THE SUPREME COURT AND THE CONSTITUTION

2023 SUPPLEMENT

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This supplement is the sixth for the second edition of the casebook, which came out in 2017. As with supplements to the first edition, this supplement is cumulative—that is, this one contains all of the earlier supplements' material as well as new stuff. The idea of the casebook continues to be to teach basic principles of constitutional law without attempting to capture the current state of play on every doctrinal point. For that reason, this and future supplements focus on cases which arguably change the way we think about material covered in the main text. The Supreme Court decided some truly interesting standing cases in the 2020, 2021, and 2022 Terms, for instance, but because those cases concerned a level of detail more appropriate to a Federal Courts class than to one in introductory Constitutional Law, they do not appear in this supplement.

This year's supplement makes three additions—two large, one less so. The large ones are *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023), which struck down race-based affirmative action in admissions at Harvard and the University of North Carolina, and *National Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023), which rejected a dormant Commerce Clause challenge to California's law barring sales of pork produced under inhumane conditions, even out of state. *Students for Fair Admissions* will become the principal case in Sections 15.4 on affirmative action, replacing *Grutter* and *Parents Involved*, while *Ross* replaces *Kassel* as the principal case on the "burden" strand of dormant Commerce Clause doctrine. (In the new edition, hopefully forthcoming next year, *Ross* will anchor a much-revamped dormant Commerce Clause section concerning how federalism doctrine addresses horizontal conflicts among states.)[1]

The smaller change is *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), which continued the Roberts Court's development of the "major questions" doctrine as a limit on the Executive's exercise of delegated authority. A new note focuses on Justice Barrett's concurrence, which addressed whether that doctrine is consistent with textualism.

As always, comments on the case selection, editing, and notes are very welcome and much appreciated. Although any author's promises about timing of a

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[1] Last year's preface addressed the impact of *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), which overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* and eliminated constitutional protection for abortion. I suggested omitting *Casey* and instead borrowing two of the Court's non-abortion substantive due process decisions (*Glucksberg* and *Obergefell*) from Chapters Sixteen and Seventeen to give a picture of the Court's post-*Roe* substantive due process jurisprudence. I would then conclude the unit with *Dobbs*, as a new principal case.

new edition should be treated with skepticism, I am targeting next year for the new edition.

Thanks for using the book!

Ernest Young

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SECTION 2.3 POLITICAL QUESTIONS

Add new note 5a to the Note on the Political Question Doctrine on p. 136.

5a. *Baker v. Carr* dealt with electoral districts that were malapportioned because they included vastly disparate numbers of persons. That problem could be solved by a bright-line rule: one person, one vote. Other decisions have dealt with the somewhat more difficult problem of *racial* gerrymandering, whereby district lines are drawn in such a way as to minimize the political power of particular racial groups. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (striking down a municipal boundary line designed to exclude black voters from city elections). But the primary districting problem of contemporary times is *partisan* gerrymandering, in which state legislatures draw district lines in order to either "pack" one party's voters into a few districts that they dominate, leaving the other party with majorities in many other districts, or "crack" a party's voters into multiple districts where they form a minority. By these devices, the party that controls the state legislature can effectively assure itself a skewed majority in the state's congressional delegation—even while drawing districts that are approximately equal in population. This practice dates back to the Colonial legislatures prior to independence, but it has become considerably more significant as political parties have developed sophisticated methods for modeling districts and predicting the behavior of voters.

The Supreme Court has heard a long series of constitutional challenges to partisan gerrymandering. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court upheld a congressional redistricting plan designed to create a number of "safe" seats for each party in rough proportion to their power in the state. The Court rejected the notion that intent to achieve particular political results in districting was not inherently unconstitutional, recognizing that districting "inevitably has and is intended to have substantial political consequences." Later cases thus had to wrestle with a difficult question of degree: "deciding how much partisan dominance is too much." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006) (opinion of Kennedy, J.). For many years, no majority of the Court was able to agree either (a) on a standard for deciding which partisan gerrymanders are unconstitutional, or (b) that the issue presents a nonjusticiable political question. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), however, the Court held that the question is nonjusticiable by a five to four vote. *Rucho* involved consolidated challenges to state congressional maps in North Carolina and Maryland. In North Carolina, the Republican-controlled General Assembly drew a map that produced a congressional delegation of ten Republicans and three Democrats, even though Republican congressional candidates received only 53 percent of the statewide vote. One of the two Republicans chairing the redistricting committee explained that "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." In Maryland, Democrats controlled the governorship and the General Assembly. Governor Martin O'Malley stated his intent "to create a map that was more favorable for Democrats over the next ten years." Although Democrats never received more than 65 percent of the congressional vote in four elections following the

redistricting, the new map yielded seven out of eight congressional seats to Democrats in each of those elections.

Different sets of plaintiffs, who included voters in each state, political party organizations, and nongovernmental organizations, challenged each map. They alleged that the districts violated (a) the Equal Protection Clause (by diluting the strength of voters in their party vis-à-vis the other party), (b) the First Amendment (by retaliating against them based on their political beliefs), (c) Article I, the requirement of Article I, § 2 that Members of the House be chosen "by the People of the several States," and (d) the Elections Clause of Article I, § 4 (by exceeding the power delegated to States to prescribe the "Times, Places and manner of holding Elections" for Congress). The trial courts in both cases invalidated the districts and the defendants appealed directly to the Supreme Court.

The Court held the case nonjusticiable in an opinion by Chief Justice Roberts. Because challenges to districting ask courts to intervene in one of the most sensitive aspects of the political process, the Court insisted that "[a]ny standard for resolving such claims [challenging partisan gerrymandering] must be grounded in a limited and precise rationale and be clear, manageable, and politically neutral." In the malapportionment cases, "one person, one vote" offered such a standard. And the racial gerrymandering cases turned on the use of an impermissible factor: racial identity. But because the Court had long accepted that considerations of partisan advantage are not impermissible (and may be inevitable) in districting, the question was whether any sufficiently clear standard could be drawn to say how much partisanship is *too* much.

The Chief Justice rejected several possible standards. Although "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation," he noted that "[t]he Founders certainly did not think proportional representation was required"; after all, in the early nineteenth century, "many States elected their congressional representatives through at-large or 'general ticket' elections" that "typically sent single-party delegations to Congress." Likewise, the Chief Justice rejected general notions of fairness: "federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so." Indeed, "it is not even clear what fairness looks like in this context. There is a large measure of 'unfairness' in any winner-take-all system." Fairness might focus on making more districts competitive, or ensuring each party an appropriate number of safe seats. It could be measured by "adherence to 'traditional' districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents." But ultimately, the Court concluded, "[d]eciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments . . . ." Hence, "partisan gerrymandering claims present political questions beyond the reach of the federal courts."

Justice Kagan dissented in an opinion joined by Justices Ginsburg, Breyer, and Sotomayor. She began by emphasizing that "the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American

idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government." Moreover, she insisted that "checking [partisan gerrymanders] is *not* beyond the courts." In her view, the standards adopted by the lower courts in this case were manageable. Those standards required plaintiffs challenging a districting plan to prove (1) that state officials' "predominant purpose in drawing a district's lines was to entrench their party in power by diluting the votes of citizens favoring its rival"; (2) that "the lines drawn in fact have the intended effect by substantially diluting their votes." If plaintiffs can make such a showing then "the State must come up with a legitimate, non-partisan justification to save its map." These standards, Justice Kagan insisted, are "the sort of thing courts work with every day."

What does *Rucho* tell you about the state of the contemporary political question doctrine? Justice Kagan opened her dissent by asserting that *Rucho* was "the first time ever" that "this Court refuse[d] to remedy a constitutional violation because it thinks the task beyond judicial capabilities." But did the Court reject her proposed standard because it thought that standard was not "judicially manageable," in the *Baker v. Carr* sense? Having held that partisan motives are not inherently unconstitutional, would there be any basis for the majority to have struck down a district on the basis of a preodominantly partisan purpose or a partisan effect? When the Court said that "[t]here are no legal standards discernible in the Constitution for making such judgments" about political fairness, did it mean (as Justice Kagan thought) that the Court could not apply constitutional principles of political fairness, or that the Constitution simply does not contain the principles that the plaintiffs and the dissent sought to assert? If the Court meant the latter, is that really a holding that the plaintiffs' claim was non-justiciable or a rejection of that claim on the merits?

SECTION 5.3 THE JUDICIAL REVOLUTION OF 1937

Add the following additional paragraphs at the end of note 3 on p. 327:

Calls from Democrats to pack the Supreme Court intensified at the end of the Trump Administration, after President Trump nominated Amy Coney Barrett, a judge on the U.S. Court of Appeals for the Seventh Circuit and a former professor of constitutional law and federal courts at Notre Dame, to succeed Ruth Bader Ginsburg, who died on Sept. 18, 2020. Many Democrats were angry that the Republican-majority Senate was willing to confirm Judge Barrett just before a presidential election, after Republican Senators had refused to confirm Judge Merrick Garland to the Court just before the end of Barack Obama's presidency. Others thought that Barrett would simply tip the Court too far to the political right. Following his election in November 2020, President Joe Biden established a "Presidential Commission on the Supreme Court of the United States," a bipartisan but mostly left-leaning group of legal scholars, judges, and practitioners, to consider a wide range of possible reforms to the Court.

One who testified before the Commission was Professor Neil Siegel of Duke Law School, a respected liberal constitutional scholar and a former law clerk to the late Justice Ginsburg. Professor Siegel was unstinting in his condemnation of Senate Republicans, whom he viewed as having "damaged the Court's legitimacy and the appointments process." But he suggested that court-packing, while constitutional, runs counter to a strong consitutional "convention" or "norm" dating back to 1937. Siegel thus urged caution about proposals to pack the Court:

> Court-packing remains an extreme act—a break-the-glass-and-pull-the-lever-only-in-case-of-emergency sort of act. Court-packing would significantly undermine the Court's independence and, in almost all circumstances, risk its legal and public legitimacy. Undermining the Court's legitimacy would in turn impair its ability to perform critical functions that no other governmental institution in the United States is likely to perform more effectively. Courtpacking should therefore be reserved for extreme situations, in which adding seats would respond to a previous instance of Court-packing, restore the Court's legitimacy, or meet a national crisis more important than the Court's legitimacy. And even when an extreme situation exists, Court-packing should be the last resort, not the first.[2]

Do you agree with this analysis? What does it mean to say that court-packing is not unconstitutional, but counter to a constitutional "convention"?

Besides outright packing, the Commission considered other reform proposals. Professor Samuel Moyn of Yale, for example, insisted that judicial review is fundamentally undemocratic and thus urged "reforms that seek to curtail and manage the [Court's] power, compared to those that affect its composition or personnel."[3] Among those still believing in judicial review, the most common suggestion has been term limits for the justices, which most agree would require a constitutional amendment. An 18-year term would correspond roughly to the 17-year average terms of justices over the past century, and it would (probably) guarantee each president the opportunity to appoint two justices during each four-year presidential term. Many legal scholars are critical of court-packing but more open to term limits. Do you think they would be a good idea? Would they achieve a regular confirmation cycle? For an example of a more outlandish proposal, see Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L. J. 148 (2019) (suggesting that the Supreme Court should be composed of federal appeals court judges selected either by lottery or through a partisan-balancing scheme). For a thoughtful (and funny) response, see Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L. J. FORUM 93 (2019).

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[2] Professor Siegel's full testimony is available at https://www.whitehouse.gov/wp-content/uploads/2021/07/Siegel-Testimony.pdf.

[3] *See* https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf.

SECTION 6.3 INCORPORATION AND THE NATIONALIZATION OF CRIMINAL PROCEDURE

Add the following additional paragraphs at the end of note 3 on p. 442:

In *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the Court held that the Excessive Fines Clause of the Eighth Amendment[4] is incorporated into the Fourteenth Amendment. *Timbs* involved a civil forfeiture action brought by the State to take Timb's Land Rover SUV, which the State alleged had been used in connection with illegal drug activity. Timbs protested that the vehicle was worth $42,000—over four times the amount of the $10,000 maximum fine assessable against him for his criminal drug conviction. Writing for the Court, Justice Ginsburg cited "overwhelming" evidence that the right to be free from excessive fines was "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." She stressed that legal protection against excessive fines dates back to Magna Carta in English law; that it was included in most state constitutions in both 1789 and 1868, and that concerns about excessive fines imposed by the "black codes" in the post-Civil War South were part of the conversation leading up to the Fourteenth Amendment.

The more interesting question in *Timbs* arose from Indiana's argument that protection against excessive fines should not be incorporated with respect to *civil* forfeitures—an application with far less historical support. Justice Ginsburg did not think this question was interesting, however. She noted that the Court had already extended the Eighth Amendment's protection to civil forfeitures in *federal* cases, and she insisted that if the general principle is incorporated against the States, then it applies to the states in exactly the same way. "Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." Concurrences by Justices Thomas and Gorsuch noted continuing controversy over whether the Privileges and Immunities Clause of the Fourteenth Amendment would provide a more appropriate textual vehicle for incorporation of the Bill of Rights.

In the following term, the Court held that the Sixth Amendment's requirement of a unanimous jury verdict in criminal trials likewise binds the states under the incorporation doctrine. *See Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). In so holding, the Court overruled *Apodaca v. Oregon*, 406 U.S. 404 (1972), in which the controlling opinion had suggested that although the Sixth Amendment binds the states, incorporation could permit somewhat different requirements at the state and national levels.

[4] The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

SECTION 7.3 ABORTION AND STARE DECISIS

Omit Planned Parenthood v. Casey (pp. 488-522) and the *Note on* Casey, *the Abortion Debate, and Common Law Constitutionalism* (pp. 522-31). Instead, add the following:

Washington v. Glucksberg (pp. 1438-61) and the *Note on* Glucksberg *and the Nature of Substantive Due Process Review* (pp. 1461-62).

Obergefell v. Hodges (pp. 1660-99) and Notes 4-7 from the *Note on Equality, Liberty, and Federalism* (pp. 1702-03).

Then add the following new principal case:

Dobbs v. Jackson Women's Health Org.

142 S. Ct. 2228 (2022)

■ **JUSTICE ALITO delivered the opinion of the court.**

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

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

Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point at which a fetus was thought to achieve "viability," *i.e.*, the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting "potential life," it found that this interest could not justify any restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend *Roe*'s reasoning. One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court end[ed] up drafting" if he were "a legislator," but his assessment of *Roe* was memorable and

brutal: *Roe* was "not constitutional law" at all and gave "almost no sense of an obligation to try to be."[2]

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

Eventually, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court revisited *Roe*, but the Members of the Court split three ways. Two Justices expressed no desire to change *Roe* in any way. Four others wanted to overrule the decision in its entirety. And the three remaining Justices, who jointly signed the controlling opinion, took a third position. Their opinion did not endorse *Roe*'s reasoning, and it even hinted that one or more of its authors might have "reservations" about whether the Constitution protects a right to abortion.[8] 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.[9] Anything less, the opinion claimed, would undermine respect for this Court and the rule of law.

Paradoxically, the judgment in *Casey* did a fair amount of overruling. Several important abortion decisions were overruled *in toto*, and *Roe* itself was overruled in part. *Casey* threw out *Roe*'s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman's right to have an abortion.[11] 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.[12]

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently

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[2] J. Ely, The Wages of Crying Wolf: A Comment on *Roe v.Wade*, 82 Yale L. J. 920, 926, 947 (1973).

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

[8] *See* 505 U.S. at 853 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[9] *Id.* at 860.

[11] 505 U.S. at 874.

[12] *Id.* at 867.

enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.

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

We hold that *Roe* and *Case*y must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."

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

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Casey*, 505

U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand.

I

The law at issue in this case, Mississippi's Gestational Age Act, see Miss. Code Ann. § 41–41–191 (2018), contains this central provision: "Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform ... or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." § 4(b).

To support this Act, the legislature made a series of factual findings. 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] [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." § 2(b)(i). It found that most abortions after 15 weeks employ "dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child," and it concluded that the "intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." § 2(b)(i)(8).

Respondents are an abortion clinic, Jackson Women's Health Organization, and one of its doctors. On the day the Gestational Age Act was enacted, respondents filed suit in Federal District Court against various Mississippi officials, alleging that the Act violated this Court's precedents establishing a constitutional right to abortion. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act, reasoning that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions" and that 15 weeks' gestational age is "prior to viability." The Fifth Circuit affirmed.

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

[15] Those other six countries were Canada, China, the Netherlands, North Korea, Singapore, and Vietnam.

II

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion.

A

1

Constitutional analysis must begin with "the language of the instrument," *Gibbons v. Ogden*, 9 Wheat. 1, 186-89 (1824), which offers a "fixed standard" for ascertaining what our founding document means, 1 J. Story, Commentaries on the Constitution of the United States § 399, p. 383 (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. . . . The *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause.

We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents' *amici* have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. See Brief for United States as *Amicus Curiae* 24. 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.[17] The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other." *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). And as the Court has stated, the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273-74 (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. . . .

2

The underlying theory on which this argument rests—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural,

[17] See, *e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017).

protection for "liberty"—has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights.

The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, *Barron v. Baltimore*, 7 Pet. 243, 247-51 (1833), but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. See *McDonald v. Chicago*, 561 U.S. 742, 763-67 & nn. 12-13 (2010). The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty." *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019); *McDonald*, 561 U.S. at 764, 767; *Glucksberg*, 521 U.S. at 721. And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue. . . . Thus, in *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of "Anglo-American common law tradition" and made clear that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition," 521 U.S. at 720-21.

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. "Liberty" is a capacious term. As Lincoln once said: "We all declare for Liberty; but in using the same word we do not all mean the same thing."[20] . . .

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. *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). "Substantive due process has at times been a treacherous field for this Court," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives. As the Court cautioned in *Glucksberg*, "[w]e must ... exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." 521 U.S. at 720.

On occasion, when the Court has ignored the "[a]ppropriate limits" imposed by "'respect for the teachings of history,'" *Moore*, 431 U.S. at 503, 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

[20] Address at Sanitary Fair at Baltimore, Md. (Apr. 18, 1864), reprinted in 7 The Collected Works of Abraham Lincoln 301 (R. Basler ed. 1953).

an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.

B

1

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

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. . . .

Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*. . . . That the common law did not condone even prequickening abortions is confirmed by what one might call a proto-felony-murder rule. Hale and Blackstone explained a way in which a pre-quickening abortion could rise to the level of a homicide. Hale wrote that if a physician gave a woman "with child*"* a "potion" to cause an abortion, and the woman died, it was "murder" because the potion was given "*unlawfully* to destroy her child within her." 1 Sir Matthew Hale, *History of the Please of the Crown* 429–430 (1736) (emphasis added). As Blackstone explained, to be "murder" a killing had to be done with "malice aforethought, ... either express or implied." 4 William Blackstone, *Commentaries on the Laws of England* 198 (7th ed. 1775) (emphasis deleted). In the case of an abortionist, Blackstone wrote, "the law will imply [malice]" for the same reason that

[23] See R. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N. C. L. Rev. 730 (1968).

it would imply malice if a person who intended to kill one person accidentally killed a different person:

> "[I]f one shoots at A and misses *him*, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. *So also*, if one gives *a woman with child* a medicine to procure abortion, and it operates so violently as to kill the woman, *this is murder* in the person who gave it." *Id.*, at 200–201 (emphasis added; footnote omitted).

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

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

b

In this country, the historical record is similar. The most important early American edition of Blackstone's Commentaries reported Blackstone's statement that abortion of a quick child was at least "a heinous misdemeanor," 2 St. George Tucker, Blackstone's Commentaries 129–130 (1803), and that edition also included Blackstone's discussion of the proto-felony-murder rule, 5 *id.*, at 200–201. Manuals for justices of the peace printed in the Colonies in the 18th century typically restated the common-law rule on abortion, and some manuals repeated Hale's and Blackstone's statements that anyone who prescribed medication "unlawfully to destroy the child" would be guilty of murder if the woman died. See, *e.g.*, J. Parker, Conductor Generalis 220 (1788); 2 R. Burn, Justice of the Peace, and Parish Officer 221–222 (7th ed. 1762) (English manual stating the same).

The few cases available from the early colonial period corroborate that abortion was a crime. . . .

c

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages, and thus, as one court put it in 1872: "[U]ntil the period of quickening there is no *evidence* of life; and whatever may be said of the feotus, the law has fixed upon this period of gestation as the time when the child is endowed with life" because "foetal movements are the first clearly marked and well defined *evidences of life*." *Evans v. People*, 49 N.Y. 86, 90 (emphasis added).

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.'" Brief for United States 26

(quoting *Commonwealth v. Parker*, 50 Mass. 263, 266 (1845)). 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." *Ibid*. (citing 1 Blackstone 129); see also *Evans*, 49 N.Y. at 89; *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850); *Morrow v. Scott*, 7 Ga. 535, 537 (1849); *Hall v. Hancock*, 32 Mass. 255, 258 (1834); *Thellusson v. Woodford*, 4 Ves. 227, 321–322, 31 Eng. Rep. 117, 163 (1789).

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 this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. See Appendix A, *infra* (listing state statutory provisions in chronological order). By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910. . . . By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother." 410 U.S. at 139.

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. See *id.* at 118 & n.2 (listing States). 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. In short, the "Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 793 (1986) (White, J., dissenting). . . .

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," 505 U.S. at 851. *Casey* elaborated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Ibid.*

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. License to act on the basis of such beliefs may correspond to one of the many

understandings of "liberty," but it is certainly not "ordered liberty."

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being." Miss. Code Ann. § 41–41–191(4)(b). Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to marry while in prison, *Turner v. Safley*, 482 U.S. 78 (1987); the right to obtain contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Carey v. Population Svcs. Int'l*, 431 U.S. 678 (1977); the right to reside with relatives, *Moore v. East Cleveland*, 431 U.S. 494 (1977); the right to make decisions about the education of one's children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska*, 262 U.S. 390 (1923); the right not to be sterilized without consent, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, *Winston v. Lee*, 470 U.S. 753 (1985), *Washington v. Harper*, 494 U.S. 210 (1990), *Rochin v. California*, 342 U.S. 165 (1952). Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges*, 576 U.S. 644 (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*, 410 U.S. at 159 (abortion is "inherently different"); *Casey*, 505 U.S. at 852 (abortion is "a unique act"). None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

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." 505 U.S. at 848. 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

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." *Post*, at 2326 (internal quotation marks omitted). This vague formulation imposes no clear restraints on what Justice White called the "exercise of raw judicial power," *Roe*, 410 U.S. at 222 (dissenting opinion), and while the dissent claims that its standard "does not mean anything goes," any real restraints are hard to discern.

The largely limitless reach of the dissenters' standard is illustrated by the

way they apply it here. First, if the "long sweep of history" imposes any restraint on the recognition of unenumerated rights, then *Roe* was surely wrong, since abortion was never allowed (except to save the life of the mother) in a majority of States for over 100 years before that decision was handed down. Second, it is impossible to defend *Roe* based on prior precedent because all of the precedents *Roe* cited, including *Griswold* and *Eisenstadt*, were critically different for a reason that we have explained: None of those cases involved the destruction of what *Roe* called "potential life." . . .

3

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

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 for reasons we discuss later, 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. It protects the interests of those who have taken action in reliance on a past decision. It "reduces incentives

for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015). It fosters "evenhanded" decisionmaking by requiring that like cases be decided in a like manner. It "contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges." N. Gorsuch, A Republic, If You Can Keep It 217 (2019).

We have long recognized, however, that *stare decisis* is "not an inexorable command," *Pearson v. Callahan*, 555 U.S. 223, 244 (2009), and it "is at its weakest when we interpret the Constitution," *Agostini v. Felton*, 521 U.S. 203, 235 (1997). It has been said that it is sometimes more important that an issue "'be settled than that it be settled right.'" *Kimble*, 576 U.S. at 455 (quoting *Burnet v. Coronad* *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (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*, 14 U.S. (1 Wheat.) 304, 326 (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. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents. We mention three. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court repudiated the "separate but equal" doctrine, which had allowed States to maintain racially segregated schools and other facilities. In so doing, the Court overruled the infamous decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule.

In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court overruled *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923), which had held that a law setting minimum wages for women violated the "liberty" protected by the Fifth Amendment's Due Process Clause. *West Coast Hotel* signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation. See *Lochner v. New York*, 198 U.S. 45 (1905) (holding invalid a law setting maximum working hours); *Coppage v. Kansas*, 326 U.S. 1 (1915) (holding invalid a law banning contracts forbidding employees to join a union).

Finally, in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), after the lapse of only three years, the Court overruled *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), and held that public school students could not be compelled to salute the flag in violation of their sincere beliefs. *Barnette* stands out because

nothing had changed during the intervening period other than the Court's belated recognition that its earlier decision had been seriously wrong.

On many other occasions, this Court has overruled important constitutional decisions. [Footnote with massive string cite omitted.] Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.

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

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

A

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

The infamous decision in *Plessy v. Ferguson*, was one such decision. It betrayed our commitment to "equality before the law." It was "egregiously wrong" on the day it was decided, and as the Solicitor General agreed at oral argument, it should have been overruled at the earliest opportunity. . . .

Roe was on a collision course with the Constitution from the day it was decided, *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*, 410 U.S. at 222 (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*. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since." *Casey*, 505 U.S. at 995-96 (opinion of Scalia, J.). Together, *Roe* and *Casey* represent an error that cannot be allowed to stand.

As the Court's landmark decision in *West Coast Hotel* illustrates, the Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process. As Justice White later explained, "decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people

have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken." *Thornburgh*, 476 U.S. at 787 (dissenting opinion).

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 v. Am. Fed'n of State, County, & Municipal Employees*, 138 S. Ct. 2448, 2480-81 (2018); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414-15 (2020) (opinion of Kavanaugh, J.). In Part II, *supra*, we explained why *Roe* was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds.

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

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

c

. . . 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." 410 U.S. at 163.

As Professor Laurence Tribe has written, "[c]learly, this mistakes 'a definition for a syllogism.'" Laurence Tribe, *Foreword: Toward a Model of Roles in the Due process of Life and Law*, 87 Harv. L. Rev. 1, 4 (1973) (quoting Ely at 924). 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," 410 U.S. at 163, why isn't that interest "equally compelling before viability"? *Webster v. Reproductive Health Svcs.*, 492 U.S. 490, 519 (1989) (plurality opinion). *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. . . .

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. . . .

Viability also depends on the "quality of the available medical facilities." *Colautti v. Franklin*, 439 U.S. 379, 396 (1979). Thus, a 24-week-old fetus may be viable if a woman gives birth in a city with hospitals that provide advanced care for very premature babies, but if the woman travels to a remote area far from any such hospital, the fetus may no longer be viable. On what ground could the constitutional status of a fetus depend on the pregnant woman's location? . . .

In addition, as the Court once explained, 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. 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

All in all, *Roe*'s reasoning was exceedingly weak, and academic commentators, including those who agreed with the decision as a matter of policy, were unsparing in their criticism. . . .

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, *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 433-39 (1983); that minors obtain parental consent, *Planned Parenthood*

of Central Mo. v. Danforth, 428 U.S. 52, 74 (1976); that women give written consent after being informed of the status of the developing prenatal life and the risks of abortion, *Akron*, 462 U.S. at 442-45; that women wait 24 hours for an abortion, *id.*, at 449–451; that a physician determine viability in a particular manner, *Colautti*, 439 U.S. at 390-97; that a physician performing a post-viability abortion use the technique most likely to preserve the life of the fetus, *id.*, at 397–401; and that fetal remains be treated in a humane and sanitary manner, *Akron*, 462 U.S. at 451-52.

Justice White complained that the Court was engaging in "unrestrained imposition of its own extraconstitutional value preferences." *Thornburgh*, 476 U.S. at 794 (dissenting opinion). And the United States as *amicus curiae* asked the Court to overrule *Roe* five times in the decade before *Casey*, see 505 U.S. at 844 (joint opinion), 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. . . . The Court retained what it called *Roe*'s "central holding"—that a State may not regulate pre-viability abortions for the purpose of protecting fetal life—but it provided no principled defense of the viability line. Instead, it merely rephrased what *Roe* had said, stating that viability marked the point at which "the independent existence of a second life can in reason and fairness be the object of state protection that now overrides the rights of the woman." 505 U.S. at 870. Why "reason and fairness" demanded that the line be drawn at viability the Court did not explain. And the Justices who authored the controlling opinion conspicuously failed to say that they agreed with the viability rule; instead, they candidly acknowledged "the reservations [some] of us may have in reaffirming [that] holding of *Roe*." *Id.* at 853.

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 predictable manner. *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009).; *Patterson v. MLean Credit Union*, 491 U.S. 164, 173 (1989). *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." 505 U.S. at 992; see also *June Medical Svcs. LLC v. Russo*, 140 S. Ct. 2103, 2180 (2020) (GORSUCH, J., dissenting) ("[W]hether a burden is deemed undue depends heavily on which factors the judge considers and how much weight he accords each of them.").

The *Casey* plurality tried to put meaning into the "undue burden" test by

setting out three subsidiary rules, but these rules created their own problems. The first rule is that "a provision of law is invalid, if its purpose or effect is to place a *substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. at 878. 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.

This ambiguity is a problem, and the second rule, which applies at all stages of a pregnancy, muddies things further. It states that measures designed "to ensure that the woman's choice is informed" are constitutional so long as they do not impose "an undue burden on the right." 505 U.S. at 878. To the extent that this rule applies to pre-viability abortions, it overlaps with the first rule and appears to impose a different standard. Consider a law that imposes an insubstantial obstacle but serves little purpose. As applied to a pre-viability abortion, would such a regulation be constitutional on the ground that it does not impose a "*substantial* obstacle"? Or would it be unconstitutional on the ground that it creates an "*undue* burden" because the burden it imposes, though slight, outweighs its negligible benefits? *Casey* does not say, and this ambiguity would lead to confusion down the line. Compare *June Medical*, 140 S. Ct. at 2112 (plurality opinion), with 140 S. Ct. at 2135-36 (ROBERTS, C. J., concurring).

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

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

Casey provided no clear answer to these questions. It said that a regulation is unconstitutional if it imposes a substantial obstacle "in a large fraction of cases in which [it] is relevant," 505 U.S. at 895, but there is obviously no clear line between a fraction that is "large" and one that is not. Nor is it clear what the Court meant by "cases in which" a regulation is "relevant." These ambiguities have caused confusion and disagreement. Compare *Whole Woman's Health v. Hellerstedt*, 579

U.S. 582, 627-28 (2016), with *id.* at 666-67 (ALITO, J., dissenting).

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]," *Casey*, 505 U.S. at 881-87, but Justice Stevens, applying the same test, reached the opposite result, *id.* at 920-22 (opinion concurring in part and dissenting in part). . . .

The ambiguity of the "undue burden" test also produced disagreement in later cases. In *Whole Woman's Health*, the Court adopted the cost-benefit interpretation of the test, stating that "[t]he rule announced in *Casey* ... requires that courts consider the burdens a law imposes on abortion access *together with the benefits those laws confer*." 579 U.S. at 607 (emphasis added). But five years later, a majority of the Justices rejected that interpretation. Four Justices reaffirmed *Whole Woman's Health*'s instruction to "weigh" a law's "benefits" against "the burdens it imposes on abortion access." 140 S.Ct., at 2135 (plurality opinion). But THE CHIEF JUSTICE—who cast the deciding vote—argued that "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts." *Id.*, at 2136 (opinion concurring in judgment). And the four Justices in dissent rejected the plurality's interpretation of *Casey*. See 140 S. Ct. at 2154-55 (opinion of ALITO, J., joined in relevant part by THOMAS, GORSUCH, and KAVANAUGH, JJ.).

This Court's experience applying *Casey* has confirmed Chief Justice Rehnquist's prescient diagnosis that the undue-burden standard was "not built to last." *Casey*, 505 U.S. at 965 (opinion concurring in judgment in part and dissenting in part).

3

The experience of the Courts of Appeals provides further evidence that *Casey*'s line between permissible and unconstitutional restrictions has proved to be impossible to draw with precision.

Casey has generated a long list of Circuit conflicts. Most recently, the Courts of Appeals have disagreed about whether the balancing test from *Whole Woman's Health* correctly states the undue-burden framework. They have disagreed on the legality of parental notification rules. They have disagreed about bans on certain dilation and evacuation procedures. They have disagreed about when an increase in the time needed to reach a clinic constitutes an undue burden. And they have disagreed on whether a State may regulate abortions performed because of the fetus's race, sex, or disability. . . .

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.

Members of this Court have repeatedly lamented that "no legal rule or

doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting).

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

When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine "has failed to deliver the 'principled and intelligible' development of the law that *stare decisis* purports to secure." *June Medical*, 140 S.Ct. at 2152 (THOMAS, J., dissenting).

E

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

1

Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." *Casey*, 505 U.S. at 856 (joint opinion). In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." 505 U.S. at 856. . . .

2

Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society ... in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Ibid.* But this Court is ill-equipped to assess "generalized assertions about the national psyche." *Id.* at 957 (opinion of Rehnquist, C. J.). *Casey*'s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in "cases involving property and contract rights." *Payne*, 501 U.S. at 828.

When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the

authority nor the expertise to adjudicate those disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963).

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so. In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi, constituted 55.5 percent of the voters who cast ballots.

3

Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." Brief for United States 26 (citing *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Griswold v. Connecticut*, 381 U.S. 479 (1965)). That is not correct for reasons we have already discussed. As even the *Casey* plurality recognized, "[a]bortion is a unique act" because it terminates "life or potential life." 505 U.S. at 852; see also *Roe*, 410 U.S. at 159 (abortion is "inherently different from marital intimacy," "marriage," or "procreation"). And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

IV

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

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

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. *Brown v. Board of Education*, 347 U.S. 483 (1954). That is true both when we initially decide a constitutional issue *and* when we consider whether to overrule a prior decision. . . . In suggesting otherwise, the *Casey* plurality went beyond this Court's role in our constitutional system.

The *Casey* plurality "call[ed] the contending sides of a national controversy to end their national division," and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. 505 U.S. at 867. That unprecedented claim exceeded the power vested in us by the Constitution. As Alexander Hamilton famously put it, the Constitution gives the judiciary "neither Force nor Will." The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Our sole authority is to exercise "judgment"—which is to say, the authority to judge what the law means and how it should apply to the case at hand. *Ibid.* 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*, 505 U.S. at 995 (opinion of Scalia, J.); see also R. Ginsburg, Speaking in a Judicial Voice, 67 N. Y. U. L. Rev. 1185, 1208 (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.

Neither decision has ended debate over the issue of a constitutional right to obtain an abortion. Indeed, in this case, 26 States expressly ask us to overrule *Roe* and *Casey* and to return the issue of abortion to the people and their elected representatives. This Court's inability to end debate on the issue should not have been surprising. This Court cannot bring about the permanent resolution of a rancorous national controversy simply by dictating a settlement and telling the people to move on. Whatever influence the Court may have on public attitudes must stem from the strength of our opinions, not an attempt to exercise "raw judicial power." *Roe*, 410 U.S. at 222 (White, J., dissenting).

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*, 347 U.S. 483 (1954), 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? . . .

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. . . .

B

1

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

There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party. As we have recounted, both parties and

the Solicitor General have urged us either to reaffirm or overrule *Roe* and *Casey*. And when the specific approach advanced by the concurrence was broached at oral argument, both respondents and the Solicitor General emphatically rejected it. Respondents' counsel termed it "completely unworkable" and "less principled and less workable than viability." The Solicitor General argued that abandoning the viability line would leave courts and others with "no continued guidance." What is more, the concurrence has not identified any of the more than 130 *amicus* briefs filed in this case that advocated its approach. 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." *Post*, at 2311. But this rule was a critical component of the holdings in *Roe* and *Casey*, and *stare decisis* is "a doctrine of preservation, not transformation," *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 384, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (ROBERTS, C. J., concurring). Therefore, a new rule that discards the viability rule cannot be defended on *stare decisis* grounds. . . .

Not only is the new rule proposed by the concurrence inconsistent with *Casey*'s unambiguous "language," it is also contrary to the judgment in that case and later abortion cases. In *Casey*, the Court held that Pennsylvania's spousal-notification provision was facially unconstitutional, not just that it was unconstitutional as applied to abortions sought prior to the time when a woman has had a reasonable opportunity to choose. The same is true of *Whole Women's Health*, which held that certain rules that required physicians performing abortions to have admitting privileges at a nearby hospital were facially unconstitutional because they placed "a substantial obstacle in the path of women seeking *a previability abortion*." 579 U.S. AT 591 (emphasis added).

For all these reasons, *stare decisis* cannot justify the new "reasonable opportunity" rule propounded by the concurrence. If that rule is to become the law of the land, it must stand on its own, but the concurrence makes no attempt to show that this rule represents a correct interpretation of the Constitution. The concurrence does not claim that the right to a reasonable opportunity to obtain an abortion is "'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty.'" *Glucksberg*, 521 U.S. at 720-21. 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 v. FEC*, 558 U.S. 310, 375 (2010) (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. Some States have set deadlines for obtaining an abortion that are shorter than Mississippi's. If we held only that Mississippi's 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. The "measured course" charted by the concurrence would be fraught with turmoil until the Court answered the question that the concurrence seeks to defer.

Even if the Court ultimately adopted the new rule suggested by the concurrence, we would be faced with the difficult problem of spelling out what it means. For example, if the period required to give women a "reasonable" opportunity to obtain an abortion were pegged, as the concurrence seems to suggest, at the point when a certain percentage of women make that choice, we would have to identify the relevant percentage. It would also be necessary to explain what the concurrence means when it refers to "rare circumstances" that might justify an exception. And if this new right aims to give women a reasonable opportunity to get an abortion, it would be necessary to decide whether factors other than promptness in deciding might have a bearing on whether such an opportunity was available.

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 better—for this Court and the country—to face up to the real issue without further delay.

VI

We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.

A

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

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson*, 372 U.S. at 729-30; see also *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance. See, *e.g.*, *Glucksberg*, 521 U.S., at 728 ("assisted suicide"); *San Antonio Indep. Sch. Dist. V. Rodriguez*, 411 U.S. 1, 32-35, 55 (1973) ("financing public education").

A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). It must be sustained if there is a rational basis on which the legislature could have thought

that it would serve legitimate state interests. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955). These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability. See *Roe*, 410 U.S. at 150; cf. *Glucksberg*, 521 U.S., at 728–731 (identifying similar interests).

B

These legitimate interests justify Mississippi's Gestational Age Act. Except "in a medical emergency or in the case of a severe fetal abnormality," the statute prohibits abortion "if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." Miss. Code Ann. § 41–41–191(4)(b). The Mississippi Legislature's findings recount the stages of "human prenatal development" and assert the State's interest in "protecting the life of the unborn." § 2(b)(i). The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure "for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." § 2(b)(i)(8). 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. Considerable historical evidence indicates that "due process of law" merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. See, *e.g.*, *Johnson v. United States*, 576 U.S. 591, 623 (2015) (THOMAS, J., concurring in judgment). Other sources, by contrast, suggest that "due process of law" prohibited legislatures "from authorizing the deprivation of a person's life, liberty, or property without providing him the customary procedures to which freemen were entitled by the old law of England." *United States v. Vaello Madero*, 142 S. Ct. 1539, 1545 (2022)

(THOMAS, J., concurring). Either way, the Due Process Clause at most guarantees *process*. It does not, as the Court's substantive due process cases suppose, "forbi[d] the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

As I have previously explained, "substantive due process" is an oxymoron that "lack[s] any basis in the Constitution." *Johnson*, 576 U.S. at 607-08 (opinion of THOMAS, J.). "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." *McDonald v. Chicago*, 561 U.S. 742, 811 (2010) (THOMAS, J., concurring in part and concurring in judgment). The resolution of this case is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.

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

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is demonstrably erroneous, we have a duty to "correct the error" established in those precedents, *Gamble v. United States*, 139 S. Ct. 1960, 1984-85 (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. Amdt. 14, § 1. 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.

Moreover, apart from being a demonstrably incorrect reading of the Due Process Clause, the legal fiction of substantive due process is particularly dangerous. At least three dangers favor jettisoning the doctrine entirely.

First, substantive due process exalts judges at the expense of the People from whom they derive their authority. Because the Due Process Clause speaks only to

'process,' the Court has long struggled to define what substantive rights it protects. In practice, the Court's approach for identifying those "fundamental" rights "unquestionably involves policymaking rather than neutral legal analysis." *United States v. Carlton*, 512 U.S. 26, 41-42 (1994) (opinion of Scalia, J.). The Court divines new rights in line with "its own, extraconstitutional value preferences" and nullifies state laws that do not align with the judicially created guarantees. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting). . . .

Second, substantive due process distorts other areas of constitutional law. For example, once this Court identifies a "fundamental" right for one class of individuals, it invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others. See, *e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453–454 (1972) (relying on *Griswold* to invalidate a state statute prohibiting distribution of contraceptives to unmarried persons). Statutory classifications implicating certain "nonfundamental" rights, meanwhile, receive only cursory review. Similarly, this Court deems unconstitutionally "vague" or "overbroad" those laws that impinge on its preferred rights, while letting slide those laws that implicate supposedly lesser values. Therefore, regardless of the doctrinal context, the Court often "demand[s] extra justifications for encroachments" on "preferred rights" while "relax[ing] purportedly higher standards of review for less preferred rights." *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 640–642 (2016) (THOMAS, J., dissenting). Substantive due process is the core inspiration for many of the Court's constitutionally unmoored policy judgments.

Third, substantive due process is often wielded to disastrous ends. For instance, in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories. While *Dred Scott* "was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox," *Obergefell*, 576 U.S. at 696 (ROBERTS, C. J., dissenting), that overruling was purchased at the price of immeasurable human suffering. Now today, the Court rightly overrules *Roe* and *Casey*—two of this Court's most notoriously incorrect substantive due process decisions—after more than 63 million abortions have been performed, see National Right to Life Committee, Abortion Statistics (Jan. 2022), https://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf. 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. But, in future cases, we should "follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away." *Carlton*, 512 U.S. at 42 (opinion of Scalia, J.). Substantive due process conflicts with that textual command and has harmed our country in many ways.

Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.

■ **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. . . .

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. . . . Today's decision therefore does not prevent the numerous States that readily allow abortion from continuing to readily allow abortion. . . . By contrast, other States may maintain laws that more strictly limit abortion. After today's decision, all of the States may evaluate the competing interests and decide how to address this consequential issue.[2]

[2] In his dissent in *Roe*, Justice Rehnquist indicated that an exception to a State's restriction on abortion would be constitutionally required when an abortion is necessary to save the life of the mother. See *Roe v. Wade*, 410 U.S. 113, 173 (1973). Abortion statutes traditionally and currently provide for an exception when an abortion is necessary to protect the life of the mother. . . .

In arguing for a *constitutional* right to abortion that would override the people's choices in the democratic process, the plaintiff Jackson Women's Health Organization and its *amici* emphasize that the Constitution does not freeze the American people's rights as of 1791 or 1868. I fully agree. To begin, I agree that constitutional rights apply to situations that were unforeseen in 1791 or 1868—such as applying the First Amendment to the Internet or the Fourth Amendment to cars. Moreover, the Constitution authorizes the creation of new rights—state and federal, statutory and constitutional. But when it comes to creating new rights, the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitution—state legislation, state constitutional amendments, federal legislation, and federal constitutional amendments. See generally Amdt. 9; Amdt. 10; Art. I, § 8; Art. V; J. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 7−21, 203−216 (2018); A. Amar, America's Constitution: A Biography 285−291, 315−347 (2005).

The Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties based on our own moral or policy views. . . .

II

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

I have deep and unyielding respect for the Justices who wrote the *Casey* plurality opinion. And I respect the *Casey* plurality's good-faith effort to locate some middle ground or compromise that could resolve this controversy for America.

But as has become increasingly evident over time, *Casey*'s well-intentioned effort did not resolve the abortion debate. The national division has not ended. In recent years, a significant number of States have enacted abortion restrictions that directly conflict with *Roe*. Those laws cannot be dismissed as political stunts or as outlier laws. Those numerous state laws collectively represent the sincere and deeply held views of tens of millions of Americans who continue to fervently believe that allowing abortions up to 24 weeks is far too radical and far too extreme, and does not sufficiently account for what *Roe* itself recognized as the State's "important and legitimate interest" in protecting fetal life. this case, moreover, a majority of the States—26 in all—ask the Court to overrule *Roe* and return the abortion issue to the States.

In short, *Casey*'s *stare decisis* analysis rested in part on a predictive judgment about the future development of state laws and of the people's views on the abortion issue. But that predictive judgment has not borne out. As the Court today explains, the experience over the last 30 years conflicts with *Casey*'s predictive judgment and therefore undermines *Casey*'s precedential force.[5] . . .

[5] To be clear, public opposition to a prior decision is not a basis for overruling (or reaffirming) that decision. . . . The only point here is that *Casey* adopted a special *stare decisis* principle with respect to *Roe* based on the idea of resolving the national controversy and ending the

III

After today's decision, the nine Members of this Court will no longer decide the basic legality of pre-viability abortion for all 330 million Americans. That issue will be resolved by the people and their representatives in the democratic process in the States or Congress. But the parties' arguments have raised other related questions, and I address some of them here.

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

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

■ CHIEF JUSTICE ROBERTS concurring in the judgment.

We granted certiorari to decide one question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." Pet. for Cert. i. That question is directly implicated here: Mississippi's Gestational Age Act, Miss. Code Ann. § 41–41–191 (2018), generally prohibits abortion after the fifteenth week of pregnancy—several weeks before a fetus is regarded as "viable" outside the womb. In urging our review, Mississippi stated that its case was "an ideal vehicle" to "reconsider the bright-line viability rule," and that a judgment in its favor would "not require the Court to overturn" *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

Today, the Court nonetheless rules for Mississippi by doing just that. I would take a more measured course. I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability. Mississippi's law allows a woman three months to obtain an abortion, well beyond the point at which it is considered "late" to discover a pregnancy. See A. Ayoola, Late Recognition of Unintended Pregnancies, 32 Pub. Health Nursing 462 (2015) (pregnancy is discoverable and ordinarily discovered by six weeks of gestation). I

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national division over abortion. The continued and significant opposition to *Roe*, as reflected in the laws and positions of numerous States, is relevant to assessing *Casey* on its own terms.

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. . . .

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

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

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

The Court says we should consider whether to overrule *Roe* and *Casey* now, because if we delay we would be forced to consider the issue again in short order. There would be "turmoil" until we did so, according to the Court, because of existing state laws with "shorter deadlines or no deadline at all." But under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent. And to the extent States have laws that set the cutoff date earlier than fifteen weeks, any litigation over that timeframe would proceed free of the distorting effect that the viability rule has had on our constitutional debate. The same could be true, for that matter, with respect to legislative consideration in the

States. We would then be free to exercise our discretion in deciding whether and when to take up the issue, from a more informed perspective.

* * *

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

I therefore concur only in the judgment.

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

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

Roe and *Casey* well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans hold profoundly different views about the "moral[ity]" of "terminating a pregnancy, even in its earliest stage." *Casey*, 505 U.S. at 850. And the Court recognized that "the State has legitimate interests from the outset of the pregnancy in protecting" the "life of the fetus that may become a child." *Id.*, at 846. So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a "substantial obstacle" on a woman's "right to elect the procedure" as she (not the government) thought proper, in light of all the circumstances and complexities of her own life. *Ibid.*

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of

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

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

The majority tries to hide the geographically expansive effects of its holding. Today's decision, the majority says, permits "each State" to address abortion as it pleases. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. 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. If that happens, "the views of [an individual State's] citizens" will not matter. The challenge for a woman will be to finance a trip not to "New York [or] California" but to Toronto.

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the

Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." *Casey*, 505 U.S. at 856. 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. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015). They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does "cast[s] doubt on precedents that do not concern abortion." cf. *ante*, at 2301 – 2302 (THOMAS, J., concurring) (advocating 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.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. 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. *Stare decisis*, this Court has often said, "contributes to the actual and perceived integrity of the judicial process" by ensuring that decisions are "founded in the law rather than in the proclivities of individuals." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

I

We start with *Roe* and *Casey*, and with their deep connections to a broad swath of this Court's precedents. 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. After describing the decisions themselves, we explain how they are rooted in—and themselves led to—other rights giving individuals control over their bodies and their most personal and intimate associations. . . . *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. . . .

A

Some half-century ago, *Roe* struck down a state law making it a crime to perform an abortion unless its purpose was to save a woman's life. The *Roe* Court knew it was treading on difficult and disputed ground. It understood that different people's "experiences," "values," and "religious training" and beliefs led to "opposing views" about abortion. 410 U.S. at 116. But by a 7-to-2 vote, the Court held that in the earlier stages of pregnancy, that contested and contestable choice must belong to a woman, in consultation with her family and doctor. The Court explained that a long line of precedents, "founded in the Fourteenth Amendment's concept of personal liberty," protected individual decisionmaking related to "marriage, procreation, contraception, family relationships, and child rearing and education." *Id.*, at 152–153. For the same reasons, the Court held, the Constitution must protect "a woman's decision whether or not to terminate her pregnancy." *Id.*, at 153. . . .

At the same time, though, the Court recognized "valid interest[s]" of the State "in regulating the abortion decision." *Id.*, at 153. The Court noted in particular "important interests" in "protecting potential life," "maintaining medical standards," and "safeguarding [the] health" of the woman. *Id.*, at 154. . . .

The Court therefore struck a balance, turning on the stage of the pregnancy at which the abortion would occur. The Court explained that early on, a woman's choice must prevail, but that "at some point the state interests" become "dominant." *Id.*, at 155. It then set some guideposts. In the first trimester of pregnancy, the State

could not interfere at all with the decision to terminate a pregnancy. At any time after that point, the State could regulate to protect the pregnant woman's health, such as by insisting that abortion providers and facilities meet safety requirements. And after the fetus's viability—the point when the fetus "has the capability of meaningful life outside the mother's womb"—the State could ban abortions, except when necessary to preserve the woman's life or health. *Id.*, at 163–164.

In the 20 years between *Roe* and *Casey*, the Court expressly reaffirmed *Roe* on two occasions, and applied it on many more. Recognizing that "arguments [against *Roe*] continue to be made," we responded that the doctrine of *stare decisis* "demands respect in a society governed by the rule of law." *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419–420 (1983). And we avowed that the "vitality" of "constitutional principles cannot be allowed to yield simply because of disagreement with them." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986). So the Court, over and over, enforced the constitutional principles *Roe* had declared. See, *e.g.*, *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976).

Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*'s core precepts. . . . Central to that conclusion was a full-throated restatement of a woman's right to choose. Like *Roe*, *Casey* grounded that right in the Fourteenth Amendment's guarantee of "liberty." That guarantee encompasses realms of conduct not specifically referenced in the Constitution: "Marriage is mentioned nowhere" in that document, yet the Court was "no doubt correct" to protect the freedom to marry "against state interference." 505 U.S. at 847–848. And the guarantee of liberty encompasses conduct today that was not protected at the time of the Fourteenth Amendment. "It is settled now," the Court said—though it was not always so—that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity." *Id.*, at 849. Especially important in this web of precedents protecting an individual's most "personal choices" were those guaranteeing the right to contraception. *Ibid.* In those cases, the Court had recognized "the right of the individual" to make the vastly consequential "decision whether to bear" a child. *Id.*, at 851. So too, *Casey* reasoned, the liberty clause protects the decision of a woman confronting an unplanned pregnancy. Her decision about abortion was central, in the same way, to her capacity to chart her life's course. See *id.*, at 853.

In reaffirming the right *Roe* recognized, the Court took full account of the diversity of views on abortion, and the importance of various competing state interests. . . . 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. 505 U.S. at 860. 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. *Id.*, at 870. At that

point, a "second life" was capable of "independent existence." *Ibid.* If the woman even by then had not acted, she lacked adequate grounds to object to "the State's intervention on [the developing child's] behalf." *Ibid.* At the same time, *Casey* decided, based on two decades of experience, that the *Roe* framework did not give States sufficient ability to regulate abortion prior to viability. In that period, *Casey* now made clear, the State could regulate not only to protect the woman's health but also to "promot[e] prenatal life." 505 U.S. at 873. In particular, the State could ensure informed choice and could try to promote childbirth. See *id.*, at 877–878. But the State still could not place an "undue burden"—or "substantial obstacle"—"in the path of a woman seeking an abortion." *Id.*, at 878. Prior to viability, the woman, consistent with the constitutional "meaning of liberty," must "retain the ultimate control over her destiny and her body." *Id.*, at 869.

We make one initial point about this analysis in light of the majority's insistence that *Roe* and *Casey*, and we in defending them, are dismissive of a "State's interest in protecting prenatal life." Nothing could get those decisions more wrong. As just described, *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman's liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment. But what *Roe* and *Casey* also recognized—which today's majority does not—is that a woman's freedom and equality are likewise involved. . . . Today's Court . . . 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. . . .

B

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

Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century. But that turns out to be wheel-spinning. First, it is not clear what relevance such early history should have, even to the majority. See *New York State Rifle & Pistol Assn., Inc. v.Bruen*, 142 S.Ct. 2111, 2136 (2022) ("Historical evidence that long predates [ratification] may not illuminate the scope of the right"). If the early history obviously supported abortion rights, the majority would no doubt say that only the views of the Fourteenth Amendment's ratifiers are germane. Second—and embarrassingly for the majority—early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before "quickening"—the point when the fetus moved in the womb. And early American law followed the common-law rule. So the criminal law of that early time might be taken as roughly consonant with *Roe*'s and *Casey*'s different treatment of early and late abortions. Better, then, to move forward in time. On the other side of 1868, the majority occasionally notes that many States barred abortion up to the time of *Roe*.

That is convenient for the majority, but it is window dressing. As the same majority (plus one) just informed us, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *New York State Rifle & Pistol Assn., Inc.*, 142 S.Ct., at 2137. Had the pre-*Roe* liberalization of abortion laws occurred more quickly and more widely in the 20th century, the majority would say (once again) that only the ratifiers' views are germane.

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. See *ante*, at 2267 ("[T]he most important historical fact [is] how the States regulated abortion when the Fourteenth Amendment was adopted"); see also *ante*, at 2242 – 2243, 2248 – 2249, and n. 24, 23, 25, 28. If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase "We the People." In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point. Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship. . . .

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

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. "The Founders," we recently wrote, "knew they were

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

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." . . . [O]ur point is . . . that applications 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*, 367 U.S. 497, 542 (1961) (dissenting opinion). Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. *Ibid.* Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. That is why Americans . . . 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. . . . [T]he Court has "vindicated [the] principle" over and over that (no matter the sentiment in 1868) "there is a realm of personal liberty which the government may not enter"—especially relating to "bodily integrity" and "family life." 505 U.S. at 847, 849, 851. *Casey* described in detail the Court's contraception cases. It noted decisions protecting the right to marry, including to someone of another race. In reviewing decades and decades of constitutional law, *Casey* could draw but one conclusion: Whatever was true in 1868, "[i]t is settled now, as it was when the Court heard arguments in *Roe* v. *Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood." *Id.*, at 849. . . .

And eliminating that right . . . is not taking a "neutral" position, as Justice KAVANAUGH tries to argue. His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being "scrupulously neutral" if it allowed New York and California to ban all the guns they want? If the Court allowed some States to use unanimous juries and others not? If the Court told the States: Decide for yourselves whether to

put restrictions on church attendance? We could go on—and in fact we will. Suppose Justice KAVANAUGH were to say (in line with the majority opinion) that the rights we just listed are more textually or historically grounded than the right to choose. What, then, of the right to contraception or same-sex marriage? Would it be "scrupulously neutral" for the Court to eliminate those rights too? The point of all these examples is that when it comes to rights, the Court does not act "neutrally" when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers. And to apply that point to the case here: When the Court decimates a right women have held for 50 years, the Court is not being "scrupulously neutral." It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so. . . .

Consider first, then, the line of this Court's cases protecting "bodily integrity." *Casey*, 505 U.S. at 849. "No right," in this Court's time-honored view, "is held more sacred, or is more carefully guarded," than "the right of every individual to the possession and control of his own person." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); see *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 269 (1990) (Every adult "has a right to determine what shall be done with his own body"). Or to put it more simply: Everyone, including women, owns their own bodies. So the Court has restricted the power of government to interfere with a person's medical decisions or compel her to undergo medical procedures or treatments. See, *e.g.*, *Winston v. Lee*, 470 U.S. 753, 766–767 (1985) (forced surgery); *Rochin v. California*, 342 U.S. 165, 166, 173–174 (1952) (forced stomach pumping); *Washington v. Harper*, 494 U.S. 210, 229, 236 (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. See *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 618 (2016). . . .

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." *Casey*, 505 U.S. at 851. And they inevitably shape the nature and future course of a person's life (and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those

living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays. So before *Roe* and *Casey*, the Court expanded in successive cases those who could claim the right to marry—though their relationships would have been outside the law's protection in the mid-19th century. See, *e.g.*, *Loving*, 388 U.S. 1 (1967) (interracial couples); *Turner v. Safley*, 482 U.S. 78 (1987) (prisoners). And after *Roe* and *Casey*, of course, the Court continued in that vein. With a critical stop to hold that the Fourteenth Amendment protected same-sex intimacy, the Court resolved that the Amendment also conferred on same-sex couples the right to marry. See *Lawrence*, 539 U.S. 558; *Obergefell*, 576 U.S. 644. In considering that question, the Court held, "[h]istory and tradition," especially as reflected in the course of our precedent, "guide and discipline [the] inquiry." *Id.*, at 664. But the sentiments of 1868 alone do not and cannot "rule the present." *Ibid.*

Casey similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. A woman then, *Casey* wrote, "had no legal existence separate from her husband." 505 U.S. at 897. Women were seen only "as the center of home and family life," without "full and independent legal status under the Constitution." *Ibid.* But that could not be true any longer: The State could not now insist on the historically dominant "vision of the woman's role." *Id.*, at 852. And equal citizenship, *Casey* realized, was inescapably connected to reproductive rights. "The ability of women to participate equally" in the "life of the Nation"—in all its economic, social, political, and legal aspects—"has been facilitated by their ability to control their reproductive lives." *Id.*, at 856. 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*, 381 U.S. 479; *Eisenstadt*, 405 U.S. 438; *Carey v. Population Services Int'l*, 431 U.S. 678 (1977). That clause, we explained, necessarily conferred a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453. *Casey* saw *Roe* as of a piece: In "critical respects the abortion decision is of the same character." 505 U.S. at 852. "[R]easonable people," the Court noted, could also oppose contraception; and indeed, they could believe that "some forms of contraception" similarly implicate a concern with "potential life." *Id.*, at 853, 859. Yet the views of others could not automatically prevail against a woman's right to control her own body and make her own choice about whether to bear, and probably to raise, a child. When an unplanned pregnancy is involved—because either

contraception or abortion is outlawed—"the liberty of the woman is at stake in a sense unique to the human condition." *Id.*, at 852. No State could undertake to resolve the moral questions raised "in such a definitive way" as to deprive a woman of all choice. *Id.*, at 850.

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. See *supra*, at 2329 – 2330. On its later tries, though, the majority includes those too: "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." That right is unique, the majority asserts, "because [abortion] terminates life or potential life." So the majority depicts today's decision as "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

The first problem with the majority's account comes from Justice THOMAS's concurrence—which makes clear he is not with the program. In saying that nothing in today's opinion casts doubt on non-abortion precedents, Justice THOMAS explains, he means only that they are not at issue in this very case. But he lets us know what he wants to do when they are. "[I]n future cases," he says, "we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." And when we reconsider them? Then "we have a duty" to "overrul[e] these demonstrably erroneous decisions." So at least one Justice is planning to use the ticket of today's decision again and again and again. . . .

Nor does it even help just to take the majority at its word. . . . [T]he 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. . . .

II

By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. "*Stare decisis*" means "to stand by things decided." Black's Law Dictionary 1696 (11th ed. 2019). Blackstone called it the "established rule to abide by former precedents." 1 Blackstone 69. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U.S. at 827. It maintains a stability that allows people to order their lives under the law. See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 568–569 (1994).

Stare decisis also "contributes to the integrity of our constitutional system of government" by ensuring that decisions "are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). As Hamilton wrote: It "avoid[s] an arbitrary discretion in the courts." The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). And as Blackstone said before him: It "keep[s] the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 Blackstone 69. The "glory" of our legal system is that it "gives preference to precedent rather than ... jurists." H. Humble, Departure From Precedent, 19 Mich. L. Rev. 608, 614 (1921). That is why, the story goes, Chief Justice John Marshall donned a plain black robe when he swore the oath of office. That act personified an American tradition. Judges' personal preferences do not make law; rather, the law speaks through them.

That means the Court may not overrule a decision, even a constitutional one, without a "special justification." *Gamble v.United States*, 139 S.Ct. 1960, 1969 (2019). *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." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). "[I]t is not alone sufficient that we would decide a case differently now than we did then." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015).

The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling *Roe* and *Casey*. But none does, 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 majority is wrong when it says that we insist on a test of changed law or fact alone, although that is present in most of the cases.) None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives. 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*, 530 U.S. 428, 443 (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"? 1 Blackstone 69. 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*, 140 S.Ct. 2103, 2136 (2020) (ROBERTS, C. J., concurring in judgment). And it has given rise to no more conflict in application than many standards this Court and others unhesitatingly apply every day.

General standards, like the undue burden standard, are ubiquitous in the law, and particularly in constitutional adjudication. When called on to give effect to the Constitution's broad principles, this Court often crafts flexible standards that can be applied case-by-case to a myriad of unforeseeable circumstances. So, for example, the Court asks about undue or substantial burdens on speech, on voting, and on interstate commerce. See, *e.g.*, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 748 (2011); *Burdick v. Takushi*, 504 U.S. 428, 433–434 (1992); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The *Casey* undue burden standard is the same. It also resembles general standards that courts work with daily in other legal spheres—like the "rule of reason" in antitrust law or the "arbitrary and capricious" standard for agency decisionmaking. See *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 62 (1911); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42–43 (1983). Applying general standards to particular cases is, in many contexts, just what it means to do law.

And the undue burden standard has given rise to no unusual difficulties. Of course, it has provoked some disagreement among judges. *Casey* knew it would: That much "is to be expected in the application of any legal standard which must accommodate life's complexity." 505 U.S. at 878. . . . We count essentially two. THE CHIEF JUSTICE disagreed with other Justices in the *June Medical* majority about whether *Casey* called for weighing the benefits of an abortion regulation against its burdens. See 140 S.Ct., at 2114-15. We agree that the *June Medical* difference is a difference—but not one that would actually make a difference in the result of most cases (it did not in *June Medical*), and not one incapable of resolution were it ever to matter. As for lower courts, there is now a one-year-old, one-to-one Circuit split about how the undue burden standard applies to state laws that ban

abortions for certain reasons, like fetal abnormality. That is about it, as far as we can see. And that is not much. This Court mostly does not even grant certiorari on one-year-old, one-to-one Circuit splits, because we know that a bit of disagreement is an inevitable part of our legal system. . . .

Finally, the majority's ruling today invites a host of questions about interstate conflicts. See *supra*, at 2318; see generally D. Cohen, G. Donley, & R. Rebouché, The New Abortion Battleground, 123 Colum. L. Rev. (forthcoming 2023), https://ssrn.com/abstract=4032931. 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." *Id.*

In short, the majority does not save judges from unwieldy tests or extricate them from the sphere of controversy. To the contrary, it discards a known, workable, and predictable standard in favor of something novel and probably far more complicated. It forces the Court to wade further into hotly contested issues, including moral and philosophical ones, that the majority criticizes *Roe* and *Casey* for addressing.

B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision's original basis. . . . Most "successful proponent[s] of overruling precedent," this Court once said, have carried "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez*, 474 U.S. at 266. Certainly, that was so of the main examples the majority cites: *Brown v. Board of Education*, 347 U.S. 483 (1954), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). 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. *Casey*, 505 U.S. at 857. *Roe* and *Casey* have themselves formed the legal foundation for subsequent decisions protecting these profoundly personal choices. As discussed earlier, the

Court relied on *Casey* to hold that the Fourteenth Amendment protects same-sex intimate relationships. See *Lawrence*, 539 U.S. at 578. The Court later invoked the same set of precedents to accord constitutional recognition to same-sex marriage. See *Obergefell*, 576 U.S. at 665–666. In sum, *Roe* and *Casey* are inextricably interwoven with decades of precedent about the meaning of the Fourteenth Amendment. . . .

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

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. Neither reduces the health risks or financial costs of going through pregnancy and childbirth. Moreover, the choice to give up parental rights after giving birth is altogether different from the choice not to carry a pregnancy to term. 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. . . .

In sum, the majority can point to neither legal nor factual developments in support of its decision. Nothing that has happened in this country or the world in recent decades undermines the core insight of *Roe* and *Casey*. It continues to be true that, within the constraints those decisions established, a woman, not the government, should choose whether she will bear the burdens of pregnancy, childbirth, and parenting.

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*, 261 U.S. 525 (1923), and a whole line of cases beginning with *Lochner v. New York*, 198 U.S. 45 (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—*Adkin*s's assumption that a wholly unregulated market could meet basic human needs. As Justice Jackson (before becoming a Justice) wrote of that time: "The older world of *laissez faire* was recognized everywhere outside the Court to be dead." The Struggle for Judicial Supremacy 85 (1941). In *West Coast Hotel*, the Court caught up, recognizing through the lens of experience the flaws of existing legal doctrine. The havoc the Depression had worked on ordinary Americans, the Court noted, was "common knowledge through the length and breadth of the land." 300 U.S. at 399. The *laissez-faire* approach had led to "the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living." *Ibid.* 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*, 291 U.S. 502 (1934); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931). The statements in those decisions, *West Coast Hotel* explained, were "impossible to reconcile" with *Adkins*. 300 U.S. at 398. There was no escaping the need for *Adkins* to go.

Brown v. Board of Education overruled *Plessy v. Ferguson*, 163 U.S. 537 (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*, 347 U.S. at 495. Segregation was not, and could not ever be, consistent with the Reconstruction Amendments, ratified to give the former slaves full citizenship. Whatever might have been thought in *Plessy*'s time, the *Brown* Court explained, both experience and "modern authority" showed the "detrimental effect[s]" of state-sanctioned segregation: It "affect[ed] [children's] hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494. 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*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (*per curiam*); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). The logic of those cases, *Brown* held, "appl[ied] with added force to children in grade and high schools." 347 U.S. at 494. Changed facts and changed law required *Plessy*'s end.

The majority says that in recognizing those changes, we are implicitly supporting the half-century interlude between *Plessy* and *Brown*. That is not so.

First, if the *Brown* Court had used the majority's method of constitutional construction, it might not ever have overruled *Plessy*, whether 5 or 50 or 500 years later. *Brown* thought that whether the ratification-era history supported desegregation was "[a]t best ... inconclusive." 347 U.S. at 489. But even setting that aside, we are not saying that a decision can *never* be overruled just because it is terribly wrong. Take *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 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. . . .

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*, 368 U.S. 57, 62 (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*, 404 U.S. 71, 76 (1971) (recognizing that the Equal Protection Clause prohibits sex-based discrimination). By 1992, when the Court decided *Casey*, the traditional view of a woman's role as only a wife and mother was "no longer consistent with our understanding of the family, the individual, or the Constitution." 505 U.S. at 897. Under that charter, *Casey* understood, women must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions. Nothing since *Casey*—no changed law, no changed fact—has undermined that promise.

C

The reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests those decisions have created. The Court adheres to precedent not just for institutional reasons, but because it recognizes that stability in the law is "an essential thread in the mantle of protection that the law affords the individual." *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). So when overruling precedent "would dislodge [individuals'] settled rights and expectations,"*stare decisis* has "added force." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991). *Casey* understood that to deny individuals' reliance on *Roe*

was to "refuse to face the fact[s]." 505 U.S. at 856. Today the majority refuses to face the facts. "The most striking feature of the [majority] is the absence of any serious discussion" of how its ruling will affect women. By characterizing *Casey*'s reliance arguments as "generalized assertions about the national psyche," it reveals how little it knows or cares about women's lives or about the suffering its decision will cause.

In *Casey*, the Court observed that for two decades individuals "have organized intimate relationships and made" significant life choices "in reliance on the availability of abortion in the event that contraception should fail." 505 U.S. at 856. Over another 30 years, that reliance has solidified. For half a century now, in *Casey*'s words, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Ibid*. 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* 13 (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. Finally, the majority ignores, as explained above, that some women decide to have an abortion because their circumstances change during a pregnancy. Human bodies care little for hopes and plans. Events can occur after conception, from

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

That is especially so for women without money. . . . 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. . . .

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 v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a sphere of freedom, in which a person has the capacity to make choices free of government control. As *Casey* recognized, the right "order[s]" her "thinking" as well as her "living." 505 U.S. at 856. Beyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right grants.

Withdrawing a woman's right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today's Court has wrenched this choice from women and given it to the States. To allow a State to exert control over one of "the most intimate and personal choices" a woman may make is not only to affect the course of her life, monumental as those effects might be. *Id.*, at 851. It is to alter her "views of [herself]" and her understanding of her "place[ ] in society" as someone with the recognized dignity and authority to make these choices. *Id.*, at 856. Women have relied on *Roe* and *Casey* in this way for 50 years. Many have never known anything else. When *Roe* and *Casey* disappear, the loss of power, control, and dignity will be immense.

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

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

D

One last consideration counsels against the majority's ruling: the very controversy surrounding *Roe* and *Casey*. The majority accuses *Casey* of acting outside the bounds of the law to quell the conflict over abortion—of imposing an unprincipled "settlement" of the issue in an effort to end "national division." But that is not what *Casey* did. As shown above, *Casey* applied traditional principles of *stare decisis*—which the majority today ignores—in reaffirming *Roe*. *Casey* carefully assessed changed circumstances (none) and reliance interests (profound). It considered every aspect of how *Roe*'s framework operated. It adhered to the law in its analysis, and it reached the conclusion that the law required. True enough that *Casey* took notice of the "national controversy" about abortion: The Court knew in 1992, as it did in 1973, that abortion was a "divisive issue." *Casey*, 505 U.S. at 867–868. 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*, 505 U.S. at 850. 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.

"The promise of constancy, once given" in so charged an environment, *Casey* explained, "binds its maker for as long as" the "understanding of the issue has not changed so fundamentally as to render the commitment obsolete." *Id.*, at 868. A breach of that promise is "nothing less than a breach of faith." *Ibid.* "[A]nd no Court that broke its faith with the people could sensibly expect credit for principle." *Ibid.* No Court breaking its faith in that way would *deserve* credit for principle. As one of *Casey*'s authors wrote in another case, "Our legitimacy requires, above all, that

we adhere to *stare decisis*" in "sensitive political contexts" where "partisan controversy abounds." *Bush v. Vera*, 517 U.S. 952, 985 (1996) (opinion of O'Connor, J.).

Justice Jackson once called a decision he dissented from a "loaded weapon," ready to hand for improper uses. *Korematsu v. United States*, 323 U.S. 214, 246, 65 S.Ct. 193, 89 L.Ed. 194 (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

"Power, not reason, is the new currency of this Court's decisionmaking." *Payne*, 501 U.S. at 844 (Marshall, J., dissenting). *Roe* has stood for fifty years. *Casey*, a precedent about precedent specifically confirming *Roe*, has stood for thirty. . . Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court.

Mississippi—and other States too—knew exactly what they were doing in ginning up new legal challenges to *Roe* and *Casey*. The 15-week ban at issue here was enacted in 2018. Other States quickly followed: Between 2019 and 2021, eight States banned abortion procedures after six to eight weeks of pregnancy, and three States enacted all-out bans.[29] Mississippi itself decided in 2019 that it had not gone far enough: The year after enacting the law under review, the State passed a 6-week restriction. A state senator who championed both Mississippi laws said the obvious out loud. "[A] lot of people thought," he explained, that "finally, we have" a conservative Court "and so now would be a good time to start testing the limits of *Roe*." . . .

Now a new and bare majority of this Court—acting at practically the first moment possible—overrules *Roe* and *Casey*. It converts a series of dissenting opinions expressing antipathy toward *Roe* and *Casey* into a decision greenlighting even total abortion bans. It eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court's legitimacy. . . .

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

Immediately following Dobbs, *add the following new* Note:

NOTE ON *DOBBS*, THE ABORTION DEBATE, AND COMMON LAW CONSTITUTIONALISM

1. *Dobbs* overruled both *Roe* and *Casey*—the latter of which the dissenters repeatedly described as "a precedent about precedent." The joint opinion in *Casey* identified four factors for courts in ordinary cases to consider when deciding whether to follow a prior precedent: (1) whether the rule established by the prior decision has proven *workable*; (2) whether people have *relied* on that prior rule; (3) whether *factual circumstances* have changed since the prior decision in a way that undermines the old rule; and (4) whether related *legal developments* have undermined the old rule." (For "watershed" cases, the *Casey* joint opinion identified a fifth factor, involving the effect of overruling on the Court's legitimacy.) The *Casey* dissenters criticized the joint opinion's framing for leaving out any consideration of whether the prior decision was *wrong*, and if so *how* wrong. The *Dobbs* majority, on the other hand, placed whether the prior decision was erroneous at the center of its analysis.

Surely the doctrine of *stare decisis* would do little work if it did not sometimes require adherence to decisions that the current Court considers wrong; after all, if the current Court agrees with a prior decision, it can follow it for that reason alone without recourse to *stare decisis*. At the same time, is it really *irrelevant* to the *stare decisis* force of a precedent whether that precedent was egregiously wrong? *See, e.g.*, Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001) (arguing that it is not).

2. The dissenters, joined by many voices outside the Court, have decried the majority's action as threatening the Court's legitimacy. Justice Alito's majority opinion, on the other hand, pointed to instances in which the Court seemed to *enhance* its legitimacy by overruling precedent—especially *Brown v. Board of Education* (overruling *Plessy v. Ferguson*) and *West Coast Hotel Co. v. Parrish* (which overruled *Adkins v. Children's Hospital* and, indirectly, *Lochner v. New York*). Which way do these decisions cut in assessing the connection between overruling and legitimacy?

Some people have argued that *Casey*, having considered *Roe*'s validity and deciding to reaffirm, became some sort of "super-precedent" that should be uniquely immune from overruling. Others have argued that decisions like *Roe* or *Brown* are simply so important that they should have special precedential status. Do you agree with either strand of the "super-precedent" argument? If such precedents, how do we identify them?

More broadly, do you believe that *Dobbs* has or will undermine the Court's legitimacy? Why or why not? Would that be a good or bad thing?

3. One particular criticism of *Dobbs* by the dissenters was that the Court overruled *Roe* when nothing had changed in the intervening years other than the composition of the Court. Is that particularly problematic? Would *Brown*'s decision to overrule *Plessy* have been inappropriate if it occurred simply because the justices who upheld "separate but equal" had been replaced by a less racist panel? But isn't there something to the criticism that changing the law's meaning simply by changing the Court's personnel tends to eliminate the distinction between law and politics?

Justice Kavanaugh's concurrence suggested that one thing *had* changed between *Casey* and *Dobbs*. Kavanaugh thought that *Casey* rested on a predictive judgment that the Court's decision could bring the country together and lower the level of conflict over abortion; the intervening 30 years, he suggested, had proven this expectation to be dramatically wrong. If true, would that be a good reason to change course? Should the Court be making this sort of judgment in the first place?

4. Some commentators had argued that *Casey* was an exemplar of the methodology of "common law constitutionalism," by which constitutional meaning evolves over time through judicial decisions in much the same way that the common law or torts or contracts evolves. Other examples can be found in the evolution of the birth control right in *Griswold* and *Eisenstadt* and in the same-sex marriage case of *Obergefell*. Does *Dobbs* reject this methodology? Is it a good one? [Here you should look at the original Notes 8-11, pp. 528-31.]

5. Justice Alito's majority opinion was at pains to insist that abortion is unique and that *Dobbs* would not threaten other liberties, such as rights to use contraception (*Griswold*) or same-sex marriage (*Obergefell*). The dissenters—and many critics outside the Court—have discounted that assurance and raised the alarm that many other important liberties are now at risk. Who do you think is right about that?

6. *Dobbs* returned the abortion issue to legislatures, most obviously in the states but also, perhaps, Congress on a national level. Is that a good or a bad thing? In the short period since *Dobbs*, several states have enacted or revived complete bans on abortion, while others have recognized abortion rights under their state constitutions, either by judicial decision or popular referendum. Somewhat surprisingly, the latter group includes red states like Kansas and South Carolina. And some states have enacted laws that allow abortion for periods shorter than *Roe* would have permitted (*e.g.*, 12 weeks in North Carolina) but eschewed total bans. What are the advantages and disadvantages to proceeding state by state? To the extent that state statutory measures and state constitutions are both easier to alter than the federal constitution, is that a good or a bad thing? [Here you should look at original Note 4 on p. 525.]

SECTION 10.2 THE ANTI-COMMANDEERING DOCTRINE

Add new note 7a to the Note on the Anti-Commandeering Doctrine on p. 818.

7a. In *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461 (2018), the Court held that the federal Professional and Amateur Sports Protection Act (PASPA) violated the anti-commandeering rule. PASPA made it unlawful for a State or its subdivisisons "to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on competitive sporting events. 28 U.S.C. § 3702(1). The State of New Jersy had, like most other states, long banned sports gambling, but in 2014 the legislature enacted a law partially repealing that ban with respect to betting by persons over 21 years of age at horseracing tracks or casinos

in Atlantic City. The NCAA challenged the new law, arguing that it was preempted by the PASPA, and both the federal district court and the Third Circuit agreed.

The Supreme Court reversed in a 7-2 decision by Justice Alito. The United States contended that the PASPA could not amount to commandeering because it did not require the States to take any affirmative action; it simply prohibited a state from "authorizing" gambling within its borders. Justice Alito rejected this distinction between compelling and prohibiting action by states as "empty," however. "The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." Because the PASPA "dictates what a state legislature may and may not do," it was invalid under the anti-commandeering principle.

No justice directly disputed this understanding of the doctrine; rather, the additional opinions focused on whether certain additional provisions of the PASPA—most importantly, its prohibition on private persons from operating sports gambling schemes "pursuant to the law . . . of a governmental entity"—were severable from the invalid prohibition on state legislation. Justice Ginsburg's dissent, joined by Justice Sotomayor and in part by Justice Breyer, asserted Congress would have preferred to leave the prohibition on private activity in pace even if the prohibition on states had to go, and insisted that "[t]he Court wields an ax to cut down § 3702 instead of using a scalpel to trim the statute."

If the anti-commandeering doctrine bars all direct commands by Congress to state governments, then it would potentially apply to a number of federal statutes. The Driver's Privacy Protection Act, for example, prohibited States from taking personal information submitted in connection with driver's licenses and selling it to other entities. Justice Alito explained, however, that this statute was permissible because "[t]he law applied equally to state and private actors," the latter being also prohibited from selling similar information in their possession. *See generally Reno v. Condon*, 528 U.S. 141 (2000) (upholding the DPPA against a commandeering challenge). As Justice Alito put it in *Murphy*, "[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage."

Despite this limiting principle, *Murphy*'s reformulation of the anti-commandeering doctrine to include federal *prohibitions* on states seems like a potentially important shift. Can you think of other federal laws that issue direct commands to state governments? Do most such prohibitions operate on private actors as well? Does *Murphy* spell trouble, for example, for the Voting Rights Act, which imposes any number of requirements on state governments that have no analogous impact on private actors? Or is the Voting Rights Act simply not subject to the doctrine because it implements the Fifteenth Amendment, which is inherently directed at state action?

SECTION 11.1 THE DORMANT COMMERCE CLAUSE

Substitute the following new principal case for Kassel v. Consolidated Freightways Corp. *at p. 830-44:*

National Pork Producers Council v. Ross

143 S. Ct. 1142 (2023)

■ 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.

What goods belong in our stores? Usually, consumer demand and local laws supply some of the answer. Recently, California adopted just such 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. Companies that choose to sell products in various States must normally comply with the laws of those various States. Assuredly, under this Court's dormant Commerce Clause decisions, no State may use its laws to discriminate purposefully against out-of-state economic interests. But the pork producers do not suggest that California's law offends this principle. Instead, they invite us to fashion two new and more aggressive constitutional restrictions on the ability of States to regulate goods sold within their borders. We decline that invitation. While the Constitution addresses many weighty issues, the type of pork chops California merchants may sell is not on that list.

I

Modern American grocery stores offer a dizzying array of choice. Often, consumers may choose among eggs that are large, medium, or small; eggs that are white, brown, or some other color; eggs from cage-free chickens or ones raised consistent with organic farming standards. When it comes to meat and fish, the options are no less plentiful. Products may be marketed as free range, wild caught, or graded by quality (prime, choice, select, and beyond). The pork products at issue here, too, sometimes come with "antibiotic-free" and "crate-free" labels. Much of this product differentiation reflects consumer demand, informed by individual taste, health, or moral considerations.

Informed by similar concerns, 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." Mass. Gen. Laws Ann., ch. 129, App. §§ 1–3, 1–5. 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." Art. X, § 21(a). 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." Cal. Health & Safety Code Ann. § 25990(b)(2). 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." § 25991(e)(1). . . .

A spirited debate preceded the vote on Proposition 12. Proponents observed that, in some farming operations, pregnant pigs remain "[e]ncased" for 16 weeks in "fit-to-size" metal crates. These animals may receive their only opportunity for exercise when they are moved to a separate barn to give birth and later returned for another 16 weeks of pregnancy confinement—with the cycle repeating until the pigs are slaughtered. *Ibid.* Proponents hoped that Proposition 12 would go a long way toward eliminating pork sourced in this manner "from the California marketplace."

Opponents pressed their case in strong terms too. They argued that existing farming practices did a better job of protecting animal welfare (for example, by preventing pig-on-pig aggression) and ensuring consumer health (by avoiding contamination) than Proposition 12 would. They also warned voters that Proposition 12 would require some farmers and processors to incur new costs. Ones that might be "passed through" to California consumers.

Shortly after Proposition 12's adoption, two organizations—the National Pork Producers Council and the American Farm Bureau Federation (collectively, petitioners)—filed this lawsuit on behalf of their members who raise and process pigs. Petitioners alleged that Proposition 12 violates the U. S. Constitution by impermissibly burdening interstate commerce.

In support of that legal claim, petitioners pleaded a number of facts. They acknowledged that, in response to consumer demand and the laws of other States, 28% of their industry has already converted to some form of group housing for pregnant pigs. But, petitioners cautioned, even some farmers who already raise group-housed pigs will have to modify their practices if they wish to comply with Proposition 12. Much of pork production today is vertically integrated, too, with farmers selling pigs to large processing firms that turn them into different "cuts of meat" and distribute the "different parts ... all over to completely different end users." Revising this system to segregate and trace Proposition 12-compliant pork, petitioners alleged, will require certain processing firms to make substantial new capital investments. Ultimately, petitioners estimated that "compliance with Proposition 12 will increase production costs" by "9.2% ... at the farm level." These compliance costs will fall on California and out-of-state producers alike. But because California imports almost all the pork it consumes, petitioners emphasized, "the majority" of Proposition 12's compliance costs will be initially borne by out-of-state firms.

After considerable motions practice, the district court held that petitioners' complaint failed to state a claim as a matter of law and dismissed the case. 456 F.Supp.3d 1201 (SD Cal. 2020). With Judge Ikuta writing for a unanimous panel, the Ninth Circuit affirmed. 6 F.4th 1021 (2021). . . .

II

The Constitution vests Congress with the power to "regulate Commerce ... among the several States." Art. I, § 8, cl. 3. Everyone agrees that Congress may seek to exercise this power to regulate the interstate trade of pork, much as it has done with various other products. Everyone agrees, too, that congressional enactments may preempt conflicting state laws. 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.

That has led petitioners to resort to litigation, pinning their hopes on what has come to be called the *dormant* Commerce Clause. Reading between the Constitution's lines, petitioners observe, this Court has held that the Commerce Clause not only vests Congress with the power to regulate interstate trade; the Clause also "contain[s] a further, negative command," one effectively forbidding the enforcement of "certain state [economic regulations] even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). . . .

Today, [an] antidiscrimination principle lies at the "very core" of our dormant Commerce Clause jurisprudence. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997). 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.'" *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–338 (2008).

Admittedly, some "Members of the Court have authored vigorous and thoughtful critiques of this interpretation" of the Commerce Clause. They have not necessarily quarreled with the antidiscrimination principle. But they have suggested that it may be more appropriately housed elsewhere in the Constitution. Perhaps in the Import–Export Clause, which prohibits States from "lay[ing] any Imposts or Duties on Imports or Exports" without permission from Congress. Art. I, § 10, cl. 2; see *Camps Newfound/Owatonna*, 520 U.S., at 621–637 (THOMAS, J., dissenting). Perhaps in the Privileges and Immunities Clause, which entitles "[t]he Citizens of each State" to "all Privileges and Immunities of Citizens in the several States." Art. IV, § 2; see *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part). Or perhaps the principle inheres in the very structure of the Constitution, which "was framed upon the theory that the peoples of the several [S]tates must sink or swim together." *American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005).

Whatever one thinks about these critiques, we have no need to engage with any of them to resolve this case. Even under 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. As petitioners put it, "the dormant Commerce Clause ... bar on protectionist state statutes that discriminate against interstate commerce ... is not in issue here."

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.

A

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—*Healy v. Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986); and *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935). A close look at those cases, however, reveals nothing like the rule petitioners posit. Instead, each typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests.

Start with *Baldwin*. There, 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: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1248 (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." *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (discussing *Baldwin*). Really, the laws operated like "a tariff or customs duty." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994); see *Baldwin*, 294 U.S. at 523 (condemning the challenged

laws for seeking to "protec[t]" New York dairy farmers "against competition from without").

Brown-Forman and *Healy* differed from *Baldwin* only in that they involved price-affirmation, rather than price-fixing, statutes. In *Brown-Forman*, New York required liquor distillers to affirm (on a monthly basis) that their in-state prices were no higher than their out-of-state prices. Once more, the goal was plain: New York sought to force out-of-state distillers to "surrender" whatever cost advantages they enjoyed against their in-state rivals. Once more, the law amounted to "simple economic protectionism."

In *Healy*, a Connecticut law required out-of-state beer merchants to affirm that their in-state prices were no higher than those they charged in neighboring States. Here, too, protectionism took center stage. As the Court later noted, "[t]he essential vice in laws" like Connecticut's is that they "hoard" commerce "for the benefit of " in-state merchants and discourage consumers from crossing state lines to make their purchases from nearby out-of-state vendors. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 391–392 (1994). Nor did the law in *Healy* even try to cloak its discriminatory purpose: "By its plain terms, the Connecticut affirmation statute applie[d] solely to interstate" firms, and in that way "clearly discriminate[d] against interstate commerce." 491 U.S. at 340–341. The Court also worried that, if the Connecticut law stood, "each of the border States" could "enac[t] statutes essentially identical to Connecticut's" in retaliation—a result often associated with avowedly protectionist economic policies.

B

Petitioners insist that our reading of these cases misses the forest for the trees. On their account, *Baldwin*, *Brown-Forman*, and *Healy* didn't just find an impermissible discriminatory purpose in the challenged laws; they also suggested an "almost *per se*" rule against state laws with "extraterritorial effects." Brief for Petitioners 19, 23. In *Healy*, petitioners stress, the Court included language criticizing New York's laws for having the "'practical effect'" of "control[ling] commerce 'occurring wholly outside the boundaries of [the] State.'" Brief for Petitioners 21, 25 (quoting 491 U.S. at 336). In *Brown-Forman*, petitioners observe, the Court suggested that whether a state law "'is addressed only to [in-state] sales is irrelevant if the "practical effect" of the law is to control'" out-of-state prices. Brief for Petitioners 21 (quoting 476 U.S. at 583). Petitioners point to similar language in *Baldwin* as well.

In our view, however, petitioners read too much into too little. "[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). Instead, we emphasize, our opinions dispose of discrete cases and controversies and they must be read with a careful eye to context. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (Marshall, C. J.). And when it comes to *Baldwin*, *Brown-Forman*, and *Healy*, the language petitioners highlight appeared in a particular context and did particular work. Throughout, the Court explained that the challenged statutes had a *specific* impermissible "extraterritorial effect"—they

deliberately "prevent[ed out-of-state firms] from undertaking competitive pricing" or "deprive[d] businesses and consumers in other States of 'whatever competitive advantages they may possess.'" *Healy*, 491 U.S. at 338–339 (quoting *Brown-Forman*, 476 U.S. at 580).

In recognizing this much, we say nothing new. This Court has already described "[t]he rule that was applied in *Baldwin* and *Healy*" as addressing "price control or price affirmation statutes" that tied "the price of ... in-state products to out-of-state prices." *Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 669 (2003). Many lower courts have read these decisions in exactly the same way.

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. J. Goldsmith & A. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L. J. 785, 804 (2001). 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 v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824). 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. Can anyone really suppose *Baldwin*, *Brown-Forman*, and *Healy* meant to do so much?

In rejecting petitioners' "almost *per se*" theory we do not mean to trivialize the role territory and sovereign boundaries play in our federal system. Certainly, the Constitution takes great care to provide rules for fixing and changing state borders. Art. IV, § 3, cl. 1. Doubtless, too, courts must sometimes referee disputes about where one State's authority ends and another's begins—both inside and outside the commercial context. In carrying out that task, this Court has recognized the usual "legislative power of a State to act upon persons and property within the limits of its own territory," *Hoyt v. Sprague*, 103 U.S. 613, 630, (1881), a feature of our constitutional order that allows "different communities" to live "with different local standards," *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). But, by way of example, no one should think that one State may adopt a law exempting securities held by the residents of a second State from taxation in that second State. *Bonaparte v. Tax Court*, 104 U.S. 592, 592–594 (1882). Nor, we have held, should anyone think one State may prosecute the citizen of another State for acts committed "outside [the first State's] jurisdiction" that are not "intended to

produce [or that do not] produc[e] detrimental effects within it." *Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

To resolve disputes about the reach of one State's power, this Court has long consulted original and historical understandings of the Constitution's structure and the principles of "sovereignty and comity" it embraces. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996). This Court has invoked as well a number of the Constitution's express provisions—including "the Due Process Clause and the Full Faith and Credit Clause." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). The antidiscrimination principle found in our dormant Commerce Clause cases may well represent one more effort to mediate competing claims of sovereign authority under our horizontal separation of powers. But none of this means, as petitioners suppose, that *any* question about the ability of a State to project its power extraterritorially must yield to an "almost *per se*" rule under the dormant Commerce Clause. This Court has never before claimed so much "ground for judicial supremacy under the banner of the dormant Commerce Clause." *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 347 (2007). We see no reason to change course now.[5]

IV

Failing in their first theory, petitioners retreat to a second they associate with *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (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.'" Brief for Petitioners 44. 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

[5] Beyond *Baldwin*, *Brown-Forman*, and *Healy*, petitioners point to *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), as authority for the "almost *per se*" rule they propose. Invoking the dormant Commerce Clause, a plurality in that case declined to enforce an Illinois securities law that "*directly* regulate[d] transactions which [took] place ... wholly outside the State" and involved individuals "having no connection with Illinois." Some have questioned whether the state law at issue in *Edgar* posed a dormant Commerce Clause question as much as one testing the territorial limits of state authority under the Constitution's horizontal separation of powers. See, *e.g.*, D. Regan, Siamese Essays: (I) *CTS Corp. v. Dynamics Corp. of America* and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation, 85 Mich. L. Rev. 1865, 1875–1880, 1897–1902 (1987); cf. *Shelby County v. Holder*, 570 U.S. 529, 535 (2013) ("[A]ll States enjoy equal sovereignty"). But either way, the *Edgar* plurality opinion does not support the rule petitioners propose. That decision spoke to a law that *directly* regulated out-of-state transactions by those with *no* connection to the State. Petitioners do not allege those conditions exist here. To the contrary, they acknowledge that Proposition 12 regulates only products that companies choose to sell "within" California.

line" separates the *Pike* line of cases from our core antidiscrimination precedents. *General Motors Corp. v. Tracy*, 519 U.S. 278, 298, n. 12 (1997). While many of our dormant Commerce Clause cases have asked whether a law exhibits "facial discrimination," several cases that have purported to apply *Pike*, including *Pike* itself, have turned in whole or in part on the discriminatory character of the challenged state regulations. 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.

Pike itself illustrates the point. That case concerned an Arizona order requiring cantaloupes grown in state to be processed and packed in state. The Court held that Arizona's order violated the dormant Commerce Clause. Even if that order could be fairly characterized as facially neutral, the Court stressed that it "requir[ed] business operations to be performed in [state] that could more efficiently be performed elsewhere." The "practical effect[s]" of the order in operation thus revealed a discriminatory purpose—an effort to insulate in-state processing and packaging businesses from out-of-state competition.

Other cases in the *Pike* line underscore the same message. In *Minnesota* v. *Clover Leaf Creamery Co.*, the Court found no impermissible burden on interstate commerce because, looking to the law's effects, "there [was] no reason to suspect that the gainers" would be in-state firms or that "the losers [would be] out-of-state firms." Similarly, in *Exxon Corp.* v. *Governor of Maryland*, the Court keyed to the fact that the effect of the challenged law was only to shift business from one set of out-of-state suppliers to another. 437 U.S. 117, 127 (1978). And in *United Haulers*, a plurality upheld the challenged law because it could not "detect" any discrimination in favor of in-state businesses or against out-of-state competitors. 550 U.S. at 346. In each of these cases and many more, the presence or absence of discrimination in practice proved decisive.

Once again, we say nothing new here. Some time ago, *Tracy* identified the congruity between our core dormant Commerce Clause precedents and the *Pike* line. 519 U.S. at 298, n. 12. Many lower courts have done the same. So have many scholars. See, *e.g.*, Regan, 84 Mich. L. Rev., at 1286.

Nor does any of this help petitioners in this case. They 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," *Davis*, 553 U.S., at 353, and while "a small number of our cases have invalidated state laws ... that appear to have been genuinely nondiscriminatory," *Tracy*, 519 U.S., at 298, n. 12,[6] petitioners' claim falls well outside *Pike*'s heartland. That is not an auspicious start.

[6] Most notably, *Tracy* referred to, and 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*

B

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. Petitioners point to nothing in the Constitution's text or history that supports such a project. And our 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." *United Haulers*, 550 U.S., at 343. 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.

Not only is the task petitioners propose one the Commerce Clause does not authorize judges to undertake. 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. *Davis*, 553 U.S., at 353.

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

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Freight Lines, Inc., 359 U.S. 520, 523–530 (1959) (concerning a state law specifying certain mud flaps for trucks and trailers); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 763–782 (1945) (addressing a state law regarding the length of trains). Petitioners claim these cases support something like the extraterritoriality or balancing rules they propose. But at least some decisions in this line might be viewed as condemning state laws that "although neutral on their face ... were enacted at the instance of, and primarily benefit," in-state interests. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447 (1978); see also B. Friedman & D. Deacon, A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause, 97 Va. L. Rev. 1877, 1927 (2011). In any event, 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." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978). Nothing like that exists here. We do not face a law that impedes the flow of commerce. Pigs are not trucks or trains.

is like being asked to decide "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

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.

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, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). 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*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)—or, for that matter, Mr. Wilson Pond's Pork Production Systems, see W. POND, J. MANER, & D. HARRIS, 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. See Part I, *supra* (citing failed efforts). 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.

To appreciate petitioners' problem, compare our case to *Exxon*. That case involved a Maryland law prohibiting petroleum producers from operating retail gas stations in the State. 437 U.S. at 119–121, and n. 1. Because Maryland had no in-state petroleum producers, Exxon argued, the law's "divestiture requirements" fell "solely on interstate companies" and threatened to force some to "withdraw entirely from the Maryland market" or incur new costs to serve that market. All this, the company said, amounted to a violation of the dormant Commerce Clause.

This Court found the allegations in Exxon's complaint insufficient as a matter of law to demonstrate a substantial burden on interstate commerce. Without question, Maryland's law favored one business structure (independent gas station retailers) over another (vertically integrated production and retail firms). The law also promised to increase retail gas prices for Maryland consumers, allowing some to question its wisdom. But, the Court found, Exxon failed to plead facts leading, "either logically or as a practical matter, to [the] conclusion that the State [was] discriminating against interstate commerce." The company failed to do so because, on its face, Maryland's law welcomed competition from interstate retail gas station chains that did not produce petroleum. And as far as anyone could tell, the law's "practical effect" wasn't to protect in-state producers; it was to shift market share from one set of out-of-state firms (vertically integrated businesses) to another (retail gas station firms). This Court squarely rejected the view that this predicted "'change [in] the market structure'" would "impermissibly burde[n] interstate commerce." If the dormant Commerce Clause protects the "interstate market ... from prohibitive or burdensome regulations," the Court held, it does not protect "particular ... firms" or "particular structure[s] or methods of operation."

If Maryland's law did not impose a sufficient burden on interstate commerce to warrant further scrutiny, the same must be said for Proposition 12. In *Exxon*, vertically integrated businesses faced a choice: They could divest their production capacities or withdraw from the local retail market. Here, farmers and vertically integrated processors have at least as much 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. In *Exxon*, the law posed a choice *only* for out-of-state firms. 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. In *Exxon*, as far as anyone could tell, the law threatened only to shift market share from one set of out-of-state firms to another. Here, the pleadings allow for the same

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). In both cases, some 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." That goes for pigs no less than gas stations. . . .

D

THE CHIEF JUSTICE's concurrence in part and dissent in part (call it "the lead dissent") offers a contrasting view. Correctly, it begins by rejecting petitioners' "almost *per se*" rule against laws with extraterritorial effects. And correctly, it disapproves reading *Pike* to endorse a "freewheeling judicial weighing of benefits and burdens." But for all it gets right, in other respects it goes astray. In places, 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.

Consider an example. Today, many States prohibit the sale of horsemeat for human consumption. But these prohibitions "har[m] the interstate market" for horsemeat by denying outlets for its sale. Not only that, they distort the market for animal products more generally by pressuring horsemeat manufacturers to transition to different products, ones they can lawfully sell nationwide. Under the lead dissent's test, all it would take is one complaint from an unhappy out-of-state producer and—presto—the Constitution would protect the sale of horsemeat. Just find a judge anywhere in the country who considers the burden to producers "excessive." The same would go for all manner of consumer products currently banned by some States but not by others—goods ranging from fireworks, see, *e.g.*, Mass. Gen. Laws Ann., ch. 148, § 39, to single-use plastic grocery bags, see, *e.g.*, Me. Rev. Stat. Ann., Tit. 38, §§ 1611(2)(A), (4) . Rather than respecting federalism, a rule like that would require any consumer good available for sale in one State to be made available in every State. In the process, it would essentially replicate under *Pike's* banner petitioners' "almost *per se*" rule against state laws with extraterritorial effects.

Seeking a way around that problem, the lead dissent stumbles into another. It 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's solo concurrence in part and dissent in part 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*, 570 U.S. 529, 544 (2013).

The most striking feature of both dissents, however, may be another one. They suggest that, in assessing a state law's burdens under *Pike*, courts should take into account not just economic harms but also all manner of "derivative harms" to out-of-state interests. These include social costs that are "difficult to quantify" such as (in this case) costs to the "national pig population," "animal husbandry" traditions, and (again) "industry practice." But not even petitioners read *Pike* so boldly. While petitioners argue that Proposition 12 does not benefit pigs (as California has asserted), they have not asked this Court (or any court) to treat putative harms to out-of-state animal welfare or other noneconomic interests as freestanding harms cognizable under the dormant Commerce Clause. Nor could they have proceeded otherwise. Our decisions have authorized claims alleging "burdens on commerce." They do not provide judges "a roving license" to reassess the wisdom of state legislation in light of any conceivable out-of-state interest, economic or otherwise.[4]

V

Before the Constitution's passage, Rhode Island imposed special taxes on imported "*New-England* Rum"; Connecticut levied duties on goods "brought into th[e] State, by Land or Water, from any of the United States of *America*"; and Virginia taxed "vessels coming within th[e S]tate from any of the United States."

Whether moved by this experience or merely worried that more States might join the bandwagon, the Framers equipped Congress with considerable power to regulate interstate commerce and preempt contrary state laws. See U. S. Const., Art. I, § 8, cl. 3; Art. IV, § 2; see also Regan, 84 Mich. L. Rev., at 1114, n. 55. In the years since, this Court has inferred an additional judicially enforceable rule against certain, especially discriminatory, state laws adopted even against the backdrop of congressional silence. But "'extreme caution'" is warranted before a court deploys this implied authority. *Tracy*, 519 U.S., at 310. Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of "extreme delicacy," something courts should do only "where the infraction is clear." *Conway v. Taylor's Executor*, 66 U.S. (1 Black) 603, 634 (1862).

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[4] Both dissents seek to characterize today's decision as "fractured" in an effort to advance their own overbroad readings of *Pike* and layer their own gloss on opinions they do not join. But the dissents are just that—dissents. Their glosses do not speak for the Court. Today, the Court unanimously disavows petitioners' "almost *per se*" rule against laws with extraterritorial effects. See Parts II and III, *supra*. When it comes to *Pike*, a majority agrees that heartland *Pike* cases seek to smoke out purposeful discrimination in state laws (as illuminated by those laws' practical effects) or seek to protect the instrumentalities of interstate transportation. See Part IV–A, *supra*. A majority also rejects any effort to expand *Pike*'s domain to cover cases like this one, some of us for reasons found in Part IV–B, others of us for reasons discussed in Part IV–C. Today's decision depends equally on the analysis found in both of these sections; without either, there is no explaining the Court's judgment affirming the decision below. A majority also subscribes to what follows in Part V.

Petitioners would have us cast aside caution for boldness. They have failed—repeatedly—to persuade Congress to use its express Commerce Clause authority to adopt a uniform rule for pork production. And they disavow any reliance on this Court's core dormant Commerce Clause teachings focused on discriminatory state legislation. Instead, petitioners invite us to endorse two new theories of implied judicial power. They would have us recognize an "almost *per se*" rule against the enforcement of state laws that have "extraterritorial effects"—even though this Court has recognized since *Gibbons* that virtually all state laws create ripple effects beyond their borders. Alternatively, they would have us prevent a State from regulating the sale of an ordinary consumer good within its own borders on nondiscriminatory terms—even though the *Pike* line of cases they invoke has never before yielded such a result. Like the courts that faced this case before us, we decline both of petitioners' incautious invitations.

The judgment of the Ninth Circuit is *Affirmed*.

■ **Justice SOTOMAYOR, with whom Justice KAGAN joins, 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.

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), 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." *Id.*, at 142. 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." *Ibid.*

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." *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008). 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. *General Motors Corp. v. Tracy*, 519 U.S. 278, 298, n. 12, (1997). Often, such cases have addressed state laws that impose burdens on the arteries of commerce, on "trucks, trains, and the like." *Ibid.*, n. 2. Yet, there is at least one exception to that tradition. See *Edgar v. MITE Corp.*, 457 U.S. 624, 643–646 (1982) (invalidating a nondiscriminatory state law that regulated tender offers to shareholders).

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. Reading petitioners' allegations in light of the Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), the complaint fails to allege a substantial burden on interstate commerce. Alleging a substantial burden on interstate commerce is a threshold requirement that plaintiffs must satisfy before courts need even engage in *Pike*'s balancing and tailoring analyses. Because petitioners have not done so, they fail to state a *Pike* claim.

■ **JUSTICE BARRETT, concurring in part.**

A state law that burdens interstate commerce in clear excess of its putative local benefits flunks *Pike* balancing. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). 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, with whom Justice ALITO, Justice KAVANAUGH, and Justice JACKSON join, 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 some of my colleagues to analyzing petitioners' claim based on *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

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." A majority of the Court thinks that petitioners' complaint does not make for "an auspicious start" on that claim. In my view, that is through no fault of their own. The Ninth Circuit misapplied our existing *Pike* jurisprudence in evaluating petitioners' allegations. 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." 6 F.4th 1021, 1033 (2021). 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." *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997); see also *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977) (*Pike* protects "a national 'common market'"). "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, Inc. v. Du Mond*, 336 U.S. 525, 539 (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." *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 353, (2008); see also *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 346 (2007) (plurality opinion) (*Pike* applies to "a nondiscriminatory statute like this

one"). 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.*, 457 U.S. 624, 643–646 (1982). As a majority of the Court agrees, *Pike* extends beyond laws either concerning discrimination or governing interstate transportation.

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)*, 308 U.S. 147, 162 (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*, 470 U.S. 753, 760 (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."); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof."). Here too, a majority of the Court agrees that it is possible to balance benefits and burdens under the approach set forth in *Pike*.

II

This case comes before us on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, and in my view the court below erred in how it analyzed petitioners' allegations under *Pike*. 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." 6 F.4th at 1032. 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," unless such costs are defined to include all the fallout from a challenged regulatory regime. 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*. 397 U.S., at 142.

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, Inc.*, 359 U.S. 520 (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. of Del.*, 450 U.S. 662, 674 (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*, 434 U.S. 429, 445, and n. 21 (1978) (analyzing an increase in "cost" independently of other consequential effects, such as "slow[ing] the movement of goods").

Pike itself did not conflate harms to the interstate market with compliance costs. In *Pike,* we analyzed an Arizona law requiring that cantaloupes grown in the State be packed prior to shipment across state lines. We noted repeatedly that the regulation would require the appellee to construct an unneeded packing facility in Arizona at a cost of $200,000. But we considered that cost together with the "nature" of a regulation "requiring business operations to be performed in the home State." The Court in *Pike* found both compliance costs and consequential market harms cognizable in determining whether the law at issue impermissibly burdened interstate commerce.

The derivative harms we have long considered in this context are in no sense "noneconomic." Regulations that "aggravate ... the problem of highway accidents," *Kassel,* 450 U.S., at 674, or "slow the movement of goods," *Rice,* 434 U.S., at 445, 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 either involved the instrumentalities of transportation or a state law born of discriminatory purpose. As discussed above, we have applied *Pike* to state laws that neither concerned transportation nor discriminated against commerce. See *Edgar*, 457 U.S., at 643–646, 102 S.Ct. 2629. The *Pike* balance may well come out differently when it comes to interstate transportation, an area presenting a strong interest in "national uniformity." *Tracy,* 519 U.S., at 298, n. 12, 117 S.Ct. 811. 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." 6 F.4th at 1028.

We have found such sweeping extraterritorial effects, even if not considered as a *per se* invalidation, to be pertinent in applying *Pike*. In *Edgar*, we assessed the constitutionality of an Illinois corporate takeover statute that authorized the secretary of state to scrutinize tender offers, even for transactions occurring wholly beyond the State's borders. As the majority explains, only a plurality of the Court in *Edgar* concluded that the Illinois statute constituted a *per se* violation of the dormant Commerce Clause.. But a majority in *Edgar* analyzed those same extraterritorial effects under our approach in *Pike*, concluding that the "nationwide reach" of Illinois's law constituted an "obvious burden ... on interstate commerce." The Ninth Circuit did not consider whether, by effectively requiring compliance by farmers who do not even wish to ship their product into California, Proposition 12 has a "nationwide reach" similar to the regulation at issue in *Edgar*.

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.

Writing for a plurality of the Court, Justice GORSUCH relies on this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), to conclude that petitioners' complaint does not plead a substantial burden against interstate commerce. In *Exxon*, petroleum producers sued after Maryland prohibited their sale of retail gas within the State. The Court concluded that "interstate commerce is not

subjected to an impermissible burden simply because an otherwise valid regulation causes some business[es] to shift from one interstate supplier to another." Fair enough. But the complaint before us pleads facts going far beyond the allegations in *Exxon*. The producers in *Exxon* operated within Maryland and wished to continue doing so. By contrast, petitioners here allege that Proposition 12 will force compliance on farmers who do not wish to sell into the California market, exacerbate health issues in the national pig population, and undercut established operational practices. In my view, these allegations amount to economic harms against "the interstate market"—not just "particular interstate firms,"—such that they constitute a substantial burden under *Pike*. At the very least, the harms alleged by petitioners are categorically different from the cost of installing $30 mudguards, *Bibb*, 359 U.S., at 525, or of constructing a $200,000 cantaloupe packing facility, *Pike*, 397 U.S., at 140.

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." *Pike*, 397 U.S., at 142. Adhering to that established approach in this case would not convert the inquiry into a *per se* rule against extraterritorial regulation. . . .

A majority of the Court agrees that—were it possible to balance benefits and burdens in this context—petitioners have plausibly stated a substantial burden against interstate commerce. See *ante*, at 1167 (opinion of BARRETT, J.) ("The complaint plausibly alleges that Proposition 12's costs are pervasive, burdensome, and will be felt primarily (but not exclusively) outside California.").

* * *

In my view, petitioners plausibly allege a substantial burden against interstate commerce. I would therefore remand the case for the Ninth Circuit to decide whether it is plausible that the "burden ... is 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. 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 for the reasons well stated in THE CHIEF JUSTICE's separate opinion.

I add this opinion to point out that state economic regulations like California's Proposition 12 may raise questions not only under the Commerce Clause, but also under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

I

In the 1780s, the Framers in Philadelphia and the people of the United States discarded the Articles of Confederation and adopted a new Constitution. They did so in order to, among other things, create a national economic market and overcome state restrictions on free trade—and thereby promote the general welfare. By the summer of 1787, when the delegates met in Philadelphia, state interference with interstate commerce was cutting off the lifeblood of the Nation. See *Tennessee Wine and Spirits Retailers Assn.* v. *Thomas*, 139 S.Ct. 2449, 2459-2460 (2019). For the delegates, therefore, "removing state trade barriers was a principal reason for the adoption of the Constitution." *Ibid.* In the state ratifying conventions, moreover, "fostering free trade among the States was prominently cited as a reason for ratification." . . .

Under the Constitution, Congress could enact a national law imposing minimum space requirements or other regulations on pig farms involved in 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. As the *amici* brief of 26 States points out, what 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.[3]

II

Thus far, legal challenges to California's Proposition 12 have focused on the Commerce Clause and this Court's dormant Commerce Clause precedents.

Although the Court today rejects the plaintiffs' dormant Commerce Clause challenge as insufficiently pled, state laws like Proposition 12 implicate not only the Commerce Clause, but also potentially several other constitutional provisions, including the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

First, the Import-Export Clause prohibits any State, absent "the Consent of the Congress," from imposing "any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing" its "inspection Laws." Art. I, § 10, cl. 2. This Court has limited that Clause to imports from *foreign countries*. See *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 133–136 (1869). As Justice Scalia and Justice THOMAS have explained, that limitation may be mistaken as a matter of constitutional text and history: Properly interpreted, the Import-Export Clause may also prevent States "from imposing certain especially burdensome" taxes and duties on imports from other States—not just on imports from foreign countries. *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 573 (2015) (Scalia, J., dissenting); see also *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 621–637 (1997) (THOMAS, J., dissenting); *Brown v. Maryland*, 12 Wheat. 419, 438−439, 449 (1827).

In other words, if one State conditions sale of a good on the use of preferred farming, manufacturing, or production practices in another State where the good was grown or made, serious questions may arise under the Import-Export Clause. I do not take a position here on whether such an argument ultimately would prevail. I note only that the question warrants additional consideration in a future case.

Second, the Privileges and Immunities Clause provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Art. IV, § 2, cl. 1; see *South Dakota* v. *Wayfair, Inc.*, 138 S.Ct. 2080, 2100-2101 (2018) (GORSUCH, J., concurring); see also *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part); J. Eule, *Laying the Dormant Commerce Clause To Rest*, 91 Yale L. J. 425, 446−448 (1982). Under this Court's precedents, one State's efforts to effectively regulate farming, manufacturing, or production in other States could raise significant questions under that Clause. Again, I express no view on

[3] The portions of Justice GORSUCH's opinion that speak for only three Justices (Parts IV–B and IV–D) refer to THE CHIEF JUSTICE's opinion as a "dissent." But on the question of whether to retain the *Pike* balancing test in cases like this one, THE CHIEF JUSTICE's opinion reflects the majority view because six Justices agree to retain the *Pike* balancing test: THE CHIEF JUSTICE and Justices ALITO, SOTOMAYOR, KAGAN, KAVANAUGH, and JACKSON. On that legal issue, Justice GORSUCH's opinion advances a minority view.

whether such an argument ultimately would prevail. But the issue warrants further analysis in a future case.

Third, the Full Faith and Credit Clause requires each State to afford "Full Faith and Credit" to the "public Acts" of "every other State." Art. IV, § 1. That Clause prevents States from "adopting any policy of hostility to the public Acts" of another State. *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). A State's effort to regulate farming, manufacturing, and production practices in another State (in a manner different from how that other State's laws regulate those practices) could in some circumstances raise questions under that Clause. See, *e.g.*, M. Rosen, *State Extraterritorial Powers Reconsidered*, 85 Notre Dame L. Rev. 1133, 1153 (2010) ("[T]he Full Faith and Credit Clause is the more natural source for limitations on state extraterritorial powers because that clause at its core is concerned with extraterritoriality"); see also D. Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 290, 296–301 (1992).

For example, the plaintiffs in this case say that Ohio law expressly authorizes pig farmers in Ohio to do precisely what California's Proposition 12 forbids. Brief for Petitioners 30–31; see Ohio Admin. Code §§ 901:12–8–02(G)(4), (5) (2011). If so, the Full Faith and Credit Clause might preclude California from enacting conflicting regulations on Ohio pig farmers.

Once again, I express no view on whether such an argument ultimately would succeed. But the question deserves further examination in a future case.

* * *

As I understand it, the controlling plurality of the Court (reflected in Part IV–C of Justice GORSUCH's opinion) today rejects the plaintiffs' dormant Commerce Clause challenge on the ground that the plaintiffs' complaint does not sufficiently allege that the California law at issue here imposes a substantial burden on interstate commerce under *Pike*. It appears, therefore, that properly pled dormant Commerce Clause challenges under *Pike* to laws like California's Proposition 12 (or even to Proposition 12 itself) could succeed in the future—or at least survive past the motion-to-dismiss stage. Regardless, it will be important in future cases to consider that state laws like Proposition 12 also may raise substantial constitutional questions under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.

Add the following notes at the end of the section on p. 847:

8. What did the Court actually hold in *Ross*? It is surely a bad sign that the plurality as well as several different concurring and dissenting justices offered competing assessments of how the votes sorted out on the various issues. Although Justice Gorsuch's plurality opinion purported to limit the *Pike* theory to apply only to state legislation that either (a) discriminates against out-of-staters or (b) impedes interstate commerce, six justices (Sotomayor, Kagan, Roberts, Alito, Kavanaugh, and Jackson) rejected that position in favor of the more traditional view that *Pike*

potentially applies to any state regulation that burdens interstate commerce. And although a majority of the Court rejected the National Pork Producers' challenge to California's law, didn't a majority of the court reject each of the two alternative grounds for this result?[9] So again, what is the holding?

Federal courts have typically addressed this sort of conundrum under the *Marks* rule, which holds that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ."[10] This rule is not always easy to apply, but in *Ross* it probably means that the "holding" is that the plaintiffs failed to allege a sufficient burden on interstate commerce, as set forth in Part IV-C of the plurality opinion—even though a majority of the Court rejected that argument. Even if that interpretation is correct, how strong a precedent is *Ross* on that point?

9. The one clear holding in *Ross* is that the Court unanimously rejected any sort of "per se" rule against state regulation with extraterritorial effects, which practically speaking had to happen because so many state laws have such effects. But the Court did *not* say that the dormant Commerce Clause has no relevance to such effects. And it acknowledged cases, such as the transportation cases and *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), expressing concern about extraterritorial effects.[11] More generally, in a federal republic it seems hard to dispense with the principle that states' regulatory jurisdiction is generally limited to their own territory.[12] As Justice Kavanaugh's dissent pointed out, these problems of state attempts to regulate extraterritorially are unlikely to go away anytime soon. Is there a plausible rule available to handle them under the dormant Commerce Clause? Are the alternate constitutional theories that Kavanaugh suggested—the Import/Export Clause, the Privileges and Immunities Clause, or the Full Faith and Credit Clause—any more promising?

10. As the Covid-19 pandemic swept across the country in 2020, some state and local governments restricted the movement of people and goods. For instance, in June 2020, New York joined Connecticut and New Jersey in issuing a travel advisory that required people travelling from certain states to self-quarantine for fourteen days. [13] Under New York's executive order, the restriction applied to

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[9] For a helpful graphical representation of how the votes shook out, see Jaye Calhoun, Divya Jeswant, & William J. Kolarik II, *A Pictorial Guide to the* National Pork Producers Council *Decision*, 108 Tax Notes State 1087 (June 26, 2023).

[10] Marks v. United States, 430 U.S. 188, 193 (1977).

[11] *See also BMW of N. Am., Inc. v.* Gore, 517 U.S. 559, 570-72 (1996) (holding that states may not impose punitive damages on a defendant for conduct occurring in other states); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.").

[12] *See generally* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 315-22 (1992).

[13] Exec. Order No. 205, N.Y. COMP. CODES R. & REGS. tit. 9, § 8.205 (2020).

travellers from any state with a positive test rate higher than ten per 100,000 residents based on a seven day rolling average. Violators were subject to a penalty of up to $10,000. New York justified its measures as shielding New York's progress in containing the disease from the "less cautious approach" taken by other states. [14]

Does this policy and other state restrictions on out-of-state visitors violate the dormant Commerce Clause? While the legal challenges have not yet fully materialized, should a court treat such restrictions as facially discriminatory and subject to strict scrutiny? Would responses to COVID-19 pass this rigorous test? What do the discussions of quarantine laws in *Gibbons* and *Philadelphia v. New Jersey* tell you?[15] Consider also that a number of studies published both before and since the pandemic's outbreak have questioned the efficacy of both local and international travel restrictions in preventing the spread of infectious disease.[16] If we are to take seriously this research, can we consider interstate travel restrictions to be *narrowly tailored* to a compelling state interest? To what extent should judges pose as epidemiologists and wade into these scientific questions? Does *Philadelphia v. New Jersey* suggest that problems like the pandemic must be faced as a unitary country, rather than as individual states?

Beyond infectious disease, state travel bans have arisen in other settings. In 2016, the California legislature passed a law prohibiting state-sponsored travel to states with laws that, in the view of the California attorney general, discriminate on the basis of sexual orientation, gender identity, or gender expression. [17] Texas, one of the affected states, filed a lawsuit in the United States Supreme Court under the Court's original jurisdiction.[18] Although the Court exercised its discretion to decline

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[14] *Id.*

[15] *See also Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902) (upholding New Orleans law prohibiting travelers, regardless of their health, from entering the city because of a yellow fever outbreak).

[16] Matteo Chinazzi et al., *The Effect of Travel Restrictions on the Spread of the 2019 Novel Coronavirus (COVID-19) Outbreak*, 368 SCIENCE 395, 400 (April 24, 2020) (concluding that travel ban around Wuhan "only modestly delayed" COVID-19's spread across mainland China). Additionally, some pre-COVID-19 research found that travel restrictions do little to contain influenza-like diseases beyond delaying transmission by a few days. *See, e.g.*, Timothy C. Germann et al., *Mitigation Strategies for Pandemic Influenza in the United States*, 103 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 5935, 5940 (Aprill 11, 2006) ("[T]ravel restrictions alone do not appear to be an effective control strategy, due to the implausibly early and drastic measures required to significantly reduce the large number of local outbreaks that are likely to emerge around the country."); Vittoria Colizza et al., *Modeling the Worldwide Spread of Pandemic Influenza: Baseline Case and Containment Interventions*, PLOS MEDICINE, January 23, 2007, https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0040013 ("Indeed, regardless of the pandemic profile, travel restrictions, which are both economically disruptive and difficult to implement, achieve very modest results, slowing down by only a few days or weeks the overall evolution of the pandemic."). However, some might argue that even a modest delay sufficiently flattens the curve to allow governments and healthcare providers to better manage pandemics.

[17] 2016 Cal. Stat. ch. 687 (A.B. 1887), § 1 (codified at CAL. GOV'T CODE § 11139.8).

[18] *See* Motion for Leave to File a Bill of Complaint, Bill of Complaint, Brief in Support, Texas v. California, No. 153, Original (U.S. filed Feb. 2020) (alleging that California law violated

to hear the case,[19] similar issues seem likely to recur. Should strict scrutiny apply to such laws? If so, are state interests more or less compelling in the contexts of disease or discrimination?

SECTION 13.1 NONDELEGATION AND THE ADMINISTRATIVE STATE

Add the following new note at the end of the section to p. 968:

9. A recent decision upholding a federal statute against a nondelegation challenge nonetheless has sparked considerable speculation as to whether the Roberts Court may revive the nondelegation doctrine in a future case. In *Gundy v. United States*, 139 S. Ct. 2116 (2019), the Court considered a challenge to the federal Sex Offender Registration and Notification Act (SORNA). The SORNA establishes uniform federal standards for sex offender registration; any person who fails to register as required by the statute (and who travels in interstate commerce) is subject to federal criminal penalties up to ten years' imprisonment. SORNA set out detailed registration requirements for persons committing a sex offense *after* SORNA's enactment in 2006. Persons who were convicted of a sex offense *prior* to SORNA's enactment, however, are dealt with in 34 U.S.C. § 20913(d):

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter ... and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

Herman Gundy, who had pleaded guilty under Maryland law to sexually assaulting a minor in the year before SORNA's enactment, challenged § 20913(d) as granting unconstitutionally broad discretion to the Attorney General.

Writing for the plurality, Justice Kagan (joined by Ginsburg, Breyer, and Sotomayor) concluded that SORNA easily passed the "intelligible principle" test established in the Court's prior delegation cases. Critically, the plurality interpreted SORNA as requiring the Attorney General to "apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment." On this reading, "the feasibility issues [the AG] could address were administrative—and, more specifically, transitional—in nature." That was intelligible enough a principle for the plurality. "[I]f SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."

Justice Gorsuch (joined by Roberts and Thomas) sharply disagreed in dissent. The dissenters criticized the "intelligible principle" doctrine as both historically-unsupported and too permissive. Justice Gorsuch identified three instances in which delegations were appropriate: (1) when executive officials are simply "filling up the

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not only dormant Commerce Clause but also Privileges and Immunities Clause and Equal Protection Clause).

[19] Texas v. California, 141 S. Ct. 1469 (2021) (Mem).

details" in statutory schemes; (2) when Congress makes the application of legislative directives contingent upon executive factfinding"; and (3) when legislative delegations overlap with matters already within the scope of executive or judicial power. SORNA, the dissent argued, involved none of these situations. Although Justice Gorsuch acknowledged that "what qualifies as a detail can sometimes be difficult to discern," he pointed out that "SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them."

Justice Alito concurred in the result only, stating that "[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment."

What does *Gundy* portend for the future of the nondelegation doctrine? The Court was shorthanded, as Justice Kavanaugh was not confirmed until after oral argument and thus did not participate in the case. But Justice Alito's statement strongly suggests that there are four justices willing to adopt a stricter approach to nondelegation, and Justice Kavanaugh may well represent a fifth. Would that be a good thing? At Justice Kavanaugh's confirmation hearings, Nebraska Senator Ben Sasse argued that bitter political battles over control of the executive branch and the judiciary stem from Congress's failure to make basic legislative decisions. Because Congress "punts most of its power to executive branch agencies" as "a convenient way . . . to avoid taking responsibility for controversial and often unpopular decisions," "the Supreme Court becomes our substitute political battleground."[7] Likewise, scholars have argued that the gridlock created by partisan polarization in Congress creates incentives for the Executive to make law through adventurous agency action, which in turn spawns litigation challenging such action in the courts.[8] Do these conditions strengthen the case for a strong nondelegation doctrine that would force Congress to make legislative choices? Or do they suggest that such a doctrine would effectively cripple government and/or aggrandize the role of the courts?

10. In *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), invalidated the "Clean Power Plan rule," an EPA regulation that sought to reduce greenhouse gas emissions. That rule required electric grids to shift production from coal-fired to natural gas-fired power plants, and from both coal and gas-fired plants to renewable energy sources, mostly wind and solar. Chief Justice Roberts' majority opinion argued that the Clean Air Act authorized EPA to require existing power plants to adopt technologies that would allow them to operate more cleanly, but that it could *not* be fairly read to authorize EPA to take the more drastic step of ordering a shift from fossil fuel-fired plants to renewables. In so holding, he relied heavily on the

[7] Opening Statement of Sen. Ben Sasse, Sept. 4, 2018, available at https://www.sasse.senate.gov/public/index.cfm/2018/9/sasse-on-kavanaugh-hearing-we-can-and-we-should-do-better-than-this.

[8] *See* Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 Texas L. Rev. 43, 62-65 (2018).

"major questions doctrine," under which the Court will be reluctant to read ambiguous and long-standing delegations of authority to agencies to authorize significant new actions that one would expect Congress to have addressed explicitly. The Court explained:

> "In arguing that Section 111(d) [of the Clean Air Act] empowers it to substantially restructure the American energy market, EPA claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority. It located that newfound power in the vague language of an ancillary provision of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress itself had conspicuously and repeatedly declined to enact itself. Given these circumstances, there is every reason to hesitate before concluding that Congress meant to confer on EPA the authority it claims under Section 111(d)."

Justice Kagan's dissent, joined by Justices Breyer and Sotomayor, rejected the Court's reading of the Clean Air Act. But it also questioned the "major questions doctrine" as unsupported by prior case law. (In a concurrence, Justice Gorsuch was able to identify instances of the doctrine dating back all the way to 1897.)

The nondelegation doctrine discussed in *Gundy* goes to what power Congress *can* delegate to an agency; the major questions doctrine addresses how to interpret how much authority Congress *has* delegated. But both can be viewed as distinct strategies for limiting the scope of delegations to agencies. Which do you prefer, in light of historic difficulties in formulating a workable nondelegation doctrine? Are they compatible? If you have one, do you need the other? Could the separation of powers be maintained if both were abandoned?

11. The Court relied on the major questions doctrine again in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), which held that the Secretary of Education exceeded his statutory authority when he established a comprehensive student loan forgiveness program that canceled roughly $430 billion of federal student loan balances on loans extended to 43 million borrowers. The Secretary had relied upon the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), which extended an earlier statute conferring authority to adjust student debt in response to economic turmoil in the wake of the September 11, 2001 terrorist attacks. The HEROES Act extended that authority to include any war or national emergency. It authorized the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under Title IV of the [Higher Education Act of 1965] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a)(1). The Secretary invoked the HEROES Act as a response to the COVID-19 pandemic in August 2022—just a few weeks before President Biden formally stated that "the pandemic is over."

Chief Justice Roberts's majority opinion emphasized that the HEROES Act granted the Secretary "to 'waive or modify' existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not

to rewrite that statute from the ground up." "Modify" connoted a power "to make modest adjustments and additions to existing provisions, not transform them." Similarly, "waiver" signified waiver of particular statutory or regulatory provisions, but "the Secretary does not identify any provision any provision that he is actually waiving." Moreover, the loan forgiveness program "does far more than relax existing legal requirements" because it "specifies particular sums to be forgiven and income-based eligibility requirements." The Court buttressed these textual arguments with evidence of past practice under the statute, in which "modifications . . . implemented only minor changes, most of which were procedural" such as "reducing the number of tax forms borrowers are required to file, extending time periods in which borrowers must take certain actions, and allowing oral rather than written authorizations."

The Court treated its interpretation of the statutory text as sufficient to decide the case. But it invoked the major questions doctrine in response to the Secretary's (and the dissent's) argument that Congress intended the HEROES Act to grant a broad power to "do something" in response to a national emergency. "Under the Government's reading of the HEROES Act," the Court said, "the Secretary would enjoy virtually unlimited power to rewrite the Education Act. This would 'effect a fundamental revision of the statute, changing it from one sort of scheme of . . . regulation' into an entirely different kind" (quoting *West Virginia*)." The Court also contrasted the "virtually unanimous bipartisan support" for the HEROES Act itself with the "sharp debates" over the President's broad loan forgiveness proposals. All this suggested that "'[a] decision of such magnitude and consequence' on a matter of 'earnest and profound debate across the country' must 'rest with Congress itself, or an agency acting pursuant to a clear delegation from that representative body'" (again quoting *West Virginia*). In support of this point, the Chief Justice also quoted then-House Speaker Nancy Pelosi's statement that "People think the President of the United States has the power for debt forgiveness. He does not. He can postpone. He can delay. But he does not have that power. That has to be an act of Congress."

Justice Kagan dissented for herself and Justices Sotomayor and Jackson. Stressing "the stringency of the triggering conditions"—the Secretary can act only (1) "when the President has declared a national emergency; (2) by providing benefits only to "affected individuals"; and only to the extent "'necessary' to ensure that those individuals 'are not placed in a worse position financially in relation to' their loans 'because off' the emergency"—Kagan argued that "if those conditions are met, the Secretary's delegated authority is capacious." The majority's reading, the dissent argued, "would strip the secretary of "ability to respond to large-scale emergencies in commensurate ways." The dissenters also challenged the basic legitimacy of the major questions doctrine, which they characterized as "made-up" and a cover for the majority's own policy preferences. "From the first page to the last," Justice Kagan wrote, "today's opinion departs form the demands of judicial restraint."

If the dissenters' reading of the HEROES Act were correct, would that trigger concerns under the non-delegation doctrine? For example, do the triggering conditions really constrain the Executive? Are there any limits, for example, on

when the President can declare an emergency? (In the 1990s, for example, President Clinton declared a national emergency resulting from a coup in Burma in order to trigger certain statutory authority.) If the loan forgiveness program is within the statute, then does "waive or modify" offer any constraint at all?

The most interesting opinion—to academics, at least—may have been Justice Barrett's concurrence, in which she tried to develop the intellectual foundations of the major questions doctrine. As a former professor specializing in statutory interpretation, Barrett was uncomfortable with viewing the major questions doctrine as a "substantive canon" that would require courts to set aside what they would otherwise consider the most persuasive reading of a statute simply because Congress had not spoken with sufficient clarity. As discussed in Section 10.1 of this text, such canons often further particular values—such as federalism or fair warning to criminal defendants—whether or not those values were espoused by the Congress that enacted the statute in question. Barrett thought that the use of a canon of construction in this way is "inconsistent with textualism." She argued, however, that the major questions doctrine is simply an effort to "situate[] text in context, which is how textualists, like all interpreters, approach the task at hand." The doctrine thus helps textualists determine the best reading of the statute—that is, what Congress most likely intended—rather than overriding the best reading of the statute based on some external value.[1] Do you find Justice Barrett's point persuasive? How different is it from saying that readings of the text must be informed by the statute's underlying purpose? Who is more likely right about what Congress *actually* intended in the HEROES Act—the Chief Justice or Justice Kagan? Should that be the only consideration at the end of the day?

SECTION 13.3 EXECUTIVE PRIVILEGES AND IMMUNITIES

Add the following new note at the end of the section on p. 1016:

7. Two decisions handed down on the same day at the end of the 2019 Term explored the extent to which the courts may require the President to respond to subpoenas seeking his personal financial information. *Trump v. Vance*, 140 S. Ct. 2412 (2020), involved a grand jury subpoena issued by the New York County District Attorney's Office seeking financial records, including personal federal income tax returns, relating to President Donald Trump and his various business enterprises. The New York County D.A., Cyrus Vance Jr., described his investigation as concerning "business transactions involving multiple individuals whose conduct may have violated state law." He did not name President Trump as a "target" of the investigation, but the content of the subpoena was nearly identical to those sought by the House committees in the *Mazars* case (described below). The President, acting in his personal capacity, sued Vance and the Mazars accounting firm (the custodian of the requested documents) seeking to enjoin enforcement of the subpoena.

[1] *See also* Ernest Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1586-92 (2000).

The Supreme Court rejected both the President's argument that he was categorically immune from such a subpoena, as well as an argument—supported by the U.S. Solicitor General—that any such subpoena issued to a sitting President should be subject to a heightened standard of justification. Chief Justice Roberts' majority opinion began by looking back to the 1807 treason trial of Aaron Burr, who was accused of plotting to undermine American interests in the Western Territories. During the pretrial grand jury proceedings, Burr sought a subpoena to compel President Jefferson to produce correspondence from General James Wilkinson, Burr's alleged co-conspirator, implicating Burr in the plot. Chief Justice Marshall, who presided at Burr's trial as circuit justice for Virginia, rejected any notion that the President "stand[s] exempt from the general provisions of the constitution" or the Sixth Amendment's guarantee of a defendant's right to compulsory process to obtain evidence for his defense. *See United States v. Burr*, 25 F. Cas. 30, 33034 (No. 14,692d) (CC Va. 1807). In *Vance*, the current justices unanimously accepted the notion that the *Burr* case's rejection of a categorical presidential immunity from *federal* grand jury subpoenas extends to *state* grand jury subpoenas as well.

The *Vance* Court divided 5-4, however, over whether a heightened standard should apply to evaluate such subpoenas when directed to the President. Chief Justice Roberts' majority opinion rejected a heightened standard, but it nonetheless went out of its way to make clear that a President, by virtue of the responsibilities inherent in his office, will often have very strong arguments under traditional standards for resisting subpoenas. In particular, the President may "challenge the subpoena on any grounds permitted by state law, which usually include bad faith and undue burden or breadth." He may also "raise subpoena specific constitutional challenges," such as an argument that "the subpoena [is] an attempt to influence the performance of his official duties, in violation of the Supremacy Clause," or "that compliance with a particular subpoena would impede his constitutional duties."

Four justices would have imposed some level of heightened protection. Justice Kavanaugh (with Justice Gorsuch) concurred in the judgment but urged that *United States v. Nixon*'s requirement of a "demonstrated, specific need" should govern subpoena's issued to the President. Justice Thomas dissented, arguing that the President should be able to resist the enforcement of a subpoena based on practical interference with his duties, and that courts must largely defer to presidential judgments about interference. And Justice Alito also dissented, arguing that a state prosecutor should have to meet a considerably heigher burden of justification in seeking records from the President.

It is far from clear how differently the standards offered by the separate opinions in *Vance* would be applied in practice. It is equally unclear, given the solicitude for the President's prerogatives in all the opinions, how likely the lower courts are to uphold specific subpoenas to the President, notwithstanding *Vance*'s holding that such subpoenas are not barred altogether. How do you feel about this state of affairs? Did the Court brilliantly dodge definitely resolving a divisive political controversy? Does a flexible standard appropriately reflect the difficulty in anticipating the different situations and clashes of interests that can arise in such

cases? Or did the Court simply kick the can down the road and abdicate its responsibility to articulate clear rules to guide the lower courts?

Are *state* subpoenas, like the one in *Vance*, inherently more dangerous than the federal one in *Burr*? One characteristic feature of polarized twenty-first century America is that, while the country as a whole is divided roughly 50-50, individual states often tilt sharply one way or another. If Mr. Vance, a prominent Democrat, is allowed to seek potentially damaging personal information from a Republican president, should we expect red-state investigations of the next Democrat to occupy the White House? Are the courts likely to be able to prevent this sort of escalatory spiral?

Another feature of contemporary political polarization has been non-stop *congressional* investigations of the last several presidents whenever the opposing party has controlled one or both houses of Congress. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), thus concerned four legislative subpoenas issued by three committees of the U.S. House of Representatives seeking extensive financial information concerning President Trump and his businesses. As in *Vance*, the President and the Solicitor General argued that the *Nixon* standard of a "demonstrated, specific need" for the information in question should govern congressional subpoenas. The Court, in a 7-2 opinion written by Chief Justice Roberts, reserved that standard for materials over which the President had asserted executive privilege. At the same time, the Court also rejected the House's proposed standard, which would have upheld any subpoena that "relate[s] to a valid legislative purpose or concern[s] a subject on which legislation could be had." Instead, the Court concluded that "in assessing whether a subpoena directed at the President's personal information is 'related to, and in furtherance of, a legitimate task of the Congress,' courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the 'unique position' of the President." In particular, Courts must consider several "special considerations":

> First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. . . . Congress may not rely on the President's information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective. . . .
>
> Second . . . courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective. . . .
>
> Third . . . the more detailed and substantial the evidence of Congress's legislative purpose, the better. . . . [I]t is "impossible" to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation.
>
> Fourth . . . burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.

Justice Thomas dissented, insisting that "Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not. Congress may be able to obtain these documents as part of an investigation of the President, but to do so, it must proceed under the impeachment power." Justice Alito likewise dissented, suggesting that he might agree with Justice Thomas's categorical rejection of congressional power, but stating that even if legislative subpoenas were not categorically barred, the House should be "required to show more than it has put forward to date."

Are legislative investigations of the Executive a much-needed check on expansive presidential authority or a cynical manifestation of the hyper-polarization of American politics? If you think investigations need to be reined in, did the Court offer a sufficiently determinate standard to guide the lower courts in doing so? Or is the Court likely to have to intervene in every clash between the two branches? Would either of the parties in *Mazars* have gotten a more favorable outcome if they had taken offered a less extreme position to the Court?

Mazars was the first time that the Supreme Court has ever had to consider a dispute over a congressional subpoena. Chief Justice Roberts began his opinion by noting that "[h]istorically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the hurly-burly, the give-and-take of the political process between the legislative and executive." Why do you think that process was unable to resolve the dispute in *Mazars*? Should the Court force a political resolution by declaring such cases nonjusticiable political questions?

SECTION 13.4 APPOINTMENTS AND THE UNITARY EXECUTIVE

Add the following new notes at the end of the section on p. 1047:

9. The Court seemed to adopt a stronger theory of the unitary executive in *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020). Congress established the CFPB as an independent regulatory agency in the wake of the 2008 financial crisis. It empowered the agency to enforce 18 existing federal statutes, such as the Fair Credit Reporting Act and the Fair Debt Collection Practices Act, as well as new restrictions on unfair and deceptive consumer finance practices. The CFPB is empowered to promulgate regulations fleshing out these statutory mandates, prosecute offenders, and adjudicate violations before its own administrative tribunals. In contrast to most independent agencies, the CFPB is headed by a single "director" who is appointed by the President (with Senate confirmation), serves a five-year term, and can be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." In 2017, the CFPB ordered Seila Law, a California law firm providing debt-related legal services, to produce information about the firm's business practices. Seila Law resisted the request, arguing that the CFPB's structure violated the constitutioal separation of powers. In a 5-4 decision authored by Chief Justice Roberts, the Supreme Court agreed.

The opinions in *Seila Law* presented a stark battle over frameworks. The majority held, based on the text of Article II's vesting clause, historic debates over removal in the Early Republic, and the Court's opinion in *Myers*, that the Constitution generally requires unfettered presidential authority to remove all officers exercising national executive authority. This general principle is qualified by limited exceptions recognized in *Humphrey's Executor* (for "a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power") and *Morrison* (for "inferior officers with limited duties and no policymaking or administrative authority"). The general unitary principle, the Court said, is crucial to the Framers' "straightforward" constitutional strategy: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections."

In finding that the CFPB director ran afoul of the unitary principle, the Court relied primarily on the CFPB's "single-Director structure": "The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. . . . Yet the Director may *unilaterally* . . . . issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans." The Court also emphasized two other institutional features: that the CFPB was funded outside the legislative appropriations process through allocations by the Federal Reserve (which is funded through bank assessments), and that the Director's five year term could mean that some presidents would never have the opportunity to shape CFPB policy through an appointment.

Justice Kagan's dissent offered a quite different framework. For the dissenters, the general principle (reflected in *Humphrey's Executor* and *Morrison*) was that "Congress [has] broad authority to establish and organize the Executive Branch," subject to narrow exceptions recognized in *Myers* (Congress can't involve *itself* in removals by requiring Senate approval), and *PCAOB* (Congress can't make removal effectively impossible). The dissenters denied that the Constitution contains any general principle of "separation of powers" existing apart from or underneath the text, and they thus emphasized that nothing in the text of Article II explicitly empowers the President to remove executive officers. And the majority's theory, Justice Kagan worried, would call into question a wide range of independent agencies similarly insulated from presidential removal. "The analysis is as simple as simple can be," Justice Kagan insisted. "How could it be that this opinion is a dissent?"

Do you agree with Justice Kagan that removal questions are "as simple as simple can be"? This issue produced one of the first great crises of constitutional meaning in the Early Republic, got Andrew Johnson impeached, gave rise to the conflicting decisions in *Myers* and *Humphrey's Executor* within a decade of one another, and begat the confusing totality-of-the-circumstances analysis in *Morrison*. Do you think *Seila Law* simplified the analysis going forward? Are only single-

director independent agencies problematic? Or does the majority's analysis call into question multi-member agencies like the FTC or FCC?

Is the restriction on presidential removal the only separation of powers problem with the CFPB? Congress empowered the agency to issue legislative rules, bring civil actions to enforce those rules, and adjudicate those actions in administrative courts established within the agency. Didn't Madison call the combination of lawmaking, enforcement, and adjudicatory functions in the same hands "the very definition of tyranny"?[9] Isn't this objection more fundamental? Why do you think that challenges to the CFPB emphasized the removal argument rather than this combination of functions?

What should a living constitutionalist make of *Seila Law*? The dissent accused the majority of having "made up" its doctrine, presumably in an effort to curb the expansion of independent administrative agencies since the New Deal. Should a living constitutionalist applaud the majority's willingness to adapt the requirements of separation of powers to modern conditions—especially a much more pervasive administrative state raising difficult problems of executive control?[10] On the other hand, the dissenters also insisted that "[t]he deferential approach this Court has taken"—by *not* restricting Congress's ability to restrict presidential control over executive officers—"gives Congress the flexibility it needs to craft administrative agencies." This "latitude" to "adopt and adapt such measures," the dissenters contended, is crucial "under a Constitution meant to 'endure for ages to come.'" (quoting *McCulloch v. Maryland*) On this conception, the government structure is adaptable over time precisely because the Constitution itself doesn't impose any specific requirements (like a strong unitary executive rule). Which kind of flexibility should a living constitutionalist prefer?

10. Two decisions in the October 2020 Term confirmed that the President's power over officials serving in the executive branch has become a central preoccupation of the Court's separation of powers jurisprudence. *Collins v. Yellen*, 141 S. Ct. 1761 (2021), held that a provision of the Housing and Economic Recovery Act rendering the Director of the Federal Housing Finance Agency (FHFA) removable only for cause violated the constitutional separation of powers. Seven justices agreed that the head of the FHFA was indistinguishable from the head of the CFPB, whom *Seila Law* had held must serve at the President's pleasure. The justices in the majority disagreed, however, about the consequences of that problem with the agency's structure. Justice Alito's majority opinion accepted the parties' assumption that the any action taken by the agency would necessarily be invalid if the agency director were protected by an invalid removal restriction. The majority held, however, that a remand was necessary to determine whether the FHFA director's insulation from removal had caused the director to act in any way that injured the plaintiffs. Justice Thomas, concurring, took that analysis a step further, arguing that an unlawful removal provision does *not* necessarily taint all action

[9] *See* The Federalist No. 47, main text at 906.

[10] *Cf.* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2331-2346 (2001) (extolling the virtues of presidential control over administrative agencies in the modern state).

taken by the unlawfully insulated official. Justice Gorsuch, on the other hand, concurred only in part because he viewed the director's unlawful insulation from removal as necessarily vitiating any action that the director might take. What are the consequences of these various views for what persons subject to action by a federal agency may stand to gain by challenging that agency's structure on separation of powers grounds?

United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021), involved administrative *adjudication*—that is, decisions resolving disputes over the meaning and application of federal law made by administrative agency officials rather than Article III judges. The Patent and Trademark Office (PTO), an executive agency within the Department of Commerce, provides a procedure for challenging patents granted by the agency before a Patent Trial and Appeal Board (PTAB)—a panel of three agency officials (generally "Administrative Patent Judges" appointed by the Secretary of Commerce). The PTAB can uphold or invalidate a patent that is challenged, and its decision is not subject to review by the PTO Director (but it *is* subject to judicial review in the U.S. Court of Appeals for Federal Circuit). After a PTAB panel invalidated Arthrex's patent, Arthrex challenged the PTAB's structure under the Appointments Clause, arguing that the PTAB's judges were principal officers and therefore their appointment by the Secretary was unconstitutional.

The Supreme Court held that the PTAB scheme was unconstitutional in an opinion by Chief Justice Roberts. The majority opinion focused on the fact that the PTAB judges' were not reviewable by any other official within the Executive branch. This, the Court said, was inconsistent with their status as inferior officers appointed by the head of the agency. Four of the majority justices joined a portion of the opinion holding that the appropriate remedy was to permit the PTO Director to review PTAB decisions. That result was joined by Justices Breyer, Sotomayor, and Kagan, who would not have struck down the original system but agreed that, if it were unconstitutional, then permitting review by the Director was an appropriate remedy. Justice Gorsuch dissented on that point, arguing that the Court had no way of conjuring Congress's counter-factual intent regarding what to do if the statute as drafted turned out to be unconstitutional. "These legislative seances," he quipped, "usually wind up producing only the results intended by those conducting the performance." Justice Thomas dissented separately, arguing that the PTAB judges were inferior officers notwithstanding the fact that no other officer could directly review their decisions.

Two points of contention seem crucial in *Arthrex*. The first (upon which the majority disagreed with Justices Breyer and Thomas) was whether officers' ability to exercise unreviewable discretion over certain decisions necessarily makes them principal officers who must be appointed by the President. Put that way, the dissenters have a point, don't they? But the majority framed the question differently, arguing that the Constitution requires that all inferior officers be subject to control by either the President or a principal officer directly accountable to the President. Is this effectively a combination of the Appointments Clause with the unitary executive principle? Does it mark a sensible step away from the prior case law's

exclusive focus on hiring and firing toward the President's ability to control the *actions* of executive officials?

The second point concerned severability—that is, whether the offending aspect of the PTAB scheme (the PTAB's unreviewable authority over challenges to patents) could be "severed" from the remainder the scheme. Here, "severance" required not so much excising an aspect of the scheme (the PTAB retained its decisional role) but *adding* something (another layer of executive review by the Director). Is that OK for a court to do? Is it fair to argue, as Justice Gorsuch did, that the Court was simply making up a new statute it liked better? But is it crazy to think that Congress would have preferred this sort of judicial damage control?

SECTION 14.1 SOURCES OF PRESIDENTIAL POWER IN FOREIGN AFFAIRS

Add the following new note at the end of the section on p. 1069:

8. The Supreme Court upheld a revised version of President Trump's travel ban order in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). The original order had directed a worldwide review of the adequacy of information provided by foreign countries concerning their nationals seeking to enter the United States. Several lower courts enjoined enforcement of interim bans on entrants from certain countries that the President had imposed pending completion of this review. Following the review's completion, the President issued a revised order restricting entry from eight foreign states—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—that had been found to pose particular security risks and/or were unwilling to provide requested information to U.S. authorities. In issuing these restrictions, the President relied upon his authority under 8 U.S.C. § 1182(f), quoted in the previous note. The US. District Court for the District of Hawii issued a nationwide injunction barring enforcement of the President's order, and the Ninth Circuit affirmed, but the Supreme Court reversed in a 5-4 decision by Chief Justice Roberts.

Plaintiffs challenged the travel ban as exceeding the President's statutory authority and also as a violation of the Establishment Clause of the First Amendment because it allegedly discriminated against Muslims. Addressing the statutory claim first, the Chief Justice observed that § 1182(f) "exudes deference to the President in every clause." The majority rejected Plaintiffs' request that it make a "searching inquiry" into the President's determination that admission of persons from the restricted states would threaten the national interest, and it also rejected arguments that other provisions of the statute or past executive practice constrained the President's discretion under § 1182(f).

Because the travel order did not reference religion on its face and included non-Muslim countries, the Establishment Clause claim rested heavily on statements that President Trump had made during the presidential election campaign calling for a ban on Muslims entering the country. Chief Justice Roberts suggested that Trump's statements may not have lived up to the tradition of Presidential statements upholding "the principles of religious freedom and tolerance upon which this Nation was founded," but he noted that this case involved "not only the statements of a particular President, but also the authority of the Presidency itself." This inquiry

was necessarily informed by the Executive's broad powers in the spheres of immigration and national security. "For our purposes today," the Chief Justice said, "we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes." Applying this standard, the Court rather easily concluded that "the entry suspension has a legitimate grounding in national security concerns" based on its express langauge,which "says nothing about religion," its coverage of "just 8% of the world's Muslim population," and its limitation "to countries . . . previously designated by Congress or prior administrations as posing national security risks." The Court further noted that "[t]he Proclamation . . . reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies," that since the initial orer "three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list," and that the order included numerous exceptions that would cover Muslim applicants even from the covered countries.The Court thus concluded that "the Government has set forth a sufficient national security justification to survive rational basis review."

Justice Sotomayor (joined by Justice Ginsburg) filed the principal dissent, which addressed only the Establishment Clause claim. Justice Sotomayor insisted that the "heightened scrutiny" standard applicable to Establishment Clause challenges to public religious displays should apply to this case. She also asserted that there were "stark parallels between the reasoning of this case and that of *Korematsu v. United States*, 323 U.S. 214 (1944), in which the Court had upheld the internment of over 100,000 Japanese-Americans during World War II. (The majority, by contrast, took this case as an opportunity "to make express what is already obvious: *Korematsu* was wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.")

Was rational basis review the correct standard to apply to President Trump's travel ban? Should statements by a candidate on the campaign trail be considered in assessing the validity of an official Executive Order? Should the Court pretend that they never happened at all? How comparable is the national security context of the travel ban to, for example, a tablet in front of a courthouse setting forth the Bible's Ten Commandments? Do they deserve the same standard of review under the Establishment Clause? And was it fair for Justice Sotomayor to compare this case to *Korematsu*?

SECTION 15.4 AFFIRMATIVE ACTION AND "BENIGN" RACIAL CLASSIFICATIONS

Replace Grutter v. Bollinger *at p. 1293 with the following new principal case:*

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

143 S. Ct. 2141 (2023)

■ CHIEF JUSTICE ROBERTS delivered the opinion of the court.

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

I

A

Founded in 1636, Harvard College has one of the most selective application processes in the country. Over 60,000 people applied to the school last year; fewer than 2,000 were admitted. Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. See 980 F.3d 157, 166–169 (CA1 2020). 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. A rating of "1" is the best; a rating of "6" the worst. In the academic category, for example, a "1" signifies "near-perfect standardized test scores and grades"; in the extracurricular category, it indicates "truly unusual achievement"; and in the personal category, it denotes "outstanding" attributes like maturity, integrity, leadership, kindness, and courage. A score of "1" on the overall rating—a composite of the five other ratings—"signifies an exceptional candidate with >90% chance of admission." In assigning the overall rating, the first readers "can and do take an applicant's race into account." *Ibid.*

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. 397 F.Supp.3d 126, 144 (Mass. 2019). 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."

B

Founded shortly after the Constitution was ratified, the University of North Carolina (UNC) prides itself on being the "nation's first public university." 567 F.Supp.3d 580, 588 (MDNC 2021). Like Harvard, UNC's "admissions process is highly selective": In a typical year, the school "receives approximately 43,500 applications for its freshman class of 4,200."

Every application the University receives is initially reviewed by one of approximately 40 admissions office readers, each of whom reviews roughly five applications per hour. Readers are required to consider "[r]ace and ethnicity ... as one factor" in their review. Other factors include academic performance and rigor, standardized testing results, extracurricular involvement, essay quality, personal factors, and student background. Readers are responsible for providing numerical ratings for the academic, extracurricular, personal, and essay categories. During the years at issue in this litigation, underrepresented minority students were "more likely to score [highly] on their personal ratings than their white and Asian American peers," but were more likely to be "rated lower by UNC readers on their academic program, academic performance, ... extracurricular activities," and essays. *Id.*

After assessing an applicant's materials along these lines, the reader "formulates an opinion about whether the student should be offered admission" and then "writes a comment defending his or her recommended decision." In making that decision, readers may offer students a "plus" based on their race, which "may be significant in an individual case." The admissions decisions made by the first readers are, in most cases, "provisionally final."

Following the first read process, "applications then go to a process called 'school group review' ... where a committee composed of experienced staff members reviews every [initial] decision." The review committee receives a report on each student which contains, among other things, their "class rank, GPA, and test scores; the ratings assigned to them by their initial readers; and their status as residents, legacies, or special recruits." The review committee either approves or rejects each admission recommendation made by the first reader, after which the

admissions decisions are finalized. In making those decisions, the review committee may also consider the applicant's race.[11]

C

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization founded in 2014 whose purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." In November 2014, SFFA filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.[12] The District Courts in both cases held bench trials to evaluate SFFA's claims. Trial in the Harvard case lasted 15 days and included testimony from 30 witnesses, after which the Court concluded that Harvard's admissions program comported with our precedents on the use of race in college admissions. The First Circuit affirmed that determination. Similarly, in the UNC case, the District Court concluded after an eight-day trial that UNC's admissions program was permissible under the Equal Protection Clause.

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

III

A

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall "deny to any person ... the equal protection of the laws." To its proponents, the Equal Protection Clause represented a "foundation[al] principle"—"the absolute equality of all citizens of the United States politically and civilly before their own laws." Cong. Globe, 39th

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[11] . . . According to SFFA's expert, over 80% of all black applicants in the top academic decile were admitted to UNC, while under 70% of white and Asian applicants in that decile were admitted. In the second highest academic decile, the disparity is even starker: 83% of black applicants were admitted, while 58% of white applicants and 47% of Asian applicants were admitted. And in the third highest decile, 77% of black applicants were admitted, compared to 48% of white applicants and 34% of Asian applicants. The dissent does not dispute the accuracy of these figures. And its contention that white and Asian students "receive a diversity plus" in UNC's race-based admissions system blinks reality. The same is true at Harvard. See Brief for Petitioner 24 ("[A]n African American [student] in [the fourth lowest academic] decile has a higher chance of admission (12.8%) than an Asian American in the *top* decile (12.7%)."); see also 4 App. in No. 20–1199, p. 1793 (black applicants in the top four academic deciles are between four and ten times more likely to be admitted to Harvard than Asian applicants in those deciles).

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

Cong., 1st Sess., 431 (1866) (statement of Rep. Bingham). The Constitution, they were determined, "should not permit any distinctions of law based on race or color," Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, because any "law which operates upon one man [should] operate *equally* upon all," Cong. Globe 2459 (statement of Rep. Stevens). As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold "over every American citizen, without regard to color, the protecting shield of law." And in doing so, said Senator Jacob Howard of Michigan, the Amendment would give "to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." For "[w]ithout this principle of equal justice," Howard continued, "there is no republican government and none that is really worth maintaining."

At first, this Court embraced the transcendent aims of the Equal Protection Clause. "What is this," we said of the Clause in 1880, "but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States?" *Strauder v. West Virginia*, 100 U.S. 303, 307–309. "[T]he broad and benign provisions of the Fourteenth Amendment" apply "to all persons," we unanimously declared six years later; it is "hostility to ... race and nationality" "which in the eye of the law is not justified." *Yick Wo v. Hopkins*, 118 U.S. 356, 368–369, 373–374, (1886).

Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U.S. 537 (1896). The aspirations of the framers of the Equal Protection Clause, "[v]irtually strangled in [their] infancy," would remain for too long only that—aspirations. J. Tussman & J. tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 381 (1949).

After *Plessy*, "American courts ... labored with the doctrine [of separate but equal] for over half a century." *Brown v. Board of Education*, 347 U.S. 483, 491 (1954). Some cases in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students educational opportunities equal to—even if formally separate from—those enjoyed by white students. See, *e.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349–350 (1938). But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 640–642 (1950). By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown* v. *Board of Education*. In that seminal decision, we overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. *Brown* concerned the permissibility of racial segregation in public

schools. The school district maintained that such segregation was lawful because the schools provided to black students and white students were of roughly the same quality. But we held such segregation impermissible "*even though* the physical facilities and other 'tangible' factors may be equal." The mere act of separating "children ... because of their race," we explained, itself "generate[d] a feeling of inferiority."

The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education "must be made available to all on equal terms." the plaintiffs had argued, "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I,* O. T. 1952; see also Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown* v. *Board of Education*, O. T. 1953 ("That the Constitution is color blind is our dedicated belief."). The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown v. Board of Education*, 349 U.S. 294, 300–301 (1955). The time for making distinctions based on race had passed. *Brown*, the Court observed, "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional."

So too in other areas of life. Immediately after *Brown*, we began routinely affirming lower court decisions that invalidated all manner of race-based state action. . . . In the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality. Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone, all by a transformative promise "stemming from our American ideal of fairness": " 'the Constitution ... forbids ... discrimination by the General Government, or by the States, against any citizen because of his race.' " *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). As we recounted in striking down the State of Virginia's ban on interracial marriage 13 years after *Brown*, the Fourteenth Amendment "proscri[bes] ... all invidious racial discriminations." *Loving v. Virginia*, 388 U.S. 1, 8 (1967). Our cases had thus "consistently denied the constitutionality of measures which restrict the rights of citizens on account of race."

These decisions reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). We have recognized that repeatedly. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388 U.S. at 10; see also *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) ("[T]he historical fact [is] that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination.").

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, 118 U.S. at 369. 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 Cal. v. Bakke*, 438 U.S. 265, 289–290 (1978) (opinion of Powell, J.). "If both are not accorded the same protection, then it is not equal." *Id.*, at 290.

Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995). Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest. *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 311–312 (2013) (*Fisher I*).

Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. See, *e.g.*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007); *Shaw v. Hunt*, 517 U.S. 899, 909–910 (1996). The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. See *Johnson v. California*, 543 U.S. 499, 512–513 (2005).[13]

Our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). That principle cannot be overridden except in the most extraordinary case.

B

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in *Regents of University of California* v. *Bakke*, which involved a set-aside admissions program used by the University of California, Davis, medical school. Each year, the school held 16 of its 100 seats open for members of certain minority groups, who were reviewed on a special admissions track separate from those in the main admissions pool. The plaintiff, Allan Bakke, was denied admission two years in a row, despite the admission of minority applicants with lower grade point averages and MCAT

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

scores. Bakke subsequently sued the school, arguing that its set-aside program violated the Equal Protection Clause.

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

Justice Powell began by finding three of the school's four justifications for its policy not sufficiently compelling. The school's first justification of "reducing the historic deficit of traditionally disfavored minorities in medical schools," he wrote, was akin to "[p]referring members of any one group for no reason other than race or ethnic origin." Yet that was "discrimination for its own sake," which "the Constitution forbids." Justice Powell next observed that the goal of "remedying ... the effects of 'societal discrimination'" was also insufficient because it was "an amorphous concept of injury that may be ageless in its reach into the past." Finally, Justice Powell found there was "virtually no evidence in the record indicating that [the school's] special admissions program" would, as the school had argued, increase the number of doctors working in underserved areas.

Justice Powell then turned to the school's last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. That interest, in his view, was "a constitutionally permissible goal for an institution of higher education." And that was so, he opined, because a university was entitled as a matter of academic freedom "to make its own judgments as to ... the selection of its student body."

But a university's freedom was not unlimited. "Racial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." A university could not employ a quota system, for example, reserving "a specified number of seats in each class for individuals from the preferred ethnic groups." Nor could it impose a "multitrack program with a prescribed number of seats set aside for each identifiable category of applicants." And neither still could it use race to foreclose an individual "from all consideration ... simply because he was not the right color."

The role of race had to be cabined. It could operate only as "a 'plus' in a particular applicant's file." And even then, race was to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." Justice Powell derived this approach from what he called the "illuminating example" of the admissions system then used by Harvard College. Under that system, as described by Harvard in a brief it had filed with the Court, "the race of an applicant may tip the balance in his favor just as geographic origin or a life [experience] may tip the balance in other candidates' cases." Harvard continued: "A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring

something that a white person cannot offer." The result, Harvard proclaimed, was that "race has been"—and should be—"a factor in some admission decisions."

No other Member of the Court joined Justice Powell's opinion. Four Justices instead would have held that the government may use race for the purpose of "remedying the effects of past societal discrimination." (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices, meanwhile, would have struck down the Davis program as violative of Title VI. In their view, it "seem[ed] clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government." *Id.*, at 416 (Stevens, J., joined by Burger, C. J., and Stewart and Rehnquist, JJ., concurring in judgment in part and dissenting in part). The Davis program therefore flatly contravened a core "principle imbedded in the constitutional *and* moral understanding of the times": the prohibition against "racial discrimination."

C

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

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

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

But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. The Court stressed the fundamental principle that "there are serious problems of justice connected with the idea of [racial] preference itself." It observed that all "racial classifications, however compelling their goals," were "dangerous." And it cautioned that all "race-based governmental action" should "remai[n] subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit."

To manage these concerns, *Grutter* 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. "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the norm of equal treatment" must be "a temporary matter." The importance of an end point was not just a matter of repetition. It was the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection. The Court recognized as much: "[e]nshrining a permanent justification for racial preferences," the Court explained, "would offend this fundamental equal protection principle."

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

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. in No. 20–1199, p. 85; Neither does UNC's. Yet both insist that the use of race in their admissions programs must continue.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[14]

A

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

Because "[r]acial discrimination [is] invidious in all contexts," *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991), we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny, *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 381 (2016) (*Fisher II*). "Classifying and assigning" students based on their race "requires more than ... an amorphous end to justify it." *Parents Involved*, 551 U.S. at 735.

Respondents have fallen short of satisfying that burden. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."

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. In the context of racial violence in a prison, for example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison. 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 comparable to what it would have been in the absence of such 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, UNC works to avoid the underrepresentation of minority groups, while Harvard likewise "guard[s] against inadvertent drop-offs in representation" of certain minority groups from year to year. To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question."

Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. Yet "[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is 'broadly diverse.'" *Parents Involved*, 551 U.S. at 724 (quoting *Grutter*). 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. Brief for University Respondents in No. 21–707. It is true that our cases have recognized a "tradition of giving a degree of deference to a university's academic decisions." *Grutter*, 539 U.S. at 328. But we have been unmistakably clear that any deference must exist "within constitutionally prescribed limits" and that "deference does not imply abandonment or abdication of judicial review," *Miller–El* v. *Cockrell*, 537 U.S. 322, 340 (2003). 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. As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the

most exact connection between justification and classification." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). The programs at issue here do not satisfy that standard.[15]

B

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

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

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

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

Respondents' admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333. That requirement is found throughout our Equal Protection Clause jurisprudence more generally. See, *e.g.*, *Schuette v. BAMN*, 572 U.S. 291, 308 (2014) (plurality opinion).

[15] For that reason, one dissent candidly advocates abandoning the demands of strict scrutiny. See *post* (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.

Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke*, 438 U.S. at 316 (opinion of Powell, J.). UNC is much the same. It argues that race in itself "says [something] about who you are." Tr. of Oral Arg. in No. 21–707.

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

"One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice*, 528 U.S. at 517, 120 S.Ct. 1044. But when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike," *Miller v. Johnson*, 515 U.S. 900, 911–912 (1995)—at the very least alike in the sense of being different from nonminority students. In doing so, the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.*, at 912 (internal quotation marks omitted). Such stereotyping can only "cause[ ] continued hurt and injury," *Edmonson*, 500 U.S. at 631, contrary as it is to the "core purpose" of the Equal Protection Clause, *Palmore*, 466 U.S. at 432.

C

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

Respondents and the Government first suggest that respondents' race-based admissions programs will end when, in their absence, there is "meaningful representation and meaningful diversity" on college campuses. Tr. of Oral Arg. in No. 21–707. The metric of meaningful representation, respondents assert, does not involve any "strict numerical benchmark"; or "precise number or percentage"; or "specified percentage." So what does it involve?

Numbers all the same. At Harvard, each full committee meeting begins with a discussion of "how the breakdown of the class compares to the prior year in terms of racial identities." 397 F.Supp.3d at 146. 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." *Ibid.*; see also *id.*, at 147 (District Court finding that Harvard uses race to "trac[k] how

each class is shaping up relative to previous years with an eye towards achieving a level of racial diversity").

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 group. Harvard's focus on numbers is obvious.

UNC's admissions program operates similarly. The University frames the challenge it faces as "the admission and enrollment of underrepresented minorities," a metric that turns solely on whether a group's "percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina," 567 F.Supp.3d at 591, n. 7. The University "has not yet fully achieved its diversity-related educational goals," it explains, in part due to its failure to obtain closer to proportional representation. Brief for University Respondents in No. 21–707, at 7.

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

Respondents' second proffered end point fares no better. Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or "productive citizens and leaders" have been created. Nor is there any way to know whether those goals would adequately be met in the absence of a race-based admissions program. As UNC itself acknowledges, these "qualitative standard[s]" are "difficult to measure." Tr. of Oral Arg. in No. 21–707; but see *Fisher II*, 579 U.S. at 381 (requiring race-based admissions programs to operate in a manner that is "sufficiently measurable"). . . .

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

V

The dissenting opinions resist these conclusions. They would instead uphold respondents' admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. Although both opinions are thorough and thoughtful in many respects, this Court has long rejected their core thesis.

The dissents' interpretation of the Equal Protection Clause is not new. In *Bakke*, four Justices would have permitted race-based admissions programs to remedy the effects of societal discrimination. But that minority view was just that—a minority view. Justice Powell, who provided the fifth vote and controlling opinion in *Bakke*, firmly rejected the notion that societal discrimination constituted a compelling interest. Such an interest presents "an amorphous concept of injury that may be ageless in its reach into the past," he explained. It cannot "justify a [racial] classification that imposes disadvantages upon persons ... who bear no responsibility for whatever harm the beneficiaries of the [race-based] admissions program are thought to have suffered."

The Court soon adopted Justice Powell's analysis as its own. In the years after *Bakke*, the Court repeatedly held that ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action. "[A]n effort to alleviate the effects of societal discrimination is not a compelling interest," we said plainly in *Hunt*, a 1996 case about the Voting Rights Act. We reached the same conclusion in *Croson*, a case that concerned a preferential government contracting program. Permitting "past societal discrimination" to "serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief ' for every disadvantaged group." Opening that door would shutter another—"[t]he dream of a Nation of equal citizens ... would be lost," we observed, "in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." "[S]uch a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality."

The dissents here do not acknowledge any of this. They fail to cite *Hunt*. They fail to cite *Croson*. They fail to mention that the entirety of their analysis of the Equal Protection Clause—the statistics, the cases, the history—has been considered and rejected before. There is a reason the principal dissent must invoke Justice Marshall's partial dissent in *Bakke* nearly a dozen times while mentioning Justice Powell's controlling opinion barely once (Justice JACKSON's opinion ignores Justice Powell altogether). For what one dissent denigrates as "rhetorical flourishes about colorblindness," are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law. We understand the dissents want that law to be different. They are entitled to that desire. But they surely cannot claim the mantle of *stare decisis* while pursuing it.[8]

[8] Perhaps recognizing as much, the principal dissent at one point attempts to press a different remedial rationale altogether, stating that both respondents "have sordid legacies of racial exclusion." *Post* (opinion of SOTOMAYOR, J.). Such institutions should perhaps be the very *last* ones to be allowed to make race-based decisions, let alone be accorded deference in doing so. In

The dissents are no more faithful to our precedent on race-based admissions. To hear the principal dissent tell it, *Grutter* blessed such programs indefinitely, until "racial inequality will end." *Post*, at 2255 (opinion of SOTOMAYOR, J.). But *Grutter* did no such thing. It emphasized—not once or twice, but at least six separate times—that race-based admissions programs "must have reasonable durational limits" and that their "deviation from the norm of equal treatment" must be "a temporary matter." 539 U.S. at 342, 123 S.Ct. 2325. The Court also disclaimed "[e]nshrining a permanent justification for racial preferences." *Ibid.* Yet the justification for race-based admissions that the dissent latches on to is just that—unceasing.

The principal dissent's reliance on *Fisher II* is similarly mistaken. There, by a 4-to-3 vote, the Court upheld a "*sui generis*" race-based admissions program used by the University of Texas, 579 U.S. at 377, whose "goal" it was to enroll a "critical mass" of certain minority students. But neither Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means.

Fisher II also recognized the "enduring challenge" that race-based admissions systems place on "the constitutional promise of equal treatment." 579 U.S. at 388. The Court thus reaffirmed the "continuing obligation" of universities "to satisfy the burden of strict scrutiny." *Id.*, at 379. To drive the point home, *Fisher II* limited itself just as *Grutter* had—in duration. . . .

Most troubling of all is what the dissent must . . . defend: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. Separate but equal is "*inherently* unequal," said *Brown*, 347 U.S. at 495. It depends, says the dissent.

That is a remarkable view of the judicial role—remarkably wrong. Lost in the false pretense of judicial humility that the dissent espouses is a claim to power so radical, so destructive, that it required a Second Founding to undo. "Justice Harlan knew better," one of the dissents decrees. *Post* (opinion of JACKSON, J.). Indeed he did:

"[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

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any event, neither university defends its admissions system as a remedy for past discrimination—their own or anyone else's. See Tr. of Oral Arg. in No. 21–707 ("[W]e're not pursuing any sort of remedial justification for our policy."). Nor has any decision of ours permitted a remedial justification for race-based college admissions.

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. . . . "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867). A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

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

The judgments of the Court of Appeals for the First Circuit and of the District Court for the Middle District of North Carolina are reversed.

It is so ordered.

■ **Justice THOMAS, concurring.**

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

I

In the 1860s, Congress proposed and the States ratified the Thirteenth and Fourteenth Amendments. And, with the authority conferred by these Amendments, Congress passed two landmark Civil Rights Acts. Throughout the debates on each of these measures, their proponents repeatedly affirmed their view of equal

citizenship and the racial equality that flows from it. In fact, they held this principle so deeply that their crowning accomplishment—the Fourteenth Amendment—ensures racial equality *with no textual reference to race whatsoever*. The history of these measures' enactment renders their motivating principle as clear as their text: All citizens of the United States, regardless of skin color, are equal before the law.

I do not contend that all of the individuals who put forth and ratified the Fourteenth Amendment universally believed this to be true. Some Members of the proposing Congress, for example, opposed the Amendment. And, the historical record—particularly with respect to the debates on ratification in the States—is sparse. Nonetheless, substantial evidence suggests that the Fourteenth Amendment was passed to "establis[h] the broad constitutional principle of full and complete equality of all persons under the law," forbidding "all legal distinctions based on race or color." Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953. . . .

A

In its 1864 election platform, the Republican Party pledged to amend the Constitution to accomplish the "utter and complete extirpation" of slavery from "the soil of the Republic." After their landslide victory, Republicans quickly moved to make good on that promise. Congress proposed what would become the Thirteenth Amendment to the States in January 1865, and it was ratified as part of the Constitution later that year. The new Amendment stated that "[n]either slavery nor involuntary servitude ... shall exist" in the United States "except as a punishment for crime whereof the party shall have been duly convicted." It thus not only prohibited States from themselves enslaving persons, but also obligated them to end enslavement by private individuals within their borders. Its Framers viewed the text broadly, arguing that it "allowed Congress to legislate not merely against slavery itself, but against all the badges and relics of a slave system." A. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 362 (2005). The Amendment also authorized "Congress ... to enforce" its terms "by appropriate legislation"—authority not granted in any prior Amendment. Proponents believed this enforcement clause permitted legislative measures designed to accomplish the Amendment's broader goal of equality for the freedmen.

It quickly became clear, however, that further amendment would be necessary to safeguard that goal. Soon after the Thirteenth Amendment's adoption, the reconstructed Southern States began to enact "Black Codes," which circumscribed the newly won freedoms of blacks. The Black Code of Mississippi, for example, "imposed all sorts of disabilities" on blacks, "including limiting their freedom of movement and barring them from following certain occupations, owning firearms, serving on juries, testifying in cases involving whites, or voting." E. FONER, THE SECOND FOUNDING 48 (2019).

Congress responded with the landmark Civil Rights Act of 1866, in an attempt to pre-empt the Black Codes. The 1866 Act promised such a sweeping form of equality that it would lead many to say that it exceeded the scope of Congress' authority under the Thirteenth Amendment. As enacted, it stated:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

The text of the provision left no doubt as to its aim: All persons born in the United States were equal citizens entitled to the same rights and subject to the same penalties as white citizens in the categories enumerated. *See* M. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 958 (1995). And, while the 1866 Act used the rights of "white citizens" as a benchmark, its rule was decidedly colorblind, safeguarding legal equality for *all* citizens "of every race and color" and providing the same rights to all.

The 1866 Act's evolution further highlights its rule of equality. To start, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), had previously held that blacks "were not regarded as a portion of the people or citizens of the Government" and "had no rights which the white man was bound to respect." The Act, however, would effectively overrule *Dred Scott* and ensure the equality that had been promised to blacks. But the Act went further still. On January 29, 1866, Senator Lyman Trumbull, the bill's principal sponsor in the Senate, proposed text stating that "all persons of African descent born in the United States are hereby declared to be citizens." Cong. Globe, 39th Cong., 1st Sess., 474. The following day, Trumbull revised his proposal, removing the reference to "African descent" and declaring more broadly that "all persons born in the United States, and not subject to any foreign Power," are "citizens of the United States."

"In the years before the Fourteenth Amendment's adoption, jurists and legislators often connected citizenship with equality," where "the absence or presence of one entailed the absence or presence of the other." *United States* v. *Vaello Madero*, 142 S.Ct. 1539, 1547 (2022) (THOMAS, J., concurring). The addition of a citizenship guarantee thus evidenced an intent to broaden the provision, extending beyond recently freed blacks and incorporating a more general view of equality for *all* Americans. As Trumbull explained, the provision created a bond between all Americans; "any statute which is not equal to *all*, and which deprives any citizen of civil rights which are secured to other citizens," was "an unjust encroachment upon his liberty" and a "badge of servitude" prohibited by the Constitution. Cong. Globe, 39th Cong., 1st Sess., at 474 (emphasis added).

Trumbull and most of the Act's other supporters identified the Thirteenth Amendment as a principal source of constitutional authority for the Act's

nondiscrimination provisions. In particular, they explained that the Thirteenth Amendment allowed Congress not merely to legislate against slavery itself, but also to counter measures "which depriv[e] any citizen of civil rights which are secured to other citizens."

But opponents argued that Congress' authority did not sweep so broadly. President Andrew Johnson, for example, contended that Congress lacked authority to pass the measure, seizing on the breadth of the citizenship text and emphasizing state authority over matters of state citizenship. . . . As debates continued, it became increasingly apparent that safeguarding the 1866 Act, including its promise of black citizenship and the equal rights that citizenship entailed, would require further submission to the people of the United States in the form of a proposed constitutional amendment.

B

Critically, many of those who believed that Congress lacked the authority to enact the 1866 Act also supported the principle of racial equality. So, almost immediately following the ratification of the Thirteenth Amendment, several proposals for further amendments were submitted in Congress. One such proposal, approved by the Joint Committee on Reconstruction and then submitted to the House of Representatives on February 26, 1866, would have declared that "[t]he Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." Representative John Bingham, its drafter, was among those who believed Congress lacked the power to enact the 1866 Act. . . . Cong. Globe, 39th Cong., 1st Sess. (statement of Rep. Bingham). His proposed constitutional amendment accordingly would provide a clear constitutional basis for the 1866 Act and ensure that future Congresses would be unable to repeal it. See W. NELSON, THE FOURTEENTH AMENDMENT 48–49 (1988). . . .

In April, Representative Thaddeus Stevens proposed to the Joint Committee an amendment that began, "[n]o discrimination shall be made by any State nor by the United States as to the civil rights of persons because of race, color, or previous condition of servitude." S. Doc. No. 711, 63d Cong., 1st Sess. (1915) (reprinting the Journal of the Joint Committee on Reconstruction for the Thirty-Ninth Congress). Stevens' proposal was later revised to read as follows: "'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" . . . Like the eventual first section of the Fourteenth Amendment, this proposal embodied the familiar Privileges or Immunities, Due Process, and Equal Protection Clauses. And, importantly, it also featured an enforcement clause—with text borrowed from the Thirteenth Amendment—conferring upon Congress the power to enforce its provisions.

Stevens explained that the draft was intended to "allo[w] Congress to correct the unjust legislation of the States, so far that the law which operates upon one man

shall operate *equally* upon all." Moreover, Stevens' later statements indicate that he did not believe there was a difference "in substance between the new proposal and" earlier measures calling for impartial and equal treatment without regard to race. . . . The proposal passed the House by a vote of 128 to 37.

Senator Jacob Howard introduced the proposed Amendment in the Senate, powerfully asking, "Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?" In keeping with this view, he proposed an introductory sentence, declaring that "'all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.'" This text, the Citizenship Clause, was the final missing element of what would ultimately become § 1 of the Fourteenth Amendment. Howard's draft for the proposed citizenship text was modeled on the Civil Rights Act of 1866's text . . . . He further characterized the addition as "simply declaratory of what I regard as the law of the land already."

The proposal was approved in the Senate by a vote of 33 to 11. The House then reconciled differences between the two measures, approving the Senate's changes by a vote of 120 to 32. And, in June 1866, the amendment was submitted to the States for their consideration and ratification. Two years later, it was ratified by the requisite number of States and became the Fourteenth Amendment to the United States Constitution. Its opening words instilled in our Nation's Constitution a new birth of freedom:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

As enacted, the text of the Fourteenth Amendment provides a firm statement of equality before the law. It begins by guaranteeing citizenship status, invoking the longstanding political and legal tradition that closely associated the status of citizenship with the entitlement to legal equality. It then confirms that States may not abridge the rights of national citizenship, including whatever civil equality is guaranteed to 'citizens' under the Citizenship Clause. Finally, it pledges that even noncitizens must be treated equally as individuals, and not as members of racial, ethnic, or religious groups.

The drafters and ratifiers of the Fourteenth Amendment focused on this broad equality idea, offering surprisingly little explanation of which term was intended to accomplish which part of the Amendment's overall goal. "The available materials ... show," however, "that there were widespread expressions of a general understanding of the broad scope of the Amendment similar to that abundantly

demonstrated in the Congressional debates, namely, that the first section of the Amendment would establish the full constitutional right of all persons to equality before the law and would prohibit legal distinctions based on race or color." U. S. *Brown* Reargument Brief 65 (citation omitted). For example, the Pennsylvania debate suggests that the Fourteenth Amendment was understood to make the law "what justice is represented to be, blind" to the "color of [one's] skin." App. to Pa. Leg. Record XLVIII (1867) (Rep. Mann).

The most commonly held view today—consistent with the rationale repeatedly invoked during the congressional debates—is that the Amendment was designed to remove any doubts regarding Congress' authority to enact the Civil Rights Act of 1866 and to establish a nondiscrimination rule that could not be repealed by future Congresses. See, *e.g.*, J. Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L. J. 1385, 1388 (1992). The Amendment's phrasing supports this view, and there does not appear to have been any argument to the contrary predating *Brown*.

Consistent with the Civil Rights Act of 1866's aim, the Amendment definitively overruled Chief Justice Taney's opinion in *Dred Scott* that blacks "were not regarded as a portion of the people or citizens of the Government" and "had no rights which the white man was bound to respect." And, like the 1866 Act, the Amendment also clarified that American citizenship conferred rights not just against the Federal Government but also the government of the citizen's State of residence. Unlike the Civil Rights Act, however, the Amendment employed a wholly race-neutral text, extending privileges or immunities to all "citizens"—even if its practical effect was to provide all citizens with the same privileges then enjoyed by whites. . . . Combining the citizenship guarantee with the Privileges or Immunities Clause and the Equal Protection Clause, the Fourteenth Amendment ensures protection for all equal citizens of the Nation without regard to race. Put succinctly, "[o]ur Constitution is color-blind." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

C

In the period closely following the Fourteenth Amendment's ratification, Congress passed several statutes designed to enforce its terms, eliminating government-based Black Codes—systems of government-imposed segregation—and criminalizing racially motivated violence. The marquee legislation was the Civil Rights Act of 1875, and the justifications offered by proponents of that measure are further evidence for the colorblind view of the Fourteenth Amendment.

The Civil Rights Act of 1875 sought to counteract the systems of racial segregation that had arisen in the wake of the Reconstruction era. Advocates of so-called separate-but-equal systems, which allowed segregated facilities for blacks and whites, had argued that laws permitting or requiring such segregation treated members of both races precisely alike: Blacks could not attend a white school, but symmetrically, whites could not attend a black school. Congress was not persuaded. Supporters of the soon-to-be 1875 Act successfully countered that symmetrical restrictions did not constitute equality, and they did so on colorblind terms.

For example, they asserted that "free government demands the abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). And, they submitted that "[t]he time has come when all distinctions that grew out of slavery ought to disappear." Cong. Globe, 42d Cong., 2d Sess. (1872) ("[A]s long as you have distinctions and discriminations between white and black in the enjoyment of legal rights and privileges[,] you will have discontent and parties divided between black and white"). Leading Republican Senator Charles Sumner compellingly argued that "any rule excluding a man on account of his color is an indignity, an insult, and a wrong." *See also ibid.* ("I insist that by the law of the land all persons without distinction of color shall be equal before the law"). Far from conceding that segregation would be perceived as inoffensive if race roles were reversed, he declared that "[t]his is plain oppression, which you ... would feel keenly were it directed against you or your child." He went on to paraphrase the English common-law rule to which he subscribed: "[The law] makes no discrimination on account of color."

Others echoed this view. Representative John Lynch declared that "[t]he duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned." 3 Cong. Rec. 945 (1875). Senator John Sherman believed that the route to peace was to "[w]ipe out all legal discriminations between white and black [and] make no distinction between black and white." Cong. Globe, 42d Cong., 2d Sess.. And, Senator Henry Wilson sought to "make illegal all distinctions on account of color" because "there should be no distinction recognized by the laws of the land." The view of the Legislature was clear: The Constitution "neither knows nor tolerates classes among citizens." *Plessy,* 163 U.S. at 559 (Harlan, J., dissenting).

D

The earliest Supreme Court opinions to interpret the Fourteenth Amendment did so in colorblind terms. Their statements characterizing the Amendment evidence its commitment to equal rights for all citizens, regardless of the color of their skin.

In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the Court identified the "pervading purpose" of the Reconstruction Amendments as "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." Yet, the Court quickly acknowledged that the language of the Amendments did not suggest "that no one else but the negro can share in this protection." Rather, "[i]f Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, [the Thirteenth Amendment] may safely be trusted to make it void." And, similarly, "if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent." The Court thus made clear that the Fourteenth Amendment's equality guarantee applied to members of *all* races, including Asian Americans, ensuring all citizens equal treatment under law.

Seven years later, the Court . . . found that the Fourteenth Amendment banned "expres[s]" racial classifications, no matter the race affected, because these classifications are "a stimulant to ... race prejudice." Similar statements appeared in other cases decided around that time. See *Virginia v. Rives*, 100 U.S. 313, 318 (1880) ("The plain object of these statutes [enacted to enforce the Fourteenth Amendment], as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same").

E

Despite the extensive evidence favoring the colorblind view, as detailed above, it appears increasingly in vogue to embrace an "antisubordination" view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. Such a theory lacks any basis in the original meaning of the Fourteenth Amendment. Respondents cite a smattering of federal and state statutes passed during the years surrounding the ratification of the Fourteenth Amendment. And, Justice SOTOMAYOR's dissent argues that several of these statutes evidence the ratifiers' understanding that the Equal Protection Clause "permits consideration of race to achieve its goal." Upon examination, however, it is clear that these statutes are fully consistent with the colorblind view.

Start with the 1865 Freedmen's Bureau Act. That Act established the Freedmen's Bureau to issue "provisions, clothing, and fuel ... needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children" and the setting "apart, for the use of loyal refugees and freedmen," abandoned, confiscated, or purchased lands, and assigning "to every male citizen, whether refugee or freedman, ... not more than forty acres of such land." The 1866 Freedmen's Bureau Act then expanded upon the prior year's law, authorizing the Bureau to care for all loyal refugees and freedmen. Importantly, however, the Acts applied to *freedmen* (and refugees), a formally race-neutral category, not blacks writ large. And, because "not all blacks in the United States were former slaves," "'freedman'" was a decidedly under-inclusive proxy for race. M. Rappaport, *Originalism and the Colorblind Constitution*, 89 Notre Dame L. Rev. 71, 98 (2013). Moreover, the Freedmen's Bureau served newly freed slaves alongside white refugees. P. Moreno, *Racial Classifications and Reconstruction Legislation*, 61 J. So. Hist. 271, 276–277 (1995); R. Barnett & E. Bernick, The Original Meaning of the Fourteenth Amendment 119 (2021). And, advocates of the law explicitly disclaimed any view rooted in modern conceptions of antisubordination. To the contrary, they explicitly clarified that the equality sought by the law was not one in which all men shall be "six feet high"; rather, it strove to ensure that freedmen enjoy "equal rights before the law" such that "each man shall have the right to pursue in his own way life, liberty, and happiness." Cong. Globe, 39th Cong., 1st Sess., at 322, 342.

Several additional federal laws cited by respondents appear to classify based on race, rather than previous condition of servitude. For example, an 1866 law adopted special rules and procedures for the payment of "colored" servicemen in the Union Army to agents who helped them secure bounties, pensions, and other

payments that they were due. At the time, however, Congress believed that many "black servicemen were significantly overpaying for these agents' services in part because [the servicemen] did not understand how the payment system operated." Rappaport 110; see also S. Siegel, *The Federal Government's Power To Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. Rev. 477, 561 (1998). Thus, while this legislation appears to have provided a discrete race-based benefit, its aim—to prohibit race-based exploitation—may not have been possible at the time without using a racial screen. In other words, the statute's racial classifications may well have survived strict scrutiny. . . .

These laws—even if targeting race as such—likely were also constitutionally permissible examples of Government action "undo[ing] the effects of past discrimination in [a way] that do[es] not involve classification by race," even though they had "a racially disproportionate impact." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in judgment). The government can plainly remedy a race-based injury that it has inflicted—though such remedies must be meant to further a colorblind government, not perpetuate racial consciousness. See *id.*, at 505 (majority opinion). In that way, race-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were not inconsistent with the colorblind Constitution. Moreover, the very same Congress passed both these laws *and* the unambiguously worded Civil Rights Act of 1866 that clearly prohibited discrimination on the basis of race. And, as noted above, the proponents of these laws explicitly sought equal rights without regard to race while disavowing any antisubordination view. . . .

III

B

Respondents and the dissents argue that the universities' race-conscious admissions programs ought to be permitted because they accomplish positive social goals. I would have thought that history had by now taught a "greater humility" when attempting to "distinguish good from harmful uses of racial criteria." *Parents Involved*, 551 U.S. at 742 (plurality opinion). From the Black Codes, to discriminatory and destructive social welfare programs, to discrimination by individual government actors, bigotry has reared its ugly head time and again. Anyone who today thinks that some form of racial discrimination will prove "helpful" should thus tread cautiously, lest racial discriminators succeed (as they once did) in using such language to disguise more invidious motives.

Arguments for the benefits of race-based solutions have proved pernicious in segregationist circles. Segregated universities once argued that race-based discrimination was needed "to preserve harmony and peace and at the same time furnish equal education to both groups." Brief for Respondents in *Sweatt* v. *Painter*, O. T. 1949, No. 44. And, parties consistently attempted to convince the Court that the time was not right to disrupt segregationist systems. . . . Litigants have even gone so far as to offer straight-faced arguments that segregation has practical benefits. . . .

Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories. We cannot now blink reality to pretend, as the dissents urge, that affirmative action should be legally permissible merely because the experts assure us that it is "good" for black students. Though I do not doubt the sincerity of my dissenting colleagues' beliefs, experts and elites have been wrong before—and they may prove to be wrong again. In part for this reason, the Fourteenth Amendment outlaws government-sanctioned racial discrimination of all types. The stakes are simply too high to gamble.[7]

C

Even taking the desire to help on its face, what initially seems like aid may in reality be a burden, including for the very people it seeks to assist. Take, for example, the college admissions policies here. "Affirmative action" policies do nothing to increase the overall number of blacks and Hispanics able to access a college education. Rather, those racial policies simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended. See T. Sowell, Affirmative Action Around the World 145–146 (2004). In doing so, those policies sort at least some blacks and Hispanics into environments where they are less likely to succeed academically relative to their peers. The resulting mismatch places many blacks and Hispanics who likely would have excelled at less elite schools ... in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete.

It is self-evident why that is so. As anyone who has labored over an algebra textbook has undoubtedly discovered, academic advancement results from hard work and practice, not mere declaration. Simply treating students as though their grades put them at the top of their high school classes does nothing to enhance the performance level of those students or otherwise prepare them for competitive college environments. . . . See, *e.g.*, R. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367, 371–372 (2004); see also R. Sander & R. Steinbuch, *Mismatch and Bar Passage: A School-Specific Analysis* (Oct. 6, 2017), https://ssrn.com/abstract=3054208. . . .

These policies may harm even those who succeed academically. I have long believed that large racial preferences in college admissions stamp blacks and Hispanics with a badge of inferiority. They thus taint the accomplishments of all those who are admitted as a result of racial discrimination as well as all those who are the same race as those admitted as a result of racial discrimination because no one can distinguish those students from the ones whose race played a role in their admission. . . . The question itself is the stigma—because either racial

[7] Indeed, the lawyers who litigated *Brown* were unwilling to take this bet, insisting on a colorblind legal rule. See, *e.g.*, Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief "); Brief for Appellants in *Brown* v. *Board of Education*, O. T. 1952, No. 1, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone"). . . .

discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those ... who would succeed without discrimination.

Yet, in the face of those problems, it seems increasingly clear that universities are focused on "aesthetic" solutions unlikely to help deserving members of minority groups. In fact, universities' affirmative action programs are a particularly poor use of such resources. To start, these programs are overinclusive, providing the same admissions bump to a wealthy black applicant given every advantage in life as to a black applicant from a poor family with seemingly insurmountable barriers to overcome. In doing so, the programs may wind up helping the most well-off members of minority races without meaningfully assisting those who struggle with real hardship. . . .

D

Finally, it is not even theoretically possible to "help" a certain racial group without causing harm to members of other racial groups. . . . The antisubordination view thus has never guided the Court's analysis because whether a law relying upon racial taxonomy is 'benign' or 'malign' either turns on 'whose ox is gored' or on distinctions found only in the eye of the beholder. Courts are not suited to the impossible task of determining which racially discriminatory programs are helping which members of which races—and whether those benefits outweigh the burdens thrust onto other racial groups.

As the Court's opinion today explains, the zero-sum nature of college admissions—where students compete for a finite number of seats in each school's entering class—aptly demonstrates the point. Petitioner here represents Asian Americans who allege that, at the margins, Asian applicants were denied admission because of their race. Yet, Asian Americans can hardly be described as the beneficiaries of historical racial advantages. To the contrary, our Nation's first immigration ban targeted the Chinese, in part, based on "worker resentment of the low wage rates accepted by Chinese workers." U. S. Commission on Civil Rights, Civil Rights Issues Facing Asian Americans in the 1990s, p. 3 (1992); Act of May 6, 1882, ch. 126, 22 Stat. 58–59.

In subsequent years, "strong anti-Asian sentiments in the Western States led to the adoption of many discriminatory laws at the State and local levels, similar to those aimed at blacks in the South," and "segregation in public facilities, including schools, was quite common until after the Second World War." Civil Rights Issues 7. Indeed, this Court even sanctioned this segregation—in the context of schools, no less. In *Gong Lum v. Rice*, 275 U.S. 78, 81–82, 85–87 (1927), the Court held that a 9-year-old Chinese-American girl could be denied entry to a "white" school because she was "a member of the Mongolian or yellow race."

Also, following the Japanese attack on the U. S. Navy base at Pearl Harbor, Japanese Americans in the American West were evacuated and interned in relocation camps. See Exec. Order No. 9066, 3 C.F.R. 1092 (1943). Over 120,000 were removed to camps beginning in 1942, and the last camp that held Japanese

Americans did not close until 1948. In the interim, this Court endorsed the practice. *Korematsu v. United States*, 323 U.S. 214 (1944).

Given the history of discrimination against Asian Americans, especially their history with segregated schools, it seems particularly incongruous to suggest that a past history of segregationist policies toward blacks should be remedied at the expense of Asian American college applicants. But this problem is not limited to Asian Americans; more broadly, universities' discriminatory policies burden millions of applicants who are not responsible for the racial discrimination that sullied our Nation's past. That is why, in the absence of special circumstances, the remedy for *de jure* segregation ordinarily should not include educational programs for students who were not in school (or even alive) during the period of segregation. Today's 17-year-olds, after all, did not live through the Jim Crow era, enact or enforce segregation laws, or take any action to oppress or enslave the victims of the past. Whatever their skin color, today's youth simply are not responsible for instituting the segregation of the 20th century, and they do not shoulder the moral debts of their ancestors. Our Nation should not punish today's youth for the sins of the past.

IV

Far from advancing the cause of improved race relations in our Nation, affirmative action highlights our racial differences with pernicious effect. . . . [T]he legacy of *Grutter* appears to be ever increasing and strident demands for *yet more* racially oriented solutions.

A

It has become clear that sorting by race does not stop at the admissions office. In his *Grutter* opinion, Justice Scalia criticized universities for "talk[ing] of multiculturalism and racial diversity," but supporting "tribalism and racial segregation on their campuses," including through "minority only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies." 539 U.S. at 349 (opinion concurring in part and dissenting in part). This trend has hardly abated with time, and today, such programs are commonplace. In fact, a recent study considering 173 schools found that 43% of colleges offered segregated housing to students of different races, 46% offered segregated orientation programs, and 72% sponsored segregated graduation ceremonies. D. Pierre & P. Wood, Neo-Segregation at Yale 16–17 (2019). In addition to contradicting the universities' claims regarding the need for interracial interaction, these trends increasingly encourage our Nation's youth to view racial differences as important and segregation as routine.

Meanwhile, these discriminatory policies risk creating new prejudices and allowing old ones to fester. [T]here can be no doubt" that discriminatory affirmative action policies injure white and Asian applicants who are denied admission because of their race. . . . Applicants denied admission to certain colleges may come to believe—accurately or not—that their race was responsible for their failure to attain a life-long dream. These individuals, and others who wished for their success, may

resent members of what they perceive to be favored races, believing that the successes of those individuals are unearned.

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

That is because race is a social construct; we may each identify as members of particular races for any number of reasons, having to do with our skin color, our heritage, or our cultural identity. And, over time, these ephemeral, socially constructed categories have often shifted. . . .

But, under our Constitution, race is irrelevant, as the Court acknowledges. In fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities. Of course, that is false. Members of the same race do not all share the exact same experiences and viewpoints; far from it. . . . Rather than forming a more pluralistic society, these policies thus strip us of our individuality and undermine the very diversity of thought that universities purport to seek.

The solution to our Nation's racial problems thus cannot come from policies grounded in affirmative action or some other conception of equity. Racialism simply cannot be undone by different or more racialism. . . .

C

Universities' recent experiences confirm the efficacy of a colorblind rule. To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means. For example, the University of California purportedly recently admitted its "most diverse undergraduate class ever," despite California's ban on racial preferences. T. Watanabe, *UC Admits Largest, Most Diverse Class Ever, But It Was Harder To Get Accepted*, L. A. Times, July 20, 2021, p. A1. Similarly, the University of Michigan's 2021 incoming class was "among the university's most racially and ethnically diverse classes, with 37% of first-year students identifying as persons of color." S. Dodge, Largest Ever Student Body at University of Michigan This Fall, Officials Say, MLive.com (Oct. 22, 2021), https://www.mlive.com/news/ann-arbor/2021/10/largest-ever-student-body-at-university-of-michigan-this-fall-officials-say.html. In fact, at least one set of studies suggests that, "when we consider the higher education system as a whole, it is clear that the vast majority of schools would be as racially integrated, or more racially integrated, under a system of no preferences than under a system of large preferences." Brief for Richard Sander as *Amicus Curiae* 26. Race-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies.

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

Schools' successes, like students' grades, also provide objective proof of ability. Historically Black Colleges and Universities (HBCUs) do not have a large amount of racial diversity, but they demonstrate a marked ability to improve the lives of their students. To this day, they have proved "to be extremely effective in educating Black students, particularly in STEM," where "HBCUs represent seven of the top eight institutions that graduate the highest number of Black undergraduate students who go on to earn [science and engineering] doctorates." W. Wondwossen, The Science Behind HBCU Success, Nat. Science Foundation (Sept. 24, 2020), https://beta.nsf.gov/science-matters/science-behind-hbcu-success. "HBCUs have produced 40% of all Black engineers." Presidential Proclamation No. 10451, 87 Fed. Reg. 57567 (2022). And, they "account for 80% of Black judges, 50% of Black doctors, and 50% of Black lawyers." M. Hammond, L. Owens, & B. Gulko, Social Mobility Outcomes for HBCU Alumni, United Negro College Fund 4 (2021) (Hammond), https://cdn.uncf.org/wp-content/uploads/Social-Mobility-Report-FINAL.pdf; see also 87 Fed. Reg. 57567 (placing the percentage of black doctors even higher, at 70%). In fact, Xavier University, an HBCU with only a small percentage of white students, has had better success at helping its low-income students move into the middle class than Harvard has. See Hammond 14. And, each of the top 10 HBCUs have a success rate above the national average. . . .

* * *

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

The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled. And, it sees the universities' admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes. Those policies fly in the face of our colorblind Constitution and our Nation's equality ideal. In short, they are plainly—and boldly—unconstitutional.

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, with whom Justice THOMAS joins, concurring.**

. . . For some time, both universities have decided which applicants to admit or reject based in part on race. 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.

I

"[F]ew pieces of federal legislation rank in significance with the Civil Rights Act of 1964." *Bostock* v. *Clayton County*, 140 S.Ct. 1731, 1737 (2020). Title VI of that law contains terms as powerful as they are easy to understand: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The message for these cases is unmistakable. Students for Fair Admissions (SFFA) brought claims against Harvard and UNC under Title VI. That law applies to both institutions, as they elect to receive millions of dollars of federal assistance annually. And the trial records reveal that both schools routinely discriminate on the basis of race when choosing new students—exactly what the law forbids.

A

. . . The key phrases in Title VI at issue here are "subjected to discrimination" and "on the ground of." Begin with the first. To "discriminate" against a person meant in 1964 what it means today: to "trea[t] that individual worse than others who are similarly situated." *Bostock*, 140 S.Ct., at 1740; see also WEBSTER'S NEW INTERNATIONAL DICTIONARY 745 (2d ed. 1954) ("[t]o make a distinction" or "[t]o make a difference in treatment or favor (of one as compared with others)"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 648 (1961) ("to make a difference in treatment or favor on a class or categorical basis"). The provision of Title VI before us, this Court has also held, "prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). From this, we can safely say that Title VI forbids a recipient of federal funds from intentionally treating one person worse than another similarly situated person on the ground of race, color, or national origin.

What does the statute's second critical phrase—"on the ground of "—mean? Again, the answer is uncomplicated: It means "because of." See, *e.g.*, WEBSTER'S NEW WORLD DICTIONARY 640 (1960). "Because of " is a familiar phrase in the law, one we often apply in cases arising under the Civil Rights Act of 1964, and one that we usually understand to invoke "the 'simple' and 'traditional' standard of but-for causation." *Bostock*, 140 S.Ct., at 1739. The but-for-causation standard is a "sweeping" one too. A defendant's actions need not be the primary or proximate cause of the plaintiff 's injury to qualify. Nor may a defendant avoid liability "just by citing some *other* factor that contributed to" the plaintiff 's loss. All that matters

is that the plaintiff 's injury would not have happened *but for* the defendant's conduct.

Now put these pieces back together and a clear rule emerges. Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin. It does not matter if the recipient can point to "some other ... factor" that contributed to its decision to disfavor that individual. *Id.* at 1743–1745. It does not matter if the recipient discriminates in order to advance some further benign "intention" or "motivation." *Id.* at 1743; see also *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) ("the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect" or "alter [its] intentionally discriminatory character"). . . . Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race, color, or national origin and without regard to any other reason or motive the recipient might assert. Without question, Congress in 1964 could have taken the law in various directions. But to safeguard the civil rights of all Americans, Congress chose a simple and profound rule. One holding that a recipient of federal funds may never discriminate based on race, color, or national origin—period. . . .

B

Applying Title VI to the cases now before us, the result is plain. The parties debate certain details of Harvard's and UNC's admissions practices. But no one disputes that both universities operate "program[s] or activit[ies] receiving Federal financial assistance." § 2000d. No one questions that both institutions consult race when making their admissions decisions. And no one can doubt that both schools intentionally treat some applicants worse than others at least in part because of their race. . . .

C

Throughout this litigation, the parties have spent less time contesting these facts than debating other matters.

For example, the parties debate *how much* of a role race plays in admissions at Harvard and UNC. . . . The parties also debate the *reasons* both schools consult race. . . . When it comes to defining and measuring diversity, the parties spar too. . . . Even beyond all this, the parties debate the availability of alternatives. . . .

To be sure, the parties' debates raise some hard-to-answer questions. Just how many admissions decisions turn on race? And what really motivates the universities' race-conscious admissions policies and their refusal to modify other preferential practices? Fortunately, Title VI does not require an answer to any of these questions. It does not ask how much a recipient of federal funds discriminates. It does not scrutinize a recipient's reasons or motives for discriminating. Instead, the law prohibits covered institutions from intentionally treating *any* individual worse even *in part* because of race. So yes, of course, the universities consider many non-racial factors in their admissions processes too. And perhaps they mean well

when they favor certain candidates over others based on the color of their skin. But even if all that is true, their conduct violates Title VI just the same. . . .

II

. . . One might wonder . . . why the parties have devoted years and fortunes litigating other matters, like how much the universities discriminate and why they do so. The answer lies in *Bakke*.

A

. . . Justice Powell (writing only for himself) and Justice Brennan (writing for himself and three others) argued that Title VI is coterminous with the Equal Protection Clause. Put differently, they read Title VI to prohibit recipients of federal funds from doing whatever the Equal Protection Clause prohibits States from doing. Justice Powell and Justice Brennan then proceeded to evaluate racial preferences in higher education directly under the Equal Protection Clause. . . .

In the years following *Bakke*, this Court hewed to Justice Powell's and Justice Brennan's shared premise that Title VI and the Equal Protection Clause mean the same thing. See *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 343, (2003). . . . As a result, for over four decades, every case about racial preferences in school admissions under Title VI has turned into a case about the meaning of the Fourteenth Amendment. And what a confused body of constitutional law followed. . . .

B

If *Bakke* led to errors in interpreting the Equal Protection Clause, its first mistake was to take us there. These cases arise under Title VI and that statute is "more than a simple paraphrasing" of the Equal Protection Clause. *Bakke*, 438 U.S. at 416 (opinion of Stevens, J.). Title VI has "independent force, with language and emphasis in addition to that found in the Constitution." *Ibid.* That law deserves our respect and its terms provide us with all the direction we need. . . .

■ Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join, dissenting.

The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court recognized the constitutional necessity of racially integrated schools in light of the harm inflicted by segregation and the "importance of education to our democratic society." For 45 years, the Court extended *Brown*'s transformative legacy to the context of higher education, allowing colleges and universities to consider race in a limited way and for the limited purpose of promoting the important benefits of racial diversity. This limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses. Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution's guarantee of equality and have promoted *Brown*'s vision of a Nation with more inclusive schools.

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

I

A

. . . 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, p. 144 (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." E. Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 781 (1985). The Bureau also provided land and funding to establish some of our Nation's Historically Black Colleges and Universities (HBCUs). . . .

Indeed, contemporaries understood that the Freedmen's Bureau Act benefited Black people. Supporters defended the law by stressing its race-conscious approach. See, *e.g.*, Cong. Globe 632 (statement of Rep. Moulton) ("[T]he true object of this bill is the amelioration of the condition of the colored people"); Joint Comm. Rep. 11 (reporting that "the Union men of the south" declared "with one voice" that the Bureau's efforts "protect[ed] the colored people"). Opponents argued that the Act created harmful racial classifications that favored Black people and disfavored white Americans. See, *e.g.*, Cong. Globe 397 (statement of Sen. Willey) (the Act makes "a distinction on account of color between the two races"), 544 (statement of Rep. Taylor) (the Act is "legislation for a particular class of the blacks to the exclusion of all whites"), App. to Cong. Globe, 39th Cong., 1st Sess., 69–70 (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 also debated and passed the Civil Rights Act of 1866 contemporaneously with the Fourteenth Amendment. The goal of that Act was to eradicate the Black Codes enacted by Southern States following ratification of the Thirteenth Amendment. Because the Black Codes focused on race, not just slavery-related status, the Civil Rights Act explicitly recognized that white citizens enjoyed certain rights that non-white citizens did not. Section 1 of the Act provided that all persons "of every race and color ... shall have the same right[s]" as those "enjoyed by white citizens." Similarly, Section 2 established criminal penalties for subjecting racial minorities to "different punishment ... by reason of ... color or race, than is prescribed for the punishment of white persons." In other words, the Act was not colorblind. By using white citizens as a benchmark, the law classified by race and took account of the privileges enjoyed only by white people. As he did with the Freedmen's Bureau Act, President Johnson vetoed the Civil Rights Act in part because he viewed it as providing Black citizens with special treatment. See Messages and Papers 408, 413 (the Act is designed "to afford discriminating protection to colored persons," and its "distinction of race and color ... operate[s] in favor of the colored and against the white race"). Again, Congress overrode his veto. In fact, Congress reenacted race-conscious language in the Civil Rights Act of 1870, two years after ratification of the Fourteenth Amendment, where it remains today, see 42 U.S.C. §§ 1981(a) and 1982.

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, 40th Cong., 1st Sess., 79 (1867) (statement of Sen. Grimes). This history makes it "inconceivable" that race-conscious college admissions are unconstitutional.

B

The Reconstruction era marked a transformational point in the history of American democracy. Its vision of equal opportunity leading to an equal society was short-lived, however, with the assistance of this Court. In a series of decisions, the Court sharply curtailed the substantive protections of the Reconstruction Amendments and the Civil Rights Acts. That endeavor culminated with the Court's shameful decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which established that "equality of treatment" exists when the races are provided substantially equal facilities, even though these facilities be separate. Therefore, with this Court's approval, government-enforced segregation and its concomitant destruction of equal opportunity became the constitutional norm and infected every sector of our society,

from bathrooms to military units and, crucially, schools. See R. Rothstein, The Color of Law 17–176 (2017) (discussing various federal policies that promoted racial segregation).

In a powerful dissent, Justice Harlan explained in *Plessy* that the Louisiana law at issue, which authorized segregation in railway carriages, perpetuated a "caste" system. Although the State argued that the law "prescribe[d] a rule applicable alike to white and colored citizens," all knew that the law's purpose was not "to exclude white persons from railroad cars occupied by blacks," but "to exclude colored people from coaches occupied by or assigned to white persons." That is, the law "proceed[ed] on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." Although "[t]he white race deems itself to be the dominant race ... in prestige, in achievements, in education, in wealth, and in power," Justice Harlan explained, there is "no superior, dominant, ruling class of citizens" in the eyes of the law. In that context, Justice Harlan thus announced his view that "[o]ur constitution is color-blind." . . .

Brown was a race-conscious decision that emphasized the importance of education in our society. . . . The desegregation cases that followed *Brown* confirm that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness. In *Green v. School Bd. of New Kent Cty.*, 391 U.S. 430 (1968), for example, the Court held that the New Kent County School Board's "freedom of choice" plan, which allegedly allowed "every student, regardless of race, ... 'freely' [to] choose the school he [would] attend," was insufficient to effectuate "the command of [*Brown*]." That command, the Court explained, was that schools dismantle "well-entrenched dual systems" and transition "to a unitary, nonracial system of public education." That the board "opened the doors of the former 'white' school to [Black] children and the ['Black'] school to white children" on a race-blind basis was not enough. Passively eliminating race classifications did not suffice when *de facto* segregation persisted. Instead, the board was "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Affirmative steps, this Court held, are constitutionally necessary when mere formal neutrality cannot achieve *Brown*'s promise of racial equality. See also *North Carolina Bd. of Ed. v. Swann*, 402 U.S. 43, 45–46 (1971) (holding that North Carolina statute that forbade the use of race in school busing "exploits an apparently neutral form to control school assignment plans by directing that they be 'colorblind'; that requirement, against the background of segregation, would render illusory the promise of *Brown*").

In so holding, this Court's post-*Brown* decisions rejected arguments advanced by opponents of integration suggesting that "restor[ing] race as a criterion in the operation of the public schools" was at odds with "the *Brown* decisions." Brief for Respondents in *Green* v. *School Bd. of New Kent Cty.*, O. T. 1967, No. 695. . . . Those rejected arguments mirror the Court's opinion today. The Court claims that

Brown requires that students be admitted "'on a racially nondiscriminatory basis.'" It distorts the dissent in *Plessy* to advance a colorblindness theory. . . .

C

Two decades after *Brown*, in *Bakke*, a plurality of the Court held that "the attainment of a diverse student body" is a "compelling" and "constitutionally permissible goal for an institution of higher education." 438 U.S. at 311–315. Race could be considered in the college admissions process in pursuit of this goal, the plurality explained, if it is one factor of many in an applicant's file, and each applicant receives individualized review as part of a holistic admissions process. *Id.*, at 316–318.

Since *Bakke*, the Court has reaffirmed numerous times the constitutionality of limited race-conscious college admissions. First, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), a majority of the Court endorsed the *Bakke* plurality's "view that student body diversity is a compelling state interest that can justify the use of race in university admissions" and held that race may be used in a narrowly tailored manner to achieve this interest.

Later, in the *Fisher* litigation, the Court twice reaffirmed that a limited use of race in college admissions is constitutionally permissible if it satisfies strict scrutiny. In *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) (*Fisher I*), seven Members of the Court concluded that the use of race in college admissions comports with the Fourteenth Amendment if it "is narrowly tailored to obtain the educational benefits of diversity." Several years later, in *Fisher v. University of Texas at Austin*, 579 U.S. 365, 376 (2016) (*Fisher II*), the Court upheld the admissions program at the University of Texas under this framework.

Bakke, *Grutter*, and *Fisher* are an extension of *Brown*'s legacy. Those decisions recognize that "'experience lend[s] support to the view that the contribution of diversity is substantial.'" *Grutter*, 539 U.S. at 324. Racially integrated schools improve cross-racial understanding, "break down racial stereotypes," and ensure that students obtain "the skills needed in today's increasingly global marketplace ... through exposure to widely diverse people, cultures, ideas, and viewpoints." More broadly, inclusive institutions that are "visibly open to talented and qualified individuals of every race and ethnicity" instill public confidence in the "legitimacy" and "integrity" of those institutions and the diverse set of graduates that they cultivate. That is particularly true in the context of higher education, where colleges and universities play a critical role in "maintaining the fabric of society" and serve as "the training ground for a large number of our Nation's leaders." It is thus an objective of the highest order, a "compelling interest" indeed, that universities pursue the benefits of racial diversity and ensure that "the diffusion of knowledge and opportunity" is available to students of all races.

This compelling interest in student body diversity is grounded not only in the Court's equal protection jurisprudence but also in principles of "academic freedom," which "'long [have] been viewed as a special concern of the First Amendment.'" *Id.*, at 324. . . . Consistent with the First Amendment, student body diversity allows

universities to promote "th[e] robust exchange of ideas which discovers truth out of a multitude of tongues [rather] than through any kind of authoritative selection." *Bakke*, 438 U.S. at 312. Indeed, as the Court recently reaffirmed in another school case, "learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society'" under our constitutional tradition. *Kennedy* v. *Bremerton School Dist.*, 142 S.Ct. 2407, 2430–2431 (2022).

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

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. That is true for society writ large and, more specifically, for Harvard and the University of North Carolina (UNC), two institutions with a long history of racial exclusion. Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.

1

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.[4] The share of intensely segregated minority schools (*i.e.*, schools that enroll 90% to 100% racial minorities) has sharply increased.[5] To this day, the U. S. Department of Justice continues to enter into desegregation decrees with schools that have failed to "eliminat[e] the vestiges of *de jure* segregation."[6]

[4] See GAO, Report to the Chairman, Committee on Education and Labor, House of Representatives, K–12 Education: Student Population Has Significantly Diversified, but Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines 13 (GAO–22–104737, June 2022).

[5] G. Orfield, E. Frankenberg, & J. Ayscue, Harming Our Common Future: America's Segregated Schools 65 Years After *Brown* 21 (2019).

[6] *E.g.*, *Bennett* v. *Madison Cty. Bd. of Ed.*, No. 5:63–CV–613 (ND Ala., July 5, 2022), ECF Doc. 199, p. 19; *id.*, at 6 (requiring school district to ensure "the participation of black students" in advanced courses).

Moreover, underrepresented minority students are more likely to live in poverty and attend schools with a high concentration of poverty.[7] 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*, 411 U.S. 1, 72–86 (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.[11] Underrepresented minorities are less likely to have parents with a postsecondary education who may be familiar with the college application process.[12] Further, low-income children of color are less likely to attend preschool and other early childhood education programs that increase educational attainment.[13] All of these interlocked factors place underrepresented minorities multiple steps behind the starting line in the race for college admissions.

In North Carolina, the home of UNC, racial inequality is deeply entrenched in K–12 education. State courts have consistently found that the State does not provide underrepresented racial minorities equal access to educational opportunities, and that racial disparities in public schooling have increased in recent years, in violation of the State Constitution. See, *e.g.*, *Hoke Cty. Bd. of Ed. v. State*, 2020 WL 13310241, *6, *13 (N. C. Super. Ct., Jan. 21, 2020); *Hoke Cty. Bd. of Ed. v. State*, 879 S.E.2d 193, 197–198 (N.C. 2022).

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* 32. . . . Consistent with

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[7] GAO Report 6, 13 (noting that 80% of predominantly Black and Latino schools have at least 75% of their students eligible for free or reduced-price lunch—a proxy for poverty).

[11] See J. Okonofua & J. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 Psychol. Sci. 617 (2015).

[12] See, *e.g.*, Dept. of Education, National Center for Education Statistics, Digest of Education Statistics (2021) (Table 104.70)

[13] R. Crosnoe, K. Purtell, P. Davis-Kean, A. Ansari, & A. Benner, *The Selection of Children From Low-Income Families into Preschool*, 52 J. Developmental Psychology 11 (2016); A. Kenly & A. Klein, *Early Childhood Experiences of Black Children in a Diverse Midwestern Suburb*, 24 J. African American Studies 130, 136 (2020).

this reality, Latino and Black students are less likely to enroll in institutions of higher education than their white peers.[14] . . .

Put simply, society remains "inherently unequal." Racial inequality runs deep to this very day. That is particularly true in education, the "'most vital civic institution for the preservation of a democratic system of government.'" *Plyler v. Doe*, 457 U.S. 202, 221, 223 (1982). [O]nly with eyes open to this reality can the Court carry out the guarantee of equal protection.

2

Both UNC and Harvard have sordid legacies of racial exclusion. Because "[c]ontext matters" when reviewing race-conscious college admissions programs, *Grutter*, 539 U.S. at 327, this reality informs the exigency of respondents' current admissions policies and their racial diversity goals.

i

For much of its history, UNC was a bastion of white supremacy. Its leadership included slaveholders, the leaders of the Ku Klux Klan, the central figures in the white supremacy campaigns of 1898 and 1900, and many of the State's most ardent defenders of Jim Crow and race-based Social Darwinism in the twentieth century. The university excluded all people of color from its faculty and student body, glorified the institution of slavery, enforced its own Jim Crow regulations, and punished any dissent from racial orthodoxy. It resisted racial integration after this Court's decision in *Brown*, and was forced to integrate by court order in 1955. It took almost 10 more years for the first Black woman to enroll at the university in 1963. Even then, the university admitted only a handful of underrepresented racial minorities, and those students suffered constant harassment, humiliation, and isolation. UNC officials openly resisted racial integration well into the 1980s, years after the youngest Member of this Court was born. During that period, Black students faced racial epithets and stereotypes, received hate mail, and encountered Ku Klux Klan rallies on campus.

To this day, UNC's deep-seated legacy of racial subjugation continues to manifest itself in student life. Buildings on campus still bear the names of members of the Ku Klux Klan and other white supremacist leaders. Students of color also continue to experience racial harassment, isolation, and tokenism. Plus, the student body remains predominantly white: approximately 72% of UNC students identify as white, while only 8% identify as Black. These numbers do not reflect the diversity of the State, particularly Black North Carolinians, who make up 22% of the population.

ii

UNC is not alone. Harvard, like other Ivy League universities in our country, "stood beside church and state as the third pillar of a civilization built on bondage." C. Wilder, Ebony & Ivy: Race, Slavery, and the Troubled History of America's

[14] Dept. of Education, National Center for Education, Institute of Educational Science, The Condition of Education 2022, p. 24 (2020) (fig. 16).

Universities 11 (2013). 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 7 (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. Meanwhile, a few women of color attended Radcliffe College, a separate and overwhelmingly white "women's annex" where racial minorities were denied campus housing and scholarships. . . .

Today, benefactors with ties to slavery and white supremacy continue to be memorialized across campus through "statues, buildings, professorships, student houses, and the like." Harvard Report 11. Black and Latino applicants account for only 20% of domestic applicants to Harvard each year. "Even those students of color who beat the odds and earn an offer of admission" continue to experience isolation and alienation on campus. Brief for 25 Harvard Student and Alumni Organizations as *Amici Curiae* 30–31. For years, the university has reported that inequities on campus remain. For example, Harvard has reported that "far too many black students at Harvard experience feelings of isolation and marginalization," and that "student survey data show[ed] that only half of Harvard undergraduates believe that the housing system fosters exchanges between students of different backgrounds."

* * *

These may be uncomfortable truths to some, but they are truths nonetheless. . . . Acknowledging the reality that race has always mattered and continues to matter, these universities have established institutional goals of diversity and inclusion. Consistent with equal protection principles and this Court's settled law, their policies use race in a limited way with the goal of recruiting, admitting, and enrolling underrepresented racial minorities to pursue the well-documented benefits of racial integration in education.

II

The Court today stands in the way of respondents' commendable undertaking and entrenches racial inequality in higher education. . . . 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 and UNC's admissions programs are constitutional and comply with Title VI of the Civil Rights Act of 1964.[21]

A

Answering the question whether Harvard's and UNC's policies survive strict scrutiny under settled law is straightforward, both because of the procedural posture of these cases and because of the narrow scope of the issues presented by petitioner Students for Fair Admissions, Inc. (SFFA).

These cases arrived at this Court after two lengthy trials. Harvard and UNC introduced dozens of fact witnesses, expert testimony, and documentary evidence in support of their admissions programs. SFFA, by contrast, did not introduce a single fact witness and relied on the testimony of two experts.

After making detailed findings of fact and conclusions of law, the District Courts entered judgment in favor of Harvard and UNC. See 397 F.Supp.3d 126, 133–206 (Mass. 2019) (*Harvard I*); 567 F.Supp.3d 580, 588–667 (MDNC 2021) (*UNC*). The First Circuit affirmed in the *Harvard* case, finding "no error" in the District Court's thorough opinion. 980 F.3d 157, 204 (2020) (*Harvard II*).

The Court granted certiorari on three questions: (1) whether the Court should overrule *Bakke*, *Grutter*, and *Fisher*; or, alternatively, (2) whether UNC's admissions program is narrowly tailored, and (3) whether Harvard's admissions program is narrowly tailored. Answering the last two questions, which call for application of settled law to the facts of these cases, is simple: Deferring to the lower courts' careful findings of fact and credibility determinations, Harvard's and UNC's policies are narrowly tailored.

B

1

As to narrow tailoring, the only issue SFFA raises in the *UNC* case is that the university cannot use race in its admissions process because race-neutral alternatives would promote UNC's diversity objectives. . . .

The use of race is narrowly tailored unless "workable" and "available" race-neutral approaches exist, meaning race-neutral alternatives promote the institution's diversity goals and do so at " 'tolerable administrative expense.' " *Fisher I*, 570

[21] The same standard that applies under the Equal Protection Clause guides the Court's review under Title VI, as the majority correctly recognizes. Justice GORSUCH argues that "Title VI bears independent force" and holds universities to an even higher standard than the Equal Protection Clause. Because no party advances Justice GORSUCH's argument, the Court properly declines to address it under basic principles of party presentation. See *United States* v. *Sineneng-Smith*, 140 S.Ct. 1575, 1578–1579 (2020).

U.S. at 312. Narrow tailoring does not mean perfect tailoring. The Court's precedents make clear that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339. "Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Ibid.*

As the District Court found after considering extensive expert testimony, SFFA's proposed race-neutral alternatives do not meet those criteria. All of SFFA's proposals are methodologically flawed because they rest on "'terribly unrealistic'" assumptions about the applicant pools. In addition, some of SFFA's proposals force UNC to "abandon its holistic approach" to college admissions, a result "in deep tension with the goal of educational diversity as this Court's cases have defined it," *Fisher II*, 579 U.S. at 386–387. Others are "largely impractical—not to mention unprecedented—in higher education." 567 F.Supp.3d at 647. SFFA's proposed top percentage plans, for example, are based on a made-up and complicated admissions index . . . . The courts below correctly concluded that UNC is not required to adopt SFFA's unrealistic proposals to satisfy strict scrutiny.[25]

2

Harvard's admissions program is also narrowly tailored under settled law. SFFA argues that Harvard's program is not narrowly tailored because the university "has workable race-neutral alternatives," "does not use race as a mere plus," and "engages in racial balancing." As the First Circuit concluded, there was "no error" in the District Court's findings on any of these issues.

Like UNC, Harvard has already implemented many of SFFA's proposals, such as increasing recruitment efforts and financial aid for low-income students. Also like UNC, Harvard "carefully considered" other race-neutral ways to achieve its diversity goals, but none of them are "workable." 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. 980 F.3d at 194. SFFA's proposal . . . requires Harvard to make sacrifices on almost every dimension important to its admissions process and forces it to choose between a diverse student body and a reputation for

[25] SFFA and Justice GORSUCH . . . argue that universities in States that have banned the use of race in college admissions have achieved racial diversity through efforts such as increasing socioeconomic preferences, so UNC could do the same. Data from those States disprove that theory. Institutions in those States experienced "'an immediate and precipitous decline in the rates at which underrepresented-minority students applied ... were admitted ... and enrolled.'" *Schuette v. BAMN*, 572 U.S. 291, 384–390 (2014) (SOTOMAYOR, J., dissenting). . . .

academic excellence. Neither this Court's precedents nor common sense impose that type of burden on colleges and universities.

The courts below also properly rejected SFFA's argument that Harvard does not use race in the limited way this Court's precedents allow. . . . 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. . . . 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."

The courts below correctly rejected SFFA's view that Harvard's use of race is unconstitutional because it impacts overall Hispanic and Black student representation by 45%. That 45% figure shows that eliminating the use of race in admissions "would reduce African American representation ... from 14% to 6% and Hispanic representation from 14% to 9%." *Harvard II*, 980 F.3d at 180, 191. Such impact of Harvard's limited use of race on the makeup of the class is less than this Court has previously upheld as narrowly tailored. In *Grutter*, for example, eliminating the use of race would have reduced the underrepresented minority population by 72%, a much greater effect. 539 U.S. at 320. And in *Fisher II*, the use of race helped increase Hispanic representation from 11% to 16.9% (a 54% increase) and African-American representation from 3.5% to 6.8% (a 94% increase). 579 U.S. at 384. . . .

III

B

. . . There is no question that minority students will bear the burden of today's decision. . . . In a single paragraph at the end of its lengthy opinion, the Court suggests that "nothing" in today's opinion prohibits universities from considering a student's essay that explains "how race affected [that student's] life." This supposed recognition that universities can, in some situations, consider race in application essays is nothing but an attempt to put lipstick on a pig. The Court's opinion

circumscribes universities' ability to consider race in any form by meticulously gutting respondents' asserted diversity interests. Yet, because the Court cannot escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear attuned to reality. No one is fooled. . . .

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

It is not a stereotype to acknowledge the basic truth that young people's experiences are shaded by a societal structure where race matters. Acknowledging that there is something special about a student of color who graduates valedictorian from a predominantly white school is not a stereotype. Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students. . . . The absence of racial diversity, by contrast, actually contributes to stereotyping. . . .

To be clear, today's decision leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications. Universities should continue to use those tools as best they can to recruit and admit students from different backgrounds based on all the other factors the Court's opinion does not, and cannot, touch. Colleges and universities can continue to consider socioeconomic diversity and to recruit and enroll students who are first-generation college applicants or who speak multiple languages, for example. . . .

The Court today also does not adopt SFFA's suggestion that college admissions should be a function of academic metrics alone. Using class rank or standardized test scores as the only admissions criteria would severely undermine multidimensional diversity in higher education.[35] . . .

4

Cherry-picking language from *Grutter*, the Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they do not have a specific expiration date. *Ante*, at 2170 – 2173. This new durational requirement is also not grounded in law, facts, or common sense. *Grutter* simply announced a general "expect[ation]" that "the use of racial preferences [would] no longer be necessary" in the future. 539 U.S. at 343. [T]hose remarks were nothing but aspirational statements by the *Grutter* Court.

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[35] Today's decision is likely to generate a plethora of litigation by disappointed college applicants who think their credentials and personal qualities should have secured them admission. By inviting those challenges, the Court's opinion promotes chaos and incentivizes universities to convert their admissions programs into inflexible systems focused on mechanical factors, which will harm all students.

Yet this Court suggests that everyone, including the Court itself, has been misreading *Grutter* for 20 years. *Grutter*, according to the majority, requires that universities identify a specific "end point" for the use of race. *Ante*, at 2172. Justice KAVANAUGH, for his part, suggests that *Grutter* itself automatically expires in 25 years, after either "the college class of 2028" or "the college class of 2032." *Ante*, at 2224, n. 1. A faithful reading of this Court's precedents reveals that *Grutter* held nothing of the sort. . . .

A temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable. . . .

5

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

He first renews his argument that the use of race in holistic admissions leads to the "inevitable" "underperformance" by Black and Latino students at elite universities "because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I*, 570 U.S. at 332 (concurring opinion). . . . The Court previously declined to adopt this so-called "mismatch" hypothesis for good reason: It was debunked long ago. . . .

Citing nothing but his own long-held belief, Justice THOMAS also equates affirmative action in higher education with segregation, arguing that "racial preferences in college admissions 'stamp [Black and Latino students] with a badge of inferiority.'" Studies disprove this sentiment, which echoes "tropes of stigma" that "were employed to oppose Reconstruction policies." A. Onwuachi-Willig, E. Houh, & M. Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?* 96 Cal. L. Rev. 1299, 1323 (2008)., equating state-sponsored segregation with race-conscious admissions policies that promote racial integration trivializes the harms of segregation and offends *Brown*'s transformative legacy. . . .

Citing no evidence, Justice THOMAS also suggests that race-conscious admissions programs discriminate against Asian American students. It is true that SFFA "allege[d]" that Harvard discriminates against Asian American students. Specifically, SFFA argued that Harvard discriminates against Asian American applicants vis-à-vis white applicants through the use of the personal rating, an allegedly "highly subjective" component of the admissions process that is "susceptible to stereotyping and bias." *Harvard II*, 980 F.3d at 196. It is also true, however, that there was a lengthy trial to test those allegations, which SFFA lost. . . .

To begin, this part of SFFA's discrimination claim does not even fall under the strict scrutiny framework in *Grutter* and its progeny, which concerns the use of racial classifications. The personal rating is a facially race-*neutral* component of Harvard's admissions policy. Therefore, even assuming for the sake of argument that Harvard engages in racial discrimination through the personal rating, there is no connection between that rating and the remedy that SFFA sought and that the

majority grants today: ending the limited use of race in the entire admissions process. . . .

There is no question that the Asian American community continues to struggle against potent and dehumanizing stereotypes in our society. It is precisely because racial discrimination persists in our society, however, that the use of race in college admissions to achieve racially diverse classes is critical to improving cross-racial understanding and breaking down racial stereotypes. . . .Race-conscious holistic admissions that contextualize the racial identity of each individual allow Asian American applicants who would be less likely to be admitted without a comprehensive understanding of their background to explain the value of their unique background, heritage, and perspective. . . .

Moreover, the admission rates of Asian Americans at institutions with race-conscious admissions policies, including at Harvard, have "been steadily increasing for decades." *Harvard II*, 980 F.3d at 198. . . . At bottom, race-conscious admissions benefit all students, including racial minorities. That includes the Asian American community. . . .

IV

The use of race in college admissions has had profound consequences by increasing the enrollment of underrepresented minorities on college campuses. This Court presupposes that segregation is a sin of the past and that race-conscious college admissions have played no role in the progress society has made. The fact that affirmative action in higher education "has worked and is continuing to work" is no reason to abandon the practice today. *Shelby County v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) ("[It] is like throwing away your umbrella in a rainstorm because you are not getting wet").

Experience teaches that the consequences of today's decision will be destructive. The two lengthy trials below simply confirmed what we already knew: Superficial colorblindness in a society that systematically segregates opportunity will cause a sharp decline in the rates at which underrepresented minority students enroll in our Nation's colleges and universities, turning the clock back and undoing the slow yet significant progress already achieved.

After California amended its State Constitution to prohibit race-conscious college admissions in 1996, for example, "freshmen enrollees from underrepresented minority groups dropped precipitously" in California public universities. Brief for President and Chancellors of the University of California as *Amici Curiae* 4, 9, 11–13. . . .

Amici also tell the Court that race-conscious college admissions are critical for providing equitable and effective public services. . . .

The Court ignores the dangerous consequences of an America where its leadership does not reflect the diversity of the People. A system of government that visibly lacks a path to leadership open to every race cannot withstand scrutiny "in the eyes of the citizenry." *Grutter*, 539 U.S. at 332. . . .

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.

Notwithstanding this Court's actions, however, society's progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on. Although the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society's needs for diversity in education. Despite the Court's unjustified exercise of power, the opinion today will serve only to highlight the Court's own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, "the arc of the moral universe" will bend toward racial justice despite the Court's efforts today to impede its progress. Martin Luther King "Our God is Marching On!" Speech (Mar. 25, 1965).

■ Justice JACKSON, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.[*]

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal. Yet, today, the Court determines that holistic admissions programs like the one that the University of North Carolina (UNC) has operated, consistent with *Grutter v. Bollinger*, 539 U.S. 306 (2003), are a problem with respect to achievement of that aspiration, rather than a viable solution (as has long been evident to historians, sociologists, and policymakers alike).

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

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

[*] Justice JACKSON did not participate in the consideration or decision of the [Harvard] case . . . and issues this opinion with respect to the [UNC] case.

well-documented "intergenerational transmission of inequality" that still plagues our citizenry.

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

I

A

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

To answer that question, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). . . . Justice Thurgood Marshall recounted the genesis:

> Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 387–388 (1978) (Marshall, J., dissenting).

. . . After the war [to end slavery], Senator John Sherman defended the proposed Fourteenth Amendment in a manner that encapsulated our Reconstruction Framers' highest sentiments: "We are bound by every obligation, by [Black Americans'] service on the battlefield, by their heroes who are buried in our cause, by their patriotism in the hours that tried our country, we are bound to protect them and all their natural rights."

To uphold that promise, the Framers repudiated this Court's holding in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), by crafting Reconstruction Amendments (and associated legislation) that transformed our Constitution and society. Even after this Second Founding—when the need to right historical wrongs should have been clear beyond cavil—opponents insisted that vindicating equality in this manner slighted White Americans. So, when the Reconstruction Congress passed a bill to secure all citizens "the same [civil] right[s]" as "enjoyed by white citizens," 14 Stat. 27, President Andrew Johnson vetoed it because it "discriminat[ed] ... in favor of the negro."

That attitude, and the Nation's associated retreat from Reconstruction, made prophesy out of Congressman Thaddeus Stevens's fear that "those States will all ...

keep up this discrimination, and crush to death the hated freedmen." And this Court facilitated that retrenchment. . . .

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

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

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

Despite these barriers, Black people persisted. Their so-called Great Migration northward accelerated during and after the First World War. Like clockwork, American cities responded with racially exclusionary zoning (and similar policies). As a result, Black migrants had to pay disproportionately high prices for disproportionately subpar housing. Nor did migration make it more likely for Black people to access home ownership, as banks would not lend to Black people, and in the rare cases banks would fund home loans, exorbitant interest rates were charged. With Black people still locked out of the Homestead Act giveaway, it is no surprise that, when the Great Depression arrived, race-based wealth, health, and opportunity gaps were the norm.

Federal and State Governments' selective intervention further exacerbated the disparities. Consider, for example, the federal Home Owners' Loan Corporation (HOLC), created in 1933. HOLC purchased mortgages threatened with foreclosure and issued new, amortized mortgages in their place. Not only did this mean that

recipients of these mortgages could gain equity while paying off the loan, successful full payment would make the recipient a homeowner. Ostensibly to identify (and avoid) the riskiest recipients, the HOLC "created color-coded maps of every metropolitan area in the nation." Green meant safe; red meant risky. And, regardless of class, every neighborhood with Black people earned the red designation. . . . The upshot of all this is that, . . . based on their race, Black people were "[l]ocked out of the greatest mass-based opportunity for wealth accumulation in American history."[38]

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

This discussion of how the existing gaps were formed is merely illustrative, not exhaustive. I will pass over Congress's repeated crafting of family-, worker-, and retiree-protective legislation to channel benefits to White people, thereby excluding Black Americans from what was otherwise "a revolution in the status of most working Americans."[40] I will also skip how the G. I. Bill's "creation of ... middle-class America" (by giving $95 billion to veterans and their families between 1944 and 1971) was "deliberately designed to accommodate Jim Crow."[41] So, too, will I bypass how Black people were prevented from partaking in the consumer credit market—a market that helped White people who could access it build and protect wealth. Nor will time and space permit my elaborating how local officials' racial hostility meant that even those benefits that Black people could formally obtain were unequally distributed along racial lines. And I could not possibly discuss every way in which, in light of this history, facially race-blind policies *still* work race-based harms today (*e.g.*, racially disparate tax-system treatment; the disproportionate location of toxic-waste facilities in Black communities; or the deliberate action of governments at all levels in designing interstate highways to bisect and segregate Black urban communities).

The point is this: Given our history, the origin of persistent race-linked gaps should be no mystery. It has never been a deficiency of Black Americans' desire or ability to, in Frederick Douglass's words, "stand on [their] own legs."[45]"[45] Rather, it was always simply what Justice Harlan recognized 140 years ago—the persistent

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[38] M. OLIVER & T. SHAPIRO, BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 18 (1997).

[40] I. KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 53 (2005).

[41] *Id.* at 113-14.

[45] *What the Black Man Wants* (January 26, 1865), in 4 THE FREDERICK DOUGLASS PAPERS 68 (J. Blassingame & J. McKivigan eds. 1991).

and pernicious denial of "what had already been done in every State of the Union for the white race." *Civil Rights Cases,* 109 U.S. at 61 (dissenting opinion).

B

. . . The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.

Start with wealth and income. Just four years ago, in 2019, Black families' median wealth was approximately $24,000. For White families, that number was approximately eight times as much (about $188,000). These wealth disparities "exis[t] at every income and education level," so, "[o]n average, white families with college degrees have over $300,000 more wealth than black families with college degrees."[48] . . .

From those markers of social and financial unwellness flow others. In most state flagship higher educational institutions, the percentage of Black undergraduates is lower than the percentage of Black high school graduates in that State. Black Americans in their late twenties are about half as likely as their White counterparts to have college degrees. . . .

As for postsecondary professional arenas, despite being about 13% of the population, Black people make up only about 5% of lawyers. Such disparity also appears in the business realm: Of the roughly 1,800 chief executive officers to have appeared on the well-known Fortune 500 list, fewer than 25 have been Black (as of 2022, only six are Black). . . .

C

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

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

[48] M. BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 249 (2017).

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.

Permitting (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment's core promise. UNC considers race as one of many factors in order to best assess the entire unique import of John's and James's individual lives and inheritances *on an equal basis*. Doing so involves acknowledging (not ignoring) the seven generations' worth of historical privileges and disadvantages that each of these applicants was born with when his own life's journey started a mere 18 years ago.

II

Recognizing all this, UNC has developed a holistic review process to evaluate applicants for admission. Students must submit standardized test scores and other conventional information. But applicants are *not* required to submit demographic information like gender and race. . . .

So where does race come in? According to UNC's admissions-policy document, reviewers may also consider "the race or ethnicity of any student" (if that information is provided) in light of UNC's interest in diversity. And, yes, "the race or ethnicity of *any* student may—or may not—receive a 'plus' in the evaluation process depending on the individual circumstances revealed in the student's application." Stephen Farmer, the head of UNC's Office of Undergraduate Admissions, confirmed at trial (under oath) that UNC's admissions process operates in this fashion.

Thus, to be crystal clear: *Every* student who chooses to disclose his or her race is eligible for such a race-linked plus, just as any student who chooses to disclose his or her unusual interests can be credited for what those interests might add to UNC. The record supports no intimation to the contrary. Eligibility is just that; a plus is never automatically awarded, never considered in numerical terms, and never automatically results in an offer of admission.[84] There are no race-based quotas in UNC's holistic review process. . . .

More than that, every applicant is also eligible for a diversity-linked plus (beyond race) more generally. And, notably, UNC understands diversity broadly, including "socioeconomic status, first-generation college status ... political beliefs, religious beliefs ... diversity of thoughts, experiences, ideas, and talents."

So, to repeat: 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.

III

The majority seems to think that race blindness solves the problem of race-based disadvantage. But the irony is that requiring colleges to ignore the initial race-linked opportunity gap between applicants like John and James will inevitably widen that gap, not narrow it. It will delay the day that every American has an equal opportunity to thrive, 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. . . .

Rather than leaving well enough alone, today, the majority is having none of it. Turning back the clock (to a time before the legal arguments and evidence establishing the soundness of UNC's holistic admissions approach existed), the Court indulges those who either do not know our Nation's history or long to repeat it. Simply put, the race-blind admissions stance the Court mandates from this day forward is unmoored from critical real-life circumstances. Thus, the Court's meddling not only arrests the noble generational project that America's universities are attempting, it also launches, in effect, a dismally misinformed sociological experiment.

Time will reveal the results. Yet the Court's own missteps are now both eternally memorialized and excruciatingly plain. For one thing—based, apparently, on nothing more than Justice Powell's initial say so—it drastically discounts the primary reason that the racial-diversity objectives it excoriates are needed, consigning race-related historical happenings to the Court's own analytical dustbin. . . . To impose this result in [the Equal Protection] Clause's name when it requires no such thing, and to thereby obstruct our collective progress toward the full realization of the Clause's promise, is truly a tragedy for us all.

SECTION 17.3 THE MARRIAGE OF EQUALITY AND DUE PROCESS (AND FEDERALISM?)

Add the following notes before note 7 on p. 1703:

6.1. Notwithstanding the Court's legal decision in *Obergefell*, many Americans remain opposed to same-sex marriage on moral and religious grounds. Post-*Obergefell* debates about gay rights have thus focused on whether those objectors' rights to free speech and/or free exercise of religion require exemptions from prohibitions on discrimination based on sexual orientation. (Although federal law does not generally prohibit sexual orientation discrimination by private persons, several states have adopted such prohibitions). In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Supreme Court considered the case of a Colorado baker, Jack Philips, who refused to create a cake to celebrate the wedding of two gay men. Philips offered to sell ordinary cakes or other baked goods to the couple, but he maintained that his Christian faith precluded him from creating cakes for same-sex weddings. The couple filed a complaint with the Colorado Civil Rights Commission, which enforces a state statutory prohibition barring public accommodations—including any "place of business engaged in any sales to the public and any place offering services . . . to the public"—from denying "full and equal enjoyment of . . . goods, services, facilities . . . or accommodations" on the basis of "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry." The Commission found that Philips had violated the statute by refusing to provide cakes for several same-sex weddings, and it ordered Philips to stop discriminating and take additional remedial measures. Philips challenged the ruling on the ground that it violated his right to free speech (arguing that creating a cake involved expressive activity in support of a cause he disagreed with) and his right to free exercise of religion. The Colorado state courts, on judicial review of the Commission's action, rejected these claims.

The Supreme Court reversed in a narrow ruling written by Justice Kennedy and joined by all the justices save Ginsburg and Sotomayor. The majority began by acknowledging that the case "presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment." The Court observed that "while . . . religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." Nonetheless, "the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality." At a hearing on Philips' case, for example, one Commissioner described Philips' religious objection as "one of the most despicable pieces of rhetoric that people can use" and compared it to religious arguments used to justify slavery and the Holocaust. Moreover, the Court noted that another person had filed a complaint with the Commission when

Colorado bakers refused to create cakes with religious messages critical of same-sex marriage, and the Commission had rejected that complaint on grounds because it agreed with the bakers that the requested messages were offensive. "A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as 'no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,' *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive." The Court thus invalidated the Commission's order. In dissent, Justice Ginsburg (joined by Justice Sotomayor) largely discounted evidence of the Commission's hostility to Philips and urged that general laws barring discrimination by public accommodations should control over religious objections.

Although the majority's holding focused on the narrow circumstances of the Commission's treatment of Philips' case, several justices wrote separately to suggest the direction future cases might take. Justice Kagan's concurrence (joined by Justice Breyer) expanded on the majority's suggestion that "the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed." Kagan suggested that civil rights laws will generally prevail over religious objections if authorities avoid the blatant hostility of the Colorado proceeding. Justice Gorsuch's concurrence (joined by Justice Alito), on the other hand, argued that religious objections will often be more potent. He emphasized that as long as authorities are unwilling to require bakers and other service providers to accommodate anti-gay messages, as they were in the Colorado case, those authorities will have a hard time demonstrating that they are treating religious objectors in a neutral manner. Finally, Justice Thomas (joined by Justice Gorsuch) wrote separately to consider Philips' free speech claim, which the majority did not reach. Thomas suggested that uncertainties in the record concerning whether Philips had refused to provide *any* wedding cake or, more narrowly, to design a *custom* wedding cake for the gay couple, had prevented the Court from reaching the speech issue. But Thomas thought the state courts had resolved this factual dispute in favor of the latter interpretation, and he had little trouble finding that the custom design of a wedding cake was protected speech under the First and Fourteenth Amendments. He thus concluded that Philips could not constitutionally be compelled to engage in expressive activity in support of a cause with which he disagreed.

How often do you think this sort of conflict between general prohibitions on discrimination based on sexual orientation and religious objections is likely to arise? Will most free exercise claims by religious objectors be unavailing so long as enforcement authorities avoid expressions of overt hostility? Do most instances of discrimination in public accommodations—such as a refusal to serve gay customers in a restaurant—not involve expressive activity giving rise to a speech claim? On the other hand, doesn't *any* discriminatory act toward another person have an expressive component—that is, it expresses hostility toward the person or group discriminated against? Are all these expressions protected by the First Amendment?

If so, is there any way to square protection for freedom of expression with protection of civil rights?

The Court answered none of these questions in its latest encounter with religious exemptions from general principles mandating equal treatment for same-sex couples. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), involved private foster care agencies who contract with the city government to place children in foster families. Although Catholic Social Services (CSS) had contracted with the City for 50 years, the City decided to terminate its relationship unless CSS agreed to certify same-sex couples to adopt children through its agency. CSS refused to do this, because it felt that certifying same-sex couples would amount to an endorsement of their relationship in violation of longstanding Catholic religious teaching. The City maintained that refusal to certify same-sex couples would violate both a non-discrimination provision in the agency's contract and the non-discrimination requirements of the City's Fair Practices Ordinance. CSS sued to enjoin the City from freezing referrals to its adoption agency. The Supreme Court held—unanimously—that the City's action violated CSS's rights under the Free Exercise Clause of the First Amendment.

The justices disagreed, however, concerning whether to overrule the Court's established rule that neutral and generally-applicable laws that incidentally burden the free exercise of religion must pass only rational basis review. *See Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Writing for six justics, Chief Justice Roberts held that the City's policy requiring equal treatment allowed exemptions granted at the "sole discretion" of the City's Commissioner of Human Services. Because the City's policy was not neutral and generally-applicable under *Smith*, it was subject to strict scrutiny—which it failed. Justice Alito (joined by Thomas and Gorsuch) concurred only in the judgment, arguing that *Smith* should instead be overruled. One reason that the conservative justices in the majority (Roberts, Kavanaugh, and Barrett) were unwilling to go so far was telegraphed in Justice Barrett's concurrence, which suggested that *Smith* was wrong but asked, "Yet what should replace *Smith*?"

Doctrinally, *Fulton* is primarily of interest to upper-level courses focusing on religious liberty. But what can it tell you about the Court's ongoing effort to accommodate a robust theory of gay rights with an equally robust vision of individual liberty? How important, for example, do you think the fact was that other agencies were available in Philadelphia to place foster children with same-sex couples, and no couple had applied to CSS and been turned away? Does the Court's careful approach to religious exemptions in *Fulton* suggest that even a much more conservative Court than the one that decided *Obergefell* remains committed to the rights of same-sex couples? Or does it set the stage for piecemeal erosion of *Obergefell*'s holding?

6.2 In 2020, the gay rights movement won a victory that may exceed even *Obergefell* in practical importance. Rather than the Equal Protection Clause, *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), involved Title VII of the Civil Rights Act of 1964. That statute makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In an opinion by Justice Gorsuch, the Supreme Court held that the "ordinary public meaning of Title VII's command" forbidding discrimination based on "sex" requires that "[a]n indivdiual's homosexuality or transgender statuts is not relevant to employment decisions." "That's because," the Court explained, "it is impossible to discrimination ageinst a person for being homosexual or transgender without discriminating against that individual based on sex."

Bostock is a statutory case, of course, and it raises a number of interesting questions concerning the theory and practice of statutory interpretation. For our purposes, however, *Bostock* serves as a reminder that *constitutional* law is not the sole vehicle for establishing and vindicating the rights of oppressed or excluded groups and individuals. Does it complicate or support that conclusion to observe that, while the text of Title VII quite plausibly encompasses gay and transgender people, the framers of Title VII surely did not have those people in mind? Doesn't the broad reference to "any person" as entitled to "equal protection of the laws" under the Fourteenth Amendment raise the same issue?