: *Brown* v. *Board of Education* and *West Coast Hotel Co*. v. *Parrish*. But it is not so today. Although nodding to some arguments others have made about "modern developments," the majority does not really rely on them, no doubt seeing their slimness. The majority briefly invokes the current controversy over abortion. But it has to acknowledge that the same dispute has existed for decades: Conflict over abortion is not a change but a constant. . . . In the end, the majority throws longstanding precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law.

1

Subsequent legal developments have only reinforced *Roe* and *Casey*. The Court has continued to embrace all the decisions *Roe* and *Casey* cited, decisions which recognize a constitutional right for an individual to make her own choices about "intimate relationships, the family," and contraception. *Roe* and *Casey* have themselves formed the legal foundation for subsequent decisions protecting these profoundly personal choices. . . . 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 . . . 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 notes the growing prevalence of safe haven laws and demand for adoption, but, to the degree that these are changes at all, they too are irrelevant. . . . The reality is that few women denied an abortion will choose adoption. The vast majority will continue, just as in *Roe* and *Casey*'s time, to shoulder the costs of childrearing. Whether or not they choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose.

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. . . . [W]e are sure some [States] 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 EuropeChave 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 sum, the majority can point to neither legal nor factual developments in support of its decision. . . .

2

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

West Coast Hotel overruled *Adkins* v. *Children's Hospital of D. C.* (1923), and a whole line of cases beginning with *Lochner* v. *New York* (1905). *Adkins* had found a state minimum-wage law unconstitutional because, in the Court's view, the law interfered with a constitutional right to contract. But then the Great Depression hit, bringing with it unparalleled economic despair. The experience undermined—in fact, it disproved—*Adkins*'s assumption that a wholly unregulated market could meet basic human needs. . . . And since *Adkins* was decided, the law had also changed. In several decisions, the Court had started to recognize the power of States to implement economic policies designed to enhance their citizens' economic well-being. See, *e.g.*, *Nebbia* v. *New York* (1934); *Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.* (1931). The statements in those decisions, *West Coast Hotel* explained, were "impossible to reconcile" with *Adkins*. There was no escaping the need for *Adkins* to go.

Brown v. *Board of Education* overruled *Plessy* v. *Ferguson* (1896), along with its doctrine of "separate but equal." By 1954, decades of Jim Crow had made clear what *Plessy*'s turn of phrase actually meant: "inherent[ ] [in]equal[ity]." *Brown*. . . . By that point, too, the law had begun to reflect that understanding. In a series of decisions, the Court had held unconstitutional public graduate schools' exclusion of black students. See, *e.g.*, *Sweatt* v. *Painter* (1950); *Sipuel* v. *Board of Regents of Univ. of Okla.* (1948) (*per curiam*); *Missouri ex rel. Gaines* v. *Canada* (1938). . . . Changed facts and changed law required *Plessy*'s end.

The majority says that in recognizing those changes, we are implicitly supporting the half-century interlude between *Plessy* and *Brown*. That is not so. . . . [W]e are not saying that a decision can *never* be overruled just because it is terribly wrong. Take *West Virginia Bd. of Ed.* v. *Barnette,* which the majority also relies on. That overruling took place just three years after the initial decision, before any notable reliance interests had developed. It happened as well because individual Justices changed their minds, not because a new majority wanted to undo the decisions of their predecessors. Both *Barnette* and *Brown*, moreover, share another feature setting them apart from the Court's ruling today. They protected individual rights with a strong basis in the Constitution's most fundamental commitments; they did not, as the majority does here, take away a right that individuals have held, and relied on, for 50 years. To take *that* action based on a new and bare majority's declaration that two Courts got the result egregiously wrong? And to justify that action by reference to *Barnette*? Or to *Brown*—a case in which the Chief Justice also wrote an (11-page) opinion in which the entire Court could speak with one voice? These questions answer themselves.

Casey itself addressed both *West Coast Hotel* and *Brown*, and found that neither supported *Roe*'s overruling. . . . *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. *Hoyt* v. *Florida* (1961). 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* (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 factChas undermined that promise.

C

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

In *Casey*, the Court observed that for two decades individuals "have organized intimate relationships and made" significant life choices "in reliance on the availability of abortion in the event that contraception should fail." Over another 30 years, that reliance has solidified. . . . 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. See Brief for Economists as *Amici Curiae* (showing that abortion availability has "large effects on women's education, labor force participation, occupations, and earnings").

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. . . . [W]omen 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. . . . 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.[26] 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* (Ginsburg, J., dissenting). It reflects that she is an autonomous person, and that society and the law recognize her as such. . . . Beyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right grants.

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[26] The average cost of a first-trimester abortion is about $500. Federal insurance generally does not cover the cost of abortion, and 35 percent of American adults do not have cash on hand to cover an unexpected expense that high.

. . . 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. . . .

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. . . .

. . . Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight. . . .

After today, young women will come of age with fewer rights than their mothers and grandmothers had. . . . The majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision.

D

The Court knew in 1992, as it did in 1973, that abortion was a "divisive issue." But *Casey*'s reason for acknowledging public conflict was the exact opposite of what the majority insinuates. *Casey* addressed the national controversy in order to emphasize how important it was, in that case of all cases, for the Court to stick to the law. Would that today's majority had done likewise.

. . . Here, more than anywhere, the Court needs to apply the law—particularly the law of *stare decisis*. Here, we know that citizens will continue to contest the Court's decision, because "[m]en and women of good conscience" deeply disagree about abortion. *Casey*. When that contestation takes place—but when there is no legal basis for reversing course—the Court needs to be steadfast, to stand its ground. That is what the rule of law requires. And that is what respect for this Court depends on. . . .

Justice Jackson once called a decision he dissented from a "loaded weapon," ready to hand for improper uses. *Korematsu* v. *United States* (1944). We fear that today's decision, departing from *stare decisis* for no legitimate reason, is its own loaded weapon. 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.

III

. . . Since the [abortion] right's recognition (and affirmation), nothing has changed to support what the majority does today. Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court.

In its petition for certiorari, the State . . . urged the Court merely to roll back *Roe* and *Casey*, specifically assuring the Court that "the questions presented in this petition do not require the Court to overturn" those precedents. But as Mississippi grew ever more confident in its prospects, it resolved to go all in. It urged the Court to overrule *Roe* and *Casey*. Nothing but everything would be enough.

. . . For overruling *Roe*, *Casey* concluded, the Court would pay a "terrible price." The Justices who wrote those words—O'Connor, Kennedy, and Souter—they were judges of wisdom. . . . They knew that "the legitimacy of the Court [is] earned over time." They also would have recognized that it can be destroyed much more quickly. They worked hard to avert that outcome in *Casey*. The American public, they thought, should never conclude that its constitutional protections hung by a thread—that a new majority,

adhering to a new "doctrinal school," could "by dint of numbers" alone expunge their rights. It is hard—no, it is impossible—to conclude that anything else has happened here. One of us once said that "[i]t is not often in the law that so few have so quickly changed so much." S. Breyer, Breaking the Promise of *Brown*: The Resegregation of America's Schools (2022). For all of us, in our time on this Court, that has never been more true than today. In overruling *Roe* and *Casey*, this Court betrays its guiding principles.

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