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. . . .

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).

This view of the Commerce Clause developed gradually. In *Gibbons* v. *Ogden*, Chief Justice Marshall recognized that the States' constitutionally reserved powers enable them to regulate commerce in their own jurisdictions in ways sure to have "a remote and considerable influence on commerce" in other States. By way of example, he cited "[i]nspection laws, quarantine laws, [and] health laws of every description." At the same time, however, Chief Justice Marshall saw "great force in

th[e] argument" that the Commerce Clause might impliedly bar certain types of state economic regulation. Decades later, in *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, this Court again recognized that the power vested in Congress to regulate interstate commerce leaves the States substantial leeway to adopt their own commercial codes. But once more, the Court hinted that the Constitution may come with some restrictions on what "may be regulated by the States" even "in the absence of all congressional legislation."

Eventually, the Court cashed out these warnings, holding that state laws offend the Commerce Clause when they seek to "build up ... domestic commerce" through "burdens upon the industry and business of other States," regardless of whether Congress has spoken. *Guy v. Baltimore*, 100 U.S. 434, 443 (1880). At the same time, though, the Court reiterated that, absent discrimination, "a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to" the interests of its citizens.

Today, this 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.' " . . . . .

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*. . . .

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." *Ibid*. (internal quotation marks omitted).. . .

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." 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.' " 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. 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. 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.' " . . .

Consider, too, the strange places petitioners' alternative interpretation could lead. In our interconnected national marketplace, many (maybe most) state laws have the "practical effect of controlling" extraterritorial behavior. State income tax laws lead some individuals and companies to relocate to other jurisdictions. Environmental laws often prove decisive when businesses choose where to manufacture their goods. Add to the extraterritorial-effects list all manner of "libel laws, securities requirements, charitable registration requirements, franchise laws, tort laws," and plenty else besides. Nor, as we have seen, is this a recent development. Since the founding, States have enacted an "immense mass" of

"[i]nspection laws, quarantine laws, [and] health laws of every description" that have a "considerable" influence on commerce outside their borders. 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," . . . 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). . . .

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.' " 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

. . . *Pike* . . . 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." 449 U.S. 456, 473 (1981). 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. In each of these cases and many more, the presence or absence of discrimination in practice proved decisive.

B

[P]etitioners . . . 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." 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.

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. See App. to Pet. for Cert. 192a (alleging in their complaint that "Proposition 12's requirements were driven by [a] conception of what qualifies as 'cruel' animal housing" and by the State's concern for the " 'health and safety of California consumers' "). How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any juridical principle. Really, the task is like being asked to decide "whether a particular line is longer than a particular rock is heavy." *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). See Tr. of Oral Arg. 51 ("[A] state is perfectly entitled to enforce its morals in state"); see also *Western Union Telegraph Co. v. James*, 162 U.S. 650, 653 (1896) (holding that States may enact laws to "promote ... public morals"). 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." . . .

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

More accurately, your guess is *better* than ours. In a functioning democracy, policy choices like these usually belong to the people and their elected representatives. They are entitled to weigh the relevant "political and economic" costs and benefits for themselves, and "try novel social and economic experiments" if they wish. Judges cannot displace the cost-benefit analyses embodied in democratically adopted legislation guided by nothing more than their own faith in "Mr. Herbert Spencer's Social Statics," *Lochner v. New York*, 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. 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 otherAnd, 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. 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. . . .

V

[T]he Framers equipped Congress with considerable power to regulate interstate commerce and preempt contrary state laws. 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. 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."

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.

■ 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.

. . . *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*, 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. 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 Gorsuchs 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.*

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." 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). "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." . . .As a majority of the Court agrees, *Pike* extends beyond laws either concerning discrimination or governing interstate transportation. See *ante*, at 1165 - 1166 (opinion of Sotomayor, J.); *post*, at 1172 - 1173 (Kavanaugh, J., concurring in part and dissenting in part).

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 *[citing numerous cases from other constitutional contexts].*

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. 6 F.4th at 1033. 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*. *[The dissenters conclude that the plaintiffs alleged sufficient facts to withstand a motion to dismiss under Pike.]* . . .

B

Separate and apart from those costs, petitioners assert harms to the interstate market itself. The complaint alleges that the interstate pork market is so interconnected that producers will be "forced to comply" with Proposition 12, "even though some or even most of the cuts from a hog are sold in other

States." Proposition 12 may not expressly regulate farmers operating out of State. But due to the nature of the national pork market, California has enacted rules that carry implications for producers as far flung as Indiana and North Carolina, whether or not they sell in California. The panel below acknowledged petitioners' allegation that, "[a]s a practical matter, given the interconnected nature of the nationwide pork industry, all or most hog farmers will be forced to comply with California requirements.

We have found such sweeping extraterritorial effects, even if not considered as a *per se* invalidation, to be pertinent in applying *Pike*. 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*. . . .

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. 11 (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*. . . .

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." Adhering to that established approach in this case would not convert the inquiry into a *per se* rule against extraterritorial regulation. . . .

The panel below itself recognized that petitioners "plausibly alleged that Proposition 12 will have dramatic upstream effects and require pervasive changes to the pork production industry nationwide." Yet it nevertheless reduced the myriad harms detailed by petitioners in their complaint to so-called "compliance costs" and

wrote them off as independently insufficient to state a claim under *Pike*. Our precedents do not support such an approach. 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 *[citing the Barrett concurrence]*. . . .

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." *Pike*, 397 U.S., at 142.

■ JUSTICE KAVANAUGH, concurring in part and dissenting in part.

. . .

I

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

In 2018, California voters nonetheless passed a ballot initiative, Proposition 12, that not only regulates pig farming and pork production in California, but also in effect regulates pig farming and pork production *throughout the United States*. Under Proposition 12, all pork sold to consumers in California must be derived from pigs raised in compliance with California's strict standards for pig farming, including California's minimum square footage of space required for housing individual pigs. By its terms, Proposition 12 applies to pigs raised and **pork** produced *outside California*.

California's requirements for pig farms and **pork** production depart significantly from common agricultural practices that are lawful in major pig-farming and pork-producing States such as Iowa, Minnesota, Illinois, Indiana, and North Carolina. Moreover, according to various *amici*, some of the scientific literature suggests that California's requirements could worsen animal health and welfare. See, *e.g.,* Brief for American Association of Swine Veterinarians as *Amicus Curiae* 4–19. Regardless of whether the *amici* are correct on that point, it is evident that absent California's Proposition 12, relatively few pig farmers and pork producers in the United States would follow the practices that California now demands. Yet American pig farmers and pork producers have little choice but to comply with California's regulatory dictates. It would be prohibitively expensive and practically all but impossible for pig farmers and pork producers to segregate individual pigs based on their ultimate marketplace destination in California or elsewhere. And California's 13-percent share of the consumer **pork** market makes it economically infeasible for many pig farmers and pork producers to exit the California market.

California's required changes to pig-farming and pork-production practices throughout the United States will cost American farmers and pork producers hundreds of millions (if not billions) of dollars. And those costs

for pig farmers and pork producers will be passed on, in many cases, to American consumers of pork via higher pork prices nationwide. The increased costs may also result in lower wages and reduced benefits (or layoffs) for the American workers who work on pig farms and in meatpacking plants. . . .

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.

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. *[Justice Kavanaugh explains how each; of these clauses might apply, but without taking a position.]* . . .

NOTES

1. The Commerce Clause is a grant of authority to Congress to regulate commerce "among the several states." Yet the courts have long held that, even in the absence of congressional preemptive legislation, it is unconstitutional for individual states to enact laws that interfere with interstate commerce in particular ways.

The idea arose from the view that the three parts of the Commerce Clause are *exclusive*: not only is Congress empowered to regulate commerce among the states, with the tribes, and with foreign nations, but states have no such power. States are confined to regulation of commerce that takes place within their own borders. (The other two commerce clauses still are interpreted this way.) James Madison wrote that the interstate commerce clause was not just an empowerment of Congress but "was intended as a negative and preventive provision against injustice among the states themselves." Letter of February 13, 1829, to J. C. Cabell, 3 Farrand 478. This strict view may make textual sense, but it leads to conceptual confusion, because a great deal of commerce is both interstate and intrastate. The Court gradually moved toward the view that states could regulate in ways that affect interstate commerce only in the service of the state's police power—that is, its power to pass laws protecting the health, safety, welfare, and morals of their own citizens. *Pike* balancing reflects the idea that when these internal effects are small, and the out-of-state effects are large, a state law has stepped into a matter reserved by the Constitution to Congress.

2. In broad strokes, the political theory of American federalism is that decisions should be made by the unit of government where costs and benefits will be felt by its own citizens. Thus, an activity with in-state benefits but out-of-state costs, such as a factory causing air pollution that blows across state lines, should be regulated at the national level, but an issue that directly affects only the citizens of a state, such as family law, should be left to the states. How does that theory apply to California's Proposition 12?

a. Costs. Who bears the costs of Prop 12? According to the allegations in the complaint, very little of the nation's pork—0.13%—is produced in California. Almost all of the increased costs of production will be borne by producers in other states. Of course, much of this increased cost will be passed on to consumers. But (again, according to the allegations in the complaint, but not challenged by the state or by the Court) the pork market is nationally integrated. Any particular pork product might be sold anywhere, which means that the costs of pork products will increase in all 50 states. Californians consume 13% of the pork consumed in the United States, and Californians therefore will bear 13% of the increased costs caused by the law. The remaining 87% will be borne by consumers in the other states.

b. Benefits. The primary purpose of Prop 12 is to improve the humane treatment of animals. But almost all (99.87%) of the pigs affected by the law live in states other than California. Does the State of California have a legitimate interest in the welfare of non-California pigs? During debate over the referendum, there was some suggestion that pork produced under inhumane conditions might be less healthy for humans to eat, but that claim was largely abandoned in the lower courts for want of factual basis. From the point of view of the consumer, pork produced in compliance with Prop 12 is indistinguishable for pork produced in ordinary ways. In effect, the voters in California receive the moral satisfaction of improving the treatment of pigs all over the country, while bearing relatively little of the cost.

3. The plurality and the Sotomayor concurrence rely heavily on the *Exxon Corp.* precedent. But is it analogous to this case? In *Exxon*, oil producerts were forbidden to engage in retail sales in Maryland, but their activities outside of Maryland were not affected. Here, because of the national character of the pork market, pork produers all over the country are effectively required to comply with California laws regarding treatment of pigs if they wish to sell in interstate commerce. Moreover, in *Exxon*, the cost of the regulation would be borne entirely by consumers within Maryland, whereas the cost of compliance with Proposition 12 will be borne by consumers in all 50 states. Perhaps the costs are justified by the humane purposes of the statute, but should one State be able to force such costs on the entire nation?

4. As Justice Kavanaugh points out, if this decision becomes a precedent, states will be free to use their market power to impose social policies on the rest of the country. What is to keep California from forbidding the sale of products made by companies that do not pay the California minimum wage? What is to keep Texas from forbidding the sale of products made by companies that do not use the E-Verify to prevent employment of undocumented workers? What is to keep Illinois from forbidding the sale of products made by non-union labor? If it becomes a precedent, *Pork Producers* could open up a new battleground in America's red state/blue state culture wars.

5. But does *Pork Producers* create a precedent? The case presents a voting paradox: Although there was a majority for the outcome (the petitioners' ccomplain was properly dismissed), there was a majority *against* every legal theory that supports that outcome. Six Justices (the four dissenters plus Sotomayor and Kagan) reject the argument that *Pike* balancing cannot be applied to cases where the costs and benefits are incommensurable. Five Justices (the four dissenters plus Barrett) reject the argument that the complaint failed to allege a sufficient burden on interstate commerce. And five Justices (the four dissenters plus Barrett) ruled that, if *Pike* balancing applies, the complaint was sufficient to withstand a motion to dismiss, and thus the decision below should be reversed and the case remanded for trial The outcome is produced by a coalition of three Justices who would hold that *Pike* balancing is inappropriate in cases involving incommensurate costs and benefits plus two Justices who would apply *Pike* but hold that the pork producers lose on the merits. Only four Justices (Gorsuch, Thomas, Sotomayor, and Kagan) concluded that the complaint failed to allege a sufficient burden on interstate commerce. What, then is the holding of the case?

6. *Pork Producers* is an example of what some scholars have called the "*Tidewater* Voting Paradox"—so named because it first appeared in *Tidewater Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). See David Post & Steven Salop, *Rowing Against the Tidewater: A Theory of Voting by Multi-Judge Panela*, 80 GEORGETOWN L. J. 743 (1992). There have been at least ten such cases in the Supreme Court. See John Rogers*, "I Vote This Way Because I'm Wrong": The Supreme Court Justice As Epimedides*, 49 KY. L. J. 439 (1990-91).

7. What do you think of Justice Kavanaugh's point that the prohibition on extraterritorial state laws is found in a number of constitutional provisions? Could a state, consistent with due process, impose criminal punishment on a woman for obtaining an abortion in another state? Why or why not? Could a state, consistent with the Privileges and Immunities Clause of Article IV, prohibit a company from doing business in the state if it does not pay its workers in other states a certain minimum wage? Or, to use a more attractive (but out-dated) example, could a state prohibit the sale of goods made with slave labor?

Moore v. Harper

143 S.Ct. 2065 (2023)

■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Several groups of plaintiffs challenged North Carolina's congressional districting map as an impermissible partisan gerrymander. The plaintiffs brought claims under North Carolina's Constitution, which provides that "[a]ll elections shall be free." Art. I, § 10. Relying on that provision, as well as the State Constitution's equal protection, free speech, and free assembly clauses, the North Carolina Supreme Court found in favor of the plaintiffs and struck down the legislature's map. The Court concluded that North Carolina's Legislature deliberately drew the State's congressional map to favor Republican candidates.

In drawing the State's congressional map, North Carolina's Legislature exercised authority under the Elections Clause of the Federal Constitution, which expressly requires "the Legislature" of each State to prescribe "[t]he Times, Places and Manner of " federal elections. Art. I, § 4, cl. 1. We decide today whether that Clause vests state legislatures with authority to set rules governing federal elections free from restrictions imposed under state law.

I

The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." . . .

A

The 2020 decennial census showed that North Carolina's population had increased by nearly one million people, entitling the State to an additional seat in its federal congressional delegation. . . . Following those results, North Carolina's General Assembly set out to redraw the State's congressional districts. . . .

Shortly after the new maps became law, several groups of plaintiffs—including the North Carolina League of Conservation Voters, Common Cause, and individual voters—sued in state court. The plaintiffs asserted that each map constituted an impermissible partisan gerrymander in violation of the North Carolina Constitution in North Carolina's Congressional delegation. . . . [The North Carolina Supreme Court held the map unconstitutional under the state constitution, struck it down and remanded.] . . . The Court acknowledged our decision in *Rucho* v. *Common Cause*, which held "that partisan gerrymandering claims present political questions beyond the reach of the federal courts." . . . But "simply because the Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts," the court explained, "it does not follow that they are nonjusticiable in North Carolina courts." . . . The State Supreme Court also rejected the argument that the Elections

Clause in the Federal Constitution vests exclusive and independent authority in state legislatures to draw congressional maps.

[*In subsequent proceedings, the North Carolina Supreme Court overruled its earlier opinion and dismissed the plaintiffs' claims but left in place the judgment and order invalidating the specific maps that had been drawn by the legislature. Part II of Chief Justice Roberts's majority opinion held that this kept the case from being moot.* – Editors] . . .

III

The question on the merits is whether the Elections Clause insulates state legislatures from review by state courts for compliance with state law.

Since early in our Nation's history, courts have recognized their duty to evaluate the constitutionality of legislative acts. We announced our responsibility to review laws that are alleged to violate the Federal Constitution in *Marbury* v. *Madison* . . .. "Certainly all those who have framed written constitutions," we reasoned, "contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." . . .

Marbury proclaimed our authority to invalidate laws that violate the Federal Constitution, but it did not fashion this concept out of whole cloth. Before the Constitutional Convention convened in the summer of 1787, a number of state courts had already moved "in isolated but important cases to impose restraints on what the legislatures were enacting as law." G. Wood, The Creation of the American Republic 1776–1787, pp. 454–455 (1969). . . . [*The Court traced the history of judicial review of legislative acts for constitutionality in state constitutional cases predating the Constitution and Marbury, including an early North Carolina case*.—Editors]

The Framers recognized state decisions exercising judicial review at the Constitutional Convention of 1787. . . .. Writings in defense of the proposed Constitution echoed these comments. In the Federalist Papers, Alexander Hamilton maintained that "courts of justice" have the "duty ... to declare all acts contrary to the manifest tenor of the Constitution void." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961). "[T]his doctrine" of judicial review, he also wrote, was "equally applicable to most if not all the State governments." *Id.*, No. 81, at 482.

State cases, debates at the Convention, and writings defending the Constitution all advanced the concept of judicial review. . . . The idea that courts may review legislative action was so "long and well established" by the time we decided *Marbury* in 1803 that Chief Justice Marshall referred to judicial review as "one of the fundamental principles of our society." 1 Cranch at 176–177.

IV

We are asked to decide whether the Elections Clause carves out an exception to this basic principle. We hold that it does not. The Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.

A

We first considered the interplay between state constitutional provisions and a state legislature's exercise of authority under the Elections Clause in *Ohio ex rel.*

Davis v. Hildebrant, 241 U.S. 565, 36 S.Ct. 708, 60 L.Ed. 1172 (1916). There, we examined the application to the Elections Clause of a provision of the Ohio Constitution permitting the State's voters "to approve or disapprove by popular vote any law enacted by the General Assembly." . . . In 1915, the Ohio General Assembly drew new congressional districts, which the State's voters then rejected through such a popular referendum. Asked to disregard the referendum, the Ohio Supreme Court refused, explaining that the Elections Clause—while "conferring the power therein defined upon the various state legislatures"—did not preclude subjecting legislative Acts under the Clause to "a popular vote." . . .

We unanimously affirmed, rejecting as "plainly without substance" the contention that "to include the referendum within state legislative power for the purpose of apportionment is repugnant to § 4 of Article I [the Elections Clause]." *Hildebrant*, 241 U.S. at 569; see also *Hawke v. Smith*, 253 U.S. 221, 230–231 (1920) (describing *Hildebrant* as holding that "the referendum provision of the state constitution when applied to a law redistricting the State with a view to representation in Congress was not unconstitutional").

Smiley v. *Holm*, decided 16 years after *Hildebrant*, considered the effect of a Governor's veto of a state redistricting plan. 285 U.S. 355, 361, 52 S.Ct. 397, 76 L.Ed. 795 (1932). Following the 15th decennial census in 1930, Minnesota lost one seat in its federal congressional delegation. The State's legislature divided Minnesota's then nine congressional districts in 1931 and sent its Act to the Governor for his approval. The Governor vetoed the plan pursuant to his authority under the State's Constitution. But the Minnesota Secretary of State nevertheless began to implement the legislature's map for upcoming elections. A citizen sued, contending that the legislature's map "was a nullity in that, after the Governor's veto, it was not repassed by the legislature as required by law." *Id.*, at 362, 52 S.Ct. 397. The Minnesota Supreme Court disagreed. In its view, "the authority so given by" the Elections Clause "is unrestricted, unlimited, and absolute." *State ex rel. Smiley v. Holm*, 184 Minn. 228, 242 (1931). The Elections Clause, it held, conferred upon the legislature "the exclusive right to redistrict" such that its actions were "beyond the reach of the judiciary." *Id.*, at 243.

We unanimously reversed. A state legislature's "exercise of ... authority" under the Elections Clause, we held, "must be in accordance with the method which the State has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367. Nowhere in the Federal Constitution could we find "provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted." *Id.*, at 368.

Smiley relied on founding-era provisions, constitutional structure, and historical practice, each of which we found persuasive. . . .

This Court recently reinforced the teachings of *Hildebrant* and *Smiley* in a case considering the constitutionality of an Arizona ballot initiative. Voters "amended Arizona's Constitution to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission." *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 792 (2015). The Arizona Legislature challenged a congressional map adopted by the commission,

arguing that the Elections "Clause precludes resort to an independent commission ... to accomplish redistricting." *Ibid.* A divided Court rejected that argument.. . . . The Court ruled, in short, that although the Elections Clause expressly refers to the "Legislature," it does not preclude a State from vesting congressional redistricting authority in a body other than the elected group of officials who ordinarily exercise lawmaking power. States, the Court explained, "retain autonomy to establish their own governmental processes." . . .

The significant point for present purposes is that the Court in *Arizona State Legislature* recognized that whatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution. The Court embraced the core principle espoused in *Hildebrant* and *Smiley* "that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto." 576 U.S. at 808; The Court dismissed the argument that the Elections Clause divests state constitutions of the power to enforce checks against the exercise of legislative power: "Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." 576 U.S. at 817–818 (majority opinion).

The reasoning we unanimously embraced in *Smiley* commands our continued respect: A state legislature may not "create congressional districts independently of " requirements imposed "by the state constitution with respect to the enactment of laws." 285 U.S. at 373.

B

The legislative defendants and the dissent both contend that, because the Federal Constitution gives state legislatures the power to regulate congressional elections, only *that* Constitution can restrain the exercise of that power. . . .

This argument simply ignores the precedent just described. *Hildebrant*, *Smiley*, and *Arizona State Legislature* each rejected the contention that the Elections Clause vests state legislatures with exclusive and independent authority when setting the rules governing federal elections.

The argument advanced by the defendants and the dissent also does not account for the Framers' understanding that when legislatures make laws, they are bound by the provisions of the very documents that give them life. Legislatures, the Framers recognized, "are the mere creatures of the State Constitutions, and cannot be greater than their creators." 2 Farrand 88. "What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void." *Vanhorne's Lessee* v. *Dorrance*, 2 Dall. 304, 308 (Pa. 1795). *Marbury* confirmed this understanding, 1 Cranch at 176–177, and nothing in the text of the Elections Clause undermines it. When a state legislature carries out its constitutional power to prescribe rules regulating federal elections, the "commission under which" it exercises authority is two-fold. The Federalist No. 78, at 467. The legislature acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by

the Federal Constitution. Both constitutions restrain the legislature's exercise of power.

Turning to our precedents, the defendants quote from our analysis of the Electors Clause in *McPherson v. Blacker*, 146 U.S. 1 (1892). That Clause—similar to the Elections Clause—provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a [specified] Number of Electors." Art. II, § 1, cl. 2. *McPherson* considered a challenge to the Michigan Legislature's decision to allocate the State's electoral votes among the individual congressional districts, rather than to the State as a whole. We upheld that decision, explaining that in choosing Presidential electors, the Clause "leaves it to the legislature exclusively to define the method of effecting the object." 146 U.S. at 27.

Our decision in *McPherson*, however, had nothing to do with any conflict between provisions of the Michigan Constitution and action by the State's legislature—the issue we confront today. *McPherson* instead considered whether Michigan's Legislature itself directly violated the Electors Clause (by taking from the "State" the power to appoint and vesting that power in separate districts), the Fourteenth Amendment (by allowing voters to vote for only one Elector rather than "Electors"), and a particular federal statute. *Id.*, at 8–9 (argument for plaintiffs in error). Nor does the quote highlighted by petitioners tell the whole story. Chief Justice Fuller's opinion for the Court explained that "[t]he legislative power is the supreme authority *except as limited by the constitution of the State*." *Id.*, at 25 (emphasis added); see also *ibid.* ("What is forbidden or required to be done by a State is forbidden or required of the legislative power under state constitutions as they exist.").

The legislative defendants and Justice THOMAS rely as well on our decision in *Leser v. Garnett*, 258 U.S. 130 (1922), but it too offers little support. *Leser* addressed an argument that the Nineteenth Amendment—providing women the right to vote—was invalid because state constitutional provisions "render[ed] inoperative the alleged ratifications by their legislatures." 258 U.S. at 137. We rejected that position, holding that when state legislatures ratify amendments to the Constitution, they carry out "a federal function derived from the Federal Constitution," which "transcends any limitations sought to be imposed by the people of a State." *Ibid.*

But the legislature in *Leser* performed a ratifying function rather than engaging in traditional lawmaking. The provisions at issue in today's case—like the provisions examined in *Hildebrant* and *Smiley*—concern a state legislature's exercise of lawmaking power. And as we held in *Smiley*, when state legislatures act pursuant to their Elections Clause authority, they engage in lawmaking subject to the typical constraints on the exercise of such power. . . . We have already distinguished *Leser* on those grounds. *Smiley*, 285 U.S. at 365–366. In addition, *Leser* cited for support our decision in *Hawke* v. *Smith*, which sharply separated ratification "from legislative action" under the Elections Clause. 253 U.S. at 228. Lawmaking under the Elections Clause, *Hawke* explained, "is entirely different from the requirement of the

Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution." *Id.*, at 231.

Hawke and *Smiley* delineated the various roles that the Constitution assigns to state legislatures. Legislatures act as "Consent[ing]" bodies when the Nation purchases land, Art. I, § 8, cl. 17; as "Ratif[ying]" bodies when they agree to proposed Constitutional amendments, Art. V; and—prior to the passage of the Seventeenth Amendment—as "electoral" bodies when they choose United States Senators, *Smiley*, 285 U.S. at 365; see also Art. I, § 3, cl. 1; Amdt. 17 (providing for the direct election of Senators).

By fulfilling their constitutional duty to craft the rules governing federal elections, state legislatures do not consent, ratify, or elect—they make laws. Elections are complex affairs, demanding rules that dictate everything from the date on which voters will go to the polls to the dimensions and font of individual ballots. Legislatures must "provide a complete code for congressional elections," including regulations "relati[ng] to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley*, 285 U.S. at 366. In contrast, a simple up-or-down vote suffices to ratify an amendment to the Constitution. . . . [F]ashioning regulations governing federal elections "unquestionably calls for the exercise of lawmaking authority." *Arizona State Legislature*, 576 U.S. at 808, n. 17. And the exercise of such authority in the context of the Elections Clause is subject to the ordinary constraints on lawmaking in the state constitution.

In sum, our precedents have long rejected the view that legislative action under the Elections Clause is purely federal in character, governed only by restraints found in the Federal Constitution.

C

Addressing our decisions in *Smiley* and *Hildebrant*, both the legislative defendants and Justice THOMAS concede that at least some state constitutional provisions can restrain a state legislature's exercise of authority under the Elections Clause. But they read those cases to differentiate between procedural and substantive constraints. . . . But when it comes to substantive provisions, their argument goes, our precedents have nothing to say.

This argument adopts too cramped a view of our decision in *Smiley*. Chief Justice Hughes's opinion for the Court drew no distinction between "procedural" and "substantive" restraints on lawmaking. It turned on the view that state constitutional provisions apply to a legislature's exercise of lawmaking authority under the Elections Clause, with no concern about how those provisions might be categorized. . . .

The same goes for the Court's decision in *Arizona State Legislature*. The defendants attempt to cabin that case by arguing that the Court did not address substantive limits on the regulation of federal elections. But as in *Smiley*, the Court's

decision in *Arizona State Legislature* discussed no difference between procedure and substance.

D

Were there any doubt, historical practice confirms that state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause. . . .

V

A

Although we conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein. "State courts are the appropriate tribunals ... for the decision of questions arising under their local law, whether statutory or otherwise." *Murdock v. Memphis*, 20 Wall. 590, 626 (1875). At the same time, the Elections Clause expressly vests power to carry out its provisions in "the Legislature" of each State, a deliberate choice that this Court must respect. As in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law.

State law, for example, "is one important source" for defining property rights. [citations omitted]. At the same time, the Federal Constitution provides that "private property" shall not "be taken for public use, without just compensation." Amdt. 5. As a result, States "may not sidestep the Takings Clause by disavowing traditional property interests." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998); see also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980) (holding that States may not, "by *ipse dixit*, ... transform private property into public property without compensation").

A similar principle applies with respect to the Contracts Clause, which provides that "[n]o state shall ... pass any ... Law impairing the Obligation of Contracts." Art. I, § 10, cl. 1. In that context "we accord respectful consideration and great weight to the views of the State's highest court." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938). Still, "in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made." . . .

Running through each of these examples is the concern that state courts might read state law in such a manner as to circumvent federal constitutional provisions. Therefore, although mindful of the general rule of accepting state court interpretations of state law, we have tempered such deference when required by our duty to safeguard limits imposed by the Federal Constitution.

Members of this Court last discussed the outer bounds of state court review in the present context in *Bush v. Gore*, 531 U.S. 98 (2000) (*per curiam*). Our decision in that case turned on an application of the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 104–105. In separate writings, several Justices addressed whether Florida's Supreme Court, in construing provisions of Florida statutory law,

exceeded the bounds of ordinary judicial review to an extent that its interpretation violated the Electors Clause.

Chief Justice Rehnquist, joined in a concurring opinion by Justice THOMAS and Justice Scalia, acknowledged the usual deference we afford state court interpretations of state law, but noted "areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law." *Id.*, at 114. He declined to give effect to interpretations of Florida election laws by the Florida Supreme Court that "impermissibly distorted them beyond what a fair reading required." *Id.*, at 115. Justice Souter, for his part, considered whether a state court interpretation "transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the 'legislature' within the meaning of Article II." *Id.*, at 133 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).

We do not adopt these or any other test by which we can measure state court interpretations of state law in cases implicating the Elections Clause. The questions presented in this area are complex and context specific. We hold only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.

B

We decline to address whether the North Carolina Supreme Court strayed beyond the limits derived from the Elections Clause. The legislative defendants did not meaningfully present the issue in their petition for certiorari or in their briefing, nor did they press the matter at oral argument. . . .

State courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause. But federal courts must not abandon their own duty to exercise judicial review. In interpreting state law in this area, state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution. Because we need not decide whether that occurred in today's case, the judgment of the North Carolina Supreme Court is affirmed.[2]

It is so ordered.

■ JUSTICE KAVANAUGH, concurring.

I join the Court's opinion in full. The Court today correctly concludes that state laws governing federal elections are subject to ordinary state court review, including for compliance with the relevant state constitution. But because the Elections Clause assigns authority respecting federal elections to state legislatures, the Court also correctly concludes that "state courts do not have free rein" in conducting that review. Therefore, a state court's interpretation of state law in a case implicating the

[2] As noted, the North Carolina Supreme Court withdrew the opinion in Harper II, which addressed both the remedial maps developed by the General Assembly and an order by the trial court implementing an interim plan for the 2022 elections. The remedial order, having been withdrawn, is not before us, and our decision today does not pass on the constitutionality of any particular map adopted by the state courts.

Elections Clause is subject to federal court review. See also *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76–78 (2000) (unanimously concluding that a state court's interpretation of state law in a federal election case presents a federal issue). . . . Federal court review of a state court's interpretation of state law in a federal election case "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*." *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C. J., concurring).

The question, then, is what standard a federal court should employ to review a state court's interpretation of state law in a case implicating the Elections Clause — whether Chief Justice Rehnquist's standard from *Bush* v. *Gore*; Justice Souter's standard from *Bush* v. *Gore*; the Solicitor General's proposal in this case; or some other standard.

Chief Justice Rehnquist's standard is straightforward: whether the state court "impermissibly distorted" state law "beyond what a fair reading required." *Ibid.* As I understand it, Justice Souter's standard, at least the critical language, is similar: whether the state court exceeded "the limits of reasonable" interpretation of state law. *Id.*, at 133 (dissenting opinion). And the Solicitor General here has proposed another similar approach: whether the state court reached a "truly aberrant" interpretation of state law. Brief for United States as *Amicus Curiae* 27.

As I see it, all three standards convey essentially the same point: Federal court review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication. I would adopt Chief Justice Rehnquist's straightforward standard. . . .

Petitioners here, however, have disclaimed any argument that the North Carolina Supreme Court misinterpreted the North Carolina Constitution or other state law. For now, therefore, this Court need not, and ultimately does not, adopt any specific standard for our review of a state court's interpretation of state law in a case implicating the Elections Clause. . . . Instead, the Court today says simply that "state courts do not have free rein" and "hold[s] only that state courts may not transgress the ordinary bounds of judicial review." In other words, the Court has recognized and articulated a general principle for federal court review of state court decisions in federal election cases. In the future, the Court should and presumably will distill that general principle into a more specific standard such as the one advanced by Chief Justice Rehnquist.

■ JUSTICE THOMAS, with whom Justice GORSUCH joins, and with whom Justice ALITO joins as to Part I, dissenting.

[*In Part I of his dissent, Justice Thomas argued that the case before the Court was "indisputably moot and today's majority opinion is plainly advisory."*—Editors]

II

. . . The majority's views on the merits of petitioners' moot Elections Clause defense are of far less consequence than its mistaken belief that Article III authorizes any merits conclusion in this case, and I do not wish to belabor a

question that we have no jurisdiction to decide. Nonetheless, I do not find the majority's merits reasoning persuasive.

. . . The question presented was whether the people of a State can place state-constitutional limits on the times, places, and manners of holding congressional elections that "the Legislature" of the State has the power to prescribe. Petitioners said no. Their position rests on three premises, from which the conclusion follows. . . . [Justice Thomas described the first premise as that "the people of a single State" lack any ability to limit powers "given by the people of the United States" as a whole. (quoting *McCulloch v. Maryland*); the second premise as that regulating times, places, and manner of congressional elections is not an original state prerogative but a delegated federal power; and the third premise as that "'the Legislature thereof '" does not mean the people of the State or the State as an undifferentiated body politic, but, rather, the lawmaking power as it exists under the State Constitution." He argued that "if these premises hold, then petitioners' conclusion follow[ed]," that state legislatures in regulating federal elections perform a federal function that transcended any limitations imposed by the constitution of the state.]

The majority rejects petitioners' conclusion, but seemingly without rejecting any of the premises from which that conclusion follows. Its apparent rationale—that *Hildebrant*, *Smiley*, and *Arizona State Legislature* have already foreclosed petitioners' argument—is untenable, as it requires disregarding a principled distinction between the issues in those cases and the question presented here. In those cases, the relevant state-constitutional provisions addressed the allocation of lawmaking power within each State; they defined what acts, performed by which constitutional actors, constituted an "exercise of the lawmaking power." *Smiley*, 285 U.S. at 364; cf. U. S. Const., Art. I, § 7, cl. 2 (describing the processes upon completion of which a bill "become[s] a Law"). In other words, those cases addressed how to identify "the Legislature" of each State. But, nothing in their holdings speaks at all to whether the people of a State can impose substantive limits on the times, places, and manners that a procedurally complete exercise of the lawmaking power may validly prescribe. . . .

This is not an arbitrary distinction, but one rooted in the logic of petitioners' argument. No one here contends that the Elections Clause *creates* state legislatures or defines "the legislative process" in any State. *Smiley*, 285 U.S. at 369. Thus, while the Elections Clause confers a lawmaking power, "the exercise of th[at] authority must" follow "the method which the State has prescribed for legislative enactments." *Id.*, at 367. But, if the power in question is not original to the people of each State and is conferred upon the constituted legislature of the State, then it follows that the people of the State may not dictate what laws can be enacted under that power—precisely as they may not dictate what constitutional amendments their legislatures can ratify under Article V. . . .

III

The majority opinion ends with some general advice to state and lower federal courts on how to exercise "judicial review" "in cases implicating the Elections

Clause." As the majority offers no clear rationale for its interpretation of the Clause, it is impossible to be sure what the consequences of that interpretation will be. . . .

[T]he majority opens a new field for . . . controversies over state election law—and a far more uncertain one. Though some state constitutions are more "proli[x]" than the Federal Constitution, it is still a general feature of constitutional text that "only its great outlines should be marked." *McCulloch*, 4 Wheat. at 407. When "it is a *constitution* [courts] are expounding," *ibid.*, not a detailed statutory scheme, the standards to judge the fairness of a given interpretation are typically fewer and less definite.

Nonetheless, the majority's framework appears to demand that federal courts develop some generalized concept of "the bounds of ordinary judicial review," *ante*, at 2089; apply it to the task of constitutional interpretation within each State; and make that concept their rule of decision in some of the most politically acrimonious and fast-moving cases that come before them. In many cases, it is difficult to imagine what this inquiry could mean in theory, let alone practice. . . .

In the end, I fear that this framework will have the effect of investing potentially large swaths of state constitutional law with the character of a federal question not amenable to meaningful or principled adjudication by federal courts. . . .

I would hesitate long before committing the Federal Judiciary to this uncertain path. . . .

NOTES

1. Before the case was argued, two of your co-authors had written:

> In a constitutional republic like ours, legislatures ultimately derive their authority from the people. This authority is conveyed through written constitutions that charter the government, vest power in different branches, and regulate the exercise of that power. A state legislature's power to pass laws should be seen through this constitutional lens. Because state legislatures derive their lawmaking power from their own people, their authority is limited to what their state constitution gives them. When the federal Constitution gave state legislatures additional authority, it took them as it found them, as created by state constitutions rather than a new free-floating entity. State legislatures are not independent of their constitutions.
>
> But the claim that state courts may hold state legislatures to state constitutional limits does not mean that they can replace the legislature. . . . State legislatures must act according to their state's constitutional constraints. But it must still be the state legislatures that act. . . . [This] means that state constitutional provisions can restrain legislative districting, such as by limiting the use of partisan gerrymandering. The broad challenge to state constitutional law in *Moore* therefore should fail. But it also means that the North Carolina courts do not have independent constitutional power to adopt their own map.

William Baude & Michael W. McConnell, *The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case*, The Atlantic (Oct. 11, 2022). Is the majority opinion consistent with their view, or not?

The majority opinion states: "In interpreting state law in this area, state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution." What are the "bounds of orginary judicial review"? When a court concludes that a statute is inconsistent with the Constitution, it issues an order forbidding enforcement; it does not write a new statute. Are courts in election challenges permitted to engage special masters and draw up new maps?

2. Is there a partisan valence to this issue? In *Moore* itself, the state legislature was Republican, so the assumption was that a reversal on Elections Clause grounds would have helped Republicans. But there are other states, such as New York, where state courts had invalidated Democratic gerrymanders—indeed, it is possible that the overall effect of a ruling for the petitioners would have helped Democrats nationwide. Does that change how one should think about the issue, or is it irrelevant?

3. The author of the *Moore* opinion, Chief Justice Roberts, dissented in *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787 (2015). Is *Moore* consistent with the Arizona case? What is the best theory to uphold Arizona's non-partisan districting commission? Is it that when the People exercise their power to make law through referendum, they are exercising the power of a "legislature"? Similar questions: Why can the state governor veto a legislatures's enactment of a law governing elections? Can the legislature delegate its Article I, Section 4 power to an independent commission? Can Congress authorize or mandate independent district commissions?

303 Creative LLC v. Elenis

143 S.Ct. 2298 (2023)

■ JUSTICE GORSUCH delivered the opinion of the Court.

Like many States, Colorado has a law forbidding businesses from engaging in discrimination when they sell goods and services to the public. Laws along these lines have done much to secure the civil rights of all Americans. But in this particular case Colorado does not just seek to ensure the sale of goods or services on equal terms. It seeks to use its law to compel an individual to create speech she does not believe. The question we face is whether that course violates the Free Speech Clause of the First Amendment.

I

A

Through her business, 303 Creative LLC, Lorie Smith offers website and graphic design, marketing advice, and social media management services. Recently, she decided to expand her offerings to include services for couples seeking websites for their weddings. As she envisions it, her websites will provide couples with text, graphic arts, and videos to "celebrate" and "conve[y]" the "details" of their "unique love story." The websites will be "expressive in nature," designed "to communicate a particular message." Viewers will know, too, "that the websites are [Ms. Smith's] original artwork," for the name of the company she owns and operates by herself will be displayed on every one.

B

[T]he Colorado Anti-Discrimination Act (CADA) . . . defines a "public accommodation" broadly to include almost every public-facing business in the State. In what some call its "Accommodation Clause," the law prohibits a public accommodation from denying "the full and equal enjoyment" of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait. . . . Courts can order fines up to $500 per violation. The Colorado Commission on Civil Rights can issue cease-and-desist orders, and require violators to take various other "affirmative action[s]." In the past, these have included participation in mandatory educational programs and the submission of ongoing compliance reports to state officials. [The law is the same as that in *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*,, 138 S.Ct. 1719 (2018) (see Casebook p. 1133) – Editors.]

In her lawsuit, Ms. Smith alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces a credible threat that Colorado will seek to use CADA to compel her to create websites celebrating marriages she does not endorse. . . .

Ms. Smith and the State stipulated to a number of facts:

- Ms. Smith is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender," and she "will gladly create custom graphics and websites" for clients of any sexual orientation.

• She will not produce content that "contradicts biblical truth" regardless of who orders it.

• Her belief that marriage is a union between one man and one woman is a sincerely held religious conviction.

• All of the graphic and website design services Ms. Smith provides are "expressive."

• The websites and graphics Ms. Smith designs are "original, customized" creations that "contribut[e] to the overall messages" her business conveys "through the websites" it creates.

• Just like the other services she provides, the wedding websites Ms. Smith plans to create "will be expressive in nature."

• Those wedding websites will be "customized and tailored" through close collaboration with individual couples, and they will "express Ms. Smith's and 303 Creative's message celebrating and promoting" her view of marriage.

• Viewers of Ms. Smith's websites "will know that the websites are [Ms. Smith's and 303 Creative's] original artwork."

• To the extent Ms. Smith may not be able to provide certain services to a potential customer, "[t]here are numerous companies in the State of Colorado and across the nation that offer custom website design services."

[The State prevailied in both the district court and the Tenth Circuit.]

II

The framers designed the Free Speech Clause of the First Amendment to protect the "freedom to think as you will and to speak as you think." *Boy Scouts of America v. Dale . . . . [The Court summarizes Barnette, Hurley, and Dale.]*

As these cases illustrate, the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply "misguided" (*Hurley*) and likely to cause "anguish" or "incalculable grief." *Snyder v. Phelps*. Generally, too, the government may not compel a person to speak its own preferred messages [citing *Tinker*, *Miami Herald*, *Wooley*, and *NIFLA*]. Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include. All that offends the First Amendment just the same.

III

Applying these principles to this case, we align ourselves with much of the Tenth Circuit's analysis. The Tenth Circuit held that the wedding websites Ms. Smith seeks to create qualify as "pure speech" under this Court's precedents. We agree. It is a conclusion that flows directly from the parties' stipulations. They have stipulated that Ms. Smith's websites promise to contain "images, words, symbols, and other modes of expression." They have stipulated that every website will be her "original, customized" creation. And they have stipulated that Ms. Smith will create these websites to communicate ideas—namely, to "celebrate and promote the couple's

wedding and unique love story" and to "celebrat[e] and promot[e]" what Ms. Smith understands to be a true marriage.

We further agree with the Tenth Circuit that the wedding websites Ms. Smith seeks to create involve *her* speech. Again, the parties' stipulations lead the way to that conclusion. As the parties have described it, Ms. Smith intends to "ve[t]" each prospective project to determine whether it is one she is willing to endorse. She will consult with clients to discuss "their unique stories as source material." And she will produce a final story for each couple using her own words and her own "original artwork." Of course, Ms. Smith's speech may combine with the couple's in the final product. But for purposes of the First Amendment that changes nothing. An individual "does not forfeit constitutional protection simply by combining multifarious voices" in a single communication.

. . . Under Colorado's logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait. Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The government could require "an unwilling Muslim movie director to make a film with a Zionist message," or "an atheist muralist to accept a commission celebrating Evangelical zeal," so long as they would make films or murals for other members of the public with different messages. Equally, the government could force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage. Countless other creative professionals, too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so. . . .

[W]e do not question the vital role public accommodations laws play in realizing the civil rights of all Americans. . . .

At the same time, this Court has also recognized that no public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech. In *Hurley*, the Court commented favorably on Massachusetts' public accommodations law, but made plain it could not be "applied to expressive activity" to compel speech. In *Dale*, the Court observed that New Jersey's public accommodations law had many lawful applications but held that it could "not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." And, once more, what was true in those cases must hold true here. When a state public accommodations law and the Constitution collide, there can be no question which must prevail. . . .

IV

. . . . .Of course, as the State emphasizes, Ms. Smith offers her speech for pay and does so through 303 Creative LLC, a company in which she is "the sole member-owner." But none of that makes a difference. Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the

same? Many of the world's great works of literature and art were created with an expectation of compensation. Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech. This fact underlies our cases involving everything from movie producers to book publishers to newspapers.

Colorado next urges us to focus on the *reason* Ms. Smith refuses to offer the speech it seeks to compel. She refuses, the State insists, because she objects to the "protected characteristics" of certain customers. But once more, the parties' stipulations speak differently. The parties agree that Ms. Smith "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites" do not violate her beliefs. That is a condition, the parties acknowledge, Ms. Smith applies to "all customers." Ms. Smith stresses, too, that she has not and will not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments. Nor, in any event, do the First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive. . . . .

In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. In the past, other States in *Barnette*, *Hurley*, and *Dale* have similarly tested the First Amendment's boundaries by seeking to compel speech they thought vital at the time. But, as this Court has long held, the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong. Of course, abiding the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider "unattractive," (opinion of SOTOMAYOR, J.), "misguided, or even hurtful," (*Hurley*). But tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. Because Colorado seeks to deny that promise, the judgment is

Reversed.

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

Five years ago, this Court recognized the "general rule" that religious and philosophical objections to gay marriage "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." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*. The Court also recognized the "serious stigma" that would result if "purveyors of goods and services who object to gay marriages for moral and religious reasons" were "allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages.'

Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected

class. Specifically, the Court holds that the First Amendment exempts a website-design company from a state law that prohibits the company from denying wedding websites to same-sex couples if the company chooses to sell those websites to the public. The Court also holds that the company has a right to post a notice that says, " 'no [wedding websites] will be sold if they will be used for gay marriages.' "

. . . A business open to the public seeks to deny gay and lesbian customers the full and equal enjoyment of its services based on the owner's religious belief that same-sex marriages are "false." The business argues, and a majority of the Court agrees, that because the business offers services that are customized and expressive, the Free Speech Clause of the First Amendment shields the business from a generally applicable law that prohibits discrimination in the sale of publicly available goods and services. That is wrong. Profoundly wrong. As I will explain, the law in question targets conduct, not speech, for regulation, and the *act* of discrimination has never constituted protected expression under the First Amendment. Our Constitution contains no right to refuse service to a disfavored group. I dissent.

I

A

A "public accommodations law" is a law that guarantees to every person the full and equal enjoyment of places of public accommodation without unjust discrimination. The American people, through their elected representatives, have enacted such laws at all levels of government: The federal Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 prohibit discrimination by places of public accommodation on the basis of race, color, religion, national origin, or disability.1 All but five States have analogous laws that prohibit discrimination on the basis of these and other traits, such as age, sex, sexual orientation, and gender identity.2 And numerous local laws offer similar protections.

The people of Colorado have adopted the Colorado Anti-Discrimination Act (CADA), which . . . applies to any business engaged in sales "to the public." . . .

A public accommodations law has two core purposes. First, the law ensures "*equal access* to publicly available goods and services." *Roberts v. United States Jaycees.* For social groups that face discrimination, such access is vital. All the more so if the group is small in number or if discrimination against the group is widespread. . ..

Second, a public accommodations law ensures *equal dignity* in the common market. Indeed, that is the law's "fundamental object": "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' " *Heart of Atlanta Motel, Inc. v. United States*. This purpose does not depend on whether goods or services are otherwise available. " 'Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his [social identity]. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment.' " When a young Jewish girl and her parents come across a business with a sign out front that

says, " 'No dogs or Jews allowed,' the fact that another business might serve her family does not redress that "stigmatizing injury," *Roberts*. Or, put another way, "the hardship Jackie Robinson suffered when on the road" with his baseball team "was not an inability to find *some hotel* that would have him; it was the indignity of not being allowed to stay in the *same hotel* as his white teammates." J. Oleske, The Evolution of Accommodation, 50 Harv. Civ. Rights-Civ. Lib. L. Rev. 99, 138 (2015). . . .

Preventing the "unique evils" caused by "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages" is a compelling state interest "of the highest order." *Roberts*. Moreover, a law that prohibits only such acts by businesses open to the public is narrowly tailored to achieve that compelling interest. The law "responds precisely to the substantive problem which legitimately concerns the State": the harm from status-based discrimination in the public marketplace. *Roberts*. . . .

The concept of a public accommodation thus embodies a simple, but powerful, social contract: A business that chooses to sell to the public assumes a duty to serve the public without unjust discrimination. J. Singer, No Right To Exclude: Public Accommodations and Private Property, 90 Nw. U. L. Rev. 1283, 1298 (1996). . . .

II

. . . The majority protests that Smith will gladly sell her goods and services to anyone, including same-sex *couples*. She just will not sell websites for same-sex *weddings*. Apparently, a gay or lesbian couple might buy a wedding website for their straight friends. This logic would be amusing if it were not so embarrassing. I suppose the Heart of Atlanta Motel could have argued that Black people may still rent rooms for their white friends. Smith answers that she will sell other websites for gay or lesbian clients. But then she, like Ollie McClung, who would serve Black people take-out but not table service, discriminates against LGBT people by offering them a limited menu. This is plain to see, for all who do not look the other way. . . . .

NOTES

1. The plaintiff, Ms. Smith, brought her case under both the Free Speech and Free Exercise Clauses, but in its grant of certiorari the Court limited the Question Presented to compelled speech, leaving questions of free exercise to another day. What is the practical and doctrinal difference?

2. The parties stipulated that the services in question were "expressive in nature" and that the content of the speech would be attributed to Ms. Smith. In future cases, it may be necessary for the plaintiffs to litigate those issues. Did Colorado make a mistake in stipulating to those facts? Is website design of this sort expressive, and is the speech likely to be attributed to the website designer? What about florists, wedding singers, photographers, custom wedding cake baker, and wedding venue vendors? What will be the most difficult borderline cases?

3. The majority deems it important that Ms. Smith's decision not to provide her services was based on the message she was asked to convey (approbation of same-sex marriage) and not the sexual identity of the disappointed customers. Why, then, did her actions violate the Colorado public accommodation law to begin with? Note that the

Colorado courts have final (almost) authority to interpret state law. Could the Supreme Court have resolved this case by saying that CADA was not violated?

4. The dissent heaps scorn on the majority's distinction between withholding services on the basis of the customer's sexual identity and on the basis of the event being celebrated. But is the dissent right about that? If a banner painter refused to make banners for Catholics, that would seem to violate the law against religouis discrimination. But is a non-Christian (an atheist or Jew, for example) required to make a banner proclaiming "Jesus Christ is Lord"?

5. How far would the dissent take its position? How would the dissent address the various hypotheticals in the paragraph beginning "Under Colorado's logic"? How far would the majority take its position? Could a landlord refuse to include the standard "equal opportunity" language in an advertisement? See *Pittsburgh Press Co. v. Pittsburgh Comm's on Human Relations*, 413 U.S, 376, 389 (1973).

6. Is the dissent right that when an expressive service is offered for sale, it loses constitutional protection? (Is that an accurate statement of the dissent's position?) What about painters or actors? In *New York Times v. Sullivan*, the Court rejected the argument that newspapers lose their First Amendment rights because they are produced and sold for profit. Is that argument any different here?

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

Students for Fair Admissions v. University of North Carolina

143 S.Ct. 2142 (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. . . . In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants." *Id.*, at 178.

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": . . . the [UNC] review committee may also consider the applicant's race.

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." 980 F.3d at 164. 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, and the Equal Protection Clause of the Fourteenth Amendment.[2] 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

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

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.

II

[The Court first confirmed that it had jurisdiction over the 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." Amdt. 14, § 1. 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 Cong., 1st Sess., 431 (1866) (statement of Rep. Bingham) (Cong. Globe). 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, No. 1 etc., p. 41 (detailing the history of the adoption of the Equal Protection Clause), 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." *Id.*, at 2462. 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." *Id.*, at 2766. For "[w]ithout this principle of equal justice," Howard continued, "there is no republican government and none that is really worth maintaining." *Ibid.*

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).

. . . . 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. 347 U.S. at 494–495. *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." *Id.*, at 493, 74 S.Ct. 686 (emphasis added). The mere act of separating "children ... because of their race," we explained, itself "generate[d] a feeling of inferiority." *Id.*, at 494, 74 S.Ct. 686.

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." *Id.*, at 493. As 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, No. 8, p. 7 (Robert L. Carter, Dec. 9, 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, p. 65 ("That the Constitution is color blind is our dedicated belief."). . . .

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) (footnote omitted). 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.").

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*) (internal quotation marks omitted).

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).

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) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). 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. 438 U.S. at 272–276. 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. *Id.*, at 272–275. 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 scores. *Id.*, at 276–277. 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. . . .

C

We . . . 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.

. . . As for compelling interest, the Court held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Id.*, at 328. In achieving that goal, however, the Court made clear—just as Justice Powell had—that the law school was limited in the means that it could pursue. The school could not "establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks." *Id.*, at 334. Neither could it "insulate applicants who belong to certain racial or ethnic groups

from the competition for admission." *Ibid.* Nor still could it desire "some specified percentage of a particular group merely because of its race or ethnic origin." *Id.*, at 329–330 (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.)).

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

But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. The Court stressed the fundamental principle that "there are serious problems of justice connected with the idea of [racial] preference itself." *Ibid.* (quoting *Bakke*, 438 U.S. at 298 (opinion of Powell, J.)). It observed that all "racial classifications, however compelling their goals," were "dangerous." *Grutter*, 539 U.S. at 342. 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." *Id.*, at 341 (internal quotation marks omitted).

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. *Id.*, at 342. This requirement was critical, and *Grutter* emphasized it repeatedly. "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the norm of equal treatment" must be "a temporary matter." *Ibid.* (internal quotation marks omitted). 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." *Ibid.*; see also *id.,* at 342–343 (quoting N. Nathanson & C. Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 58 Chi. Bar Rec. 282, 293 (May–June 1977), for the proposition that "[i]t would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life").

Grutter thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education.... We expect that 25 years from

now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343.

IV

Twenty years later, no end is in sight. . . .

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

A

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

Respondents have fallen short of satisfying that burden. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." 980 F.3d at 173–174. 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." 567 F.Supp.3d at 656.

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? *Ibid.*; 980 F.3d at 173–174. 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." 567 F.Supp.3d at 656. 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

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

preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve. . . .

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. See, *e.g.*, M. Lopez, J. Krogstad, & J. Passel, Pew Research Center, Who is Hispanic? (Sept. 15, 2022) (referencing the "long history of changing labels [and] shifting categories ... reflect[ing] evolving cultural norms about what it means to be Hispanic or Latino in the U. S. today"). 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." Tr. of Oral Arg. in No. 21–707, p. 107.

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

B

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

First, our cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. And the District Court observed that Harvard's

"policy of considering applicants' race ... overall results in fewer Asian American and white students being admitted." 397 F.Supp.3d at 178. . . .

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 (internal quotation marks omitted). 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) ("In cautioning against 'impermissible racial stereotypes,' this Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike ....' " (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993))).

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.) (internal quotation marks omitted). 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, at 97.

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.

C

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

Here, however, Harvard concedes that its race-based admissions program has no end point. Brief for Respondent in No. 20–1199, at 52 (Harvard "has not set a sunset date" for its program (internal quotation marks omitted)). And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. Tr. of Oral Arg. in No. 20–1199, at 91. 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." 567 F.Supp.3d at 612. And UNC suggests that it might soon use race to a *greater* extent than it currently does. See Brief for University Respondents in No. 21–707, at 57. 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. 438 U.S. at 362 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). But that minority view was just that—a minority view. . . .

Most troubling of all is what the dissent . . . defend[s]: 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 (emphasis added). 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. . . .

VI

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

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867). A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not

challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

The 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 JACKSON took no part in the consideration or decision of the case in No. 20–1199.

■ JUSTICE THOMAS, concurring.

In the wake of the Civil War, the country focused its attention on restoring the Union and establishing the legal status of newly freed slaves. The Constitution was amended to abolish slavery and proclaim that all persons born in the United States are citizens, entitled to the privileges or immunities of citizenship and the equal protection of the laws. Amdts. 13, 14. Because of that second founding, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

This Court's commitment to that equality principle has ebbed and flowed over time. After forsaking the principle for decades, offering a judicial *imprimatur* to segregation and ushering in the Jim Crow era, the Court finally corrected course in *Brown v. Board of Education*, 347 U.S. 483 (1954), announcing that primary schools must either desegregate with all deliberate speed or else close their doors. See also *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*). It then pulled back in *Grutter v. Bollinger*, 539 U.S. 306 (2003), permitting universities to discriminate based on race in their admissions process (though only temporarily) in order to achieve alleged "educational benefits of diversity." *Id.*, at 319. Yet, the Constitution continues to embody a simple truth: Two discriminatory wrongs cannot make a right.

I wrote separately in *Grutter*, explaining that the use of race in higher education admissions decisions—regardless of whether intended to help or to hurt—violates the Fourteenth Amendment. *Id.*, at 351 (opinion concurring in part and dissenting in part). In the decades since, I have repeatedly stated that *Grutter* was wrongly decided and should be overruled. *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 315, 328 (2013) (concurring opinion) (*Fisher I*); *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 389 (2016) (dissenting opinion). Today, and despite a lengthy interregnum, the Constitution prevails.

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, No. 1 etc., p. 115 (U. S. *Brown* Reargument Brief).

This was Justice Harlan's view in his lone dissent in *Plessy*, where he observed that "[o]ur Constitution is color-blind." 163 U.S. at 559. It was the view of the Court in *Brown*, which rejected " 'any authority ... to use race as a factor in affording educational opportunities.' " *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 747 (2007). And, it is the view adopted in the Court's opinion today, requiring "the absolute equality of all citizens" under the law.

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." 2 A. Schlesinger, History of U. S. Political Parties 1860–1910, p. 1303 (1973). 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. . . .

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, 14 Stat. 27, 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) ("Note that the bill neither forbade racial discrimination generally nor did it guarantee particular rights to all persons. Rather, it required an equality in certain specific rights"). 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. . . .

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. . . .

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. See S. Doc. No. 31, 39th Cong., 1st Sess., 1, 6 (1866) (Johnson veto message). . . . 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. . . .

Two years later, [one of them] was ratified by the requisite number of States and became the Fourteenth Amendment to the United States Constitution. . . .

The most commonly held view today—consistent with the rationale repeatedly invoked during the congressional debates, see, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., at 2458–2469—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) (noting that the "primary purpose" of the Fourteenth Amendment "was to mandate certain rules of racial equality, especially those contained in Section 1 of the Civil Rights Act of 1866"). 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." 19 How. at 407, 411. 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. That citizenship guarantee was often linked with the concept of equality. *Vaello Madero*, 596 U. S., at —— (THOMAS, J., concurring). 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). . . .

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." *Post*, at 2228. 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." Ch. 90, §§ 2, 4, 13 Stat. 507. 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. Ch. 200, 14 Stat. 173–174. 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) (Rappaport). 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. . . .

III

Both experience and logic have vindicated the Constitution's colorblind rule and confirmed that the universities' new narrative cannot stand. Despite the Court's hope in *Grutter* that universities would voluntarily end their race-conscious programs and further the goal of racial equality, the opposite appears increasingly true. Harvard and UNC now forthrightly state that they racially discriminate when it comes to admitting students, arguing that such discrimination is consistent with this Court's precedents. And they, along with today's dissenters, defend that discrimination as *good*. More broadly, it is becoming increasingly clear that discrimination on the basis of race—often packaged as "affirmative action" or "equity" programs—are based on the benighted notion "that it is possible to tell when discrimination helps, rather than hurts, racial minorities." *Fisher I*, 570 U.S. at 328 (THOMAS, J., concurring). . . .

IV

Far from advancing the cause of improved race relations in our Nation, affirmative action highlights our racial differences with pernicious effect. In fact, recent history reveals a disturbing pattern: Affirmative action policies appear to have prolonged the asserted need for racial discrimination. Parties and *amici* in these cases report that, in the nearly 50 years since *Bakke*, 438 U.S. 265, racial progress on campuses adopting affirmative action admissions policies has stagnated, including making no meaningful progress toward a colorblind goal since *Grutter*.

Rather, the legacy of *Grutter* appears to be ever increasing and strident demands for *yet more* racially oriented solutions.

A

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

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

But, under our Constitution, race is irrelevant, as the Court acknowledges. In fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities. Of course, that is false. Members of the same race do not all share the exact same experiences and viewpoints; far from it. A black person from rural Alabama surely has different experiences than a black person from Manhattan or a black first-generation immigrant from Nigeria, in the same way that a white person from rural Vermont has a different perspective than a white person from Houston, Texas. Yet, universities' racial policies suggest that racial identity "*alone constitutes the being* of the race or the man." J. Barzun, Race: A Study in Modern Superstition 114 (1937). That is the same naked racism upon which segregation itself was built. Small wonder, then, that these policies are leading to increasing racial polarization and friction. This kind of reductionist logic leads directly to the "disregard for what does not jibe with preconceived theory," providing a "cloa[k] to conceal complexity, argumen[t] to the crown for praising or damning without the trouble of going into details"—such as details about an individual's ideas or unique background. *Ibid.* Rather than forming a more pluralistic society, these policies thus strip us of our individuality and undermine the very diversity of thought that universities purport to seek.

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

the second founding is incorporated in our Constitution: that we are all equal, and should be treated equally before the law without regard to our race. Only that promise can allow us to look past our differing skin colors and identities and see each other for what we truly are: individuals with unique thoughts, perspectives, and goals, but with equal dignity and equal rights under the law.

B

Justice JACKSON has a different view. Rather than focusing on individuals as individuals, her dissent focuses on the historical subjugation of black Americans, invoking statistical racial gaps to argue in favor of defining and categorizing individuals by their race. As she sees things, we are all inexorably trapped in a fundamentally racist society, with the original sin of slavery and the historical subjugation of black Americans still determining our lives today. *Post*, at 2263 – 2277 (dissenting opinion). The panacea, she counsels, is to unquestioningly accede to the view of elite experts and reallocate society's riches by racial means as necessary to "level the playing field," all as judged by racial metrics. *Post*, at 2277. I strongly disagree. . . .

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

Worse, the classifications that Justice JACKSON draws are themselves race-based stereotypes. . . .

Nor is it clear what another few generations of race-conscious college admissions may be expected to accomplish. Even today, affirmative action programs that offer an admissions boost to black and Hispanic students discriminate against those who identify themselves as members of other races that do not receive such preferential treatment. Must others in the future make sacrifices to re-level the playing field for this new phase of racial subordination? And then, out of whose lives should the debt owed to those further victims be repaid? This vision of meeting social racism with government-imposed racism is thus self-defeating, resulting in a never-ending cycle of victimization. There is no reason to continue down that path. In the wake of the Civil War, the Framers of the Fourteenth Amendment charted a way out: a colorblind Constitution that requires the government to, at long last, put aside its citizens' skin color and focus on their individual achievements. . . .

* * *

The great failure of this country was slavery and its progeny. And, the tragic failure of this Court was its misinterpretation of the Reconstruction Amendments, as Justice Harlan predicted in *Plessy*. We should not repeat this mistake merely

because we think, as our predecessors thought, that the present arrangements are superior to the Constitution.

The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled. And, it sees the universities' admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes. Those policies fly in the face of our colorblind Constitution and our Nation's equality ideal. In short, they are plainly—and boldly—unconstitutional. See *Brown II*, 349 U.S. at 298 (noting that the *Brown* case one year earlier had "declare[d] the fundamental principle that racial discrimination in public education is unconstitutional").

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

■ JUSTICE GORSUCH, with whom Justice THOMAS joins, concurring.

For many students, an acceptance letter from Harvard or the University of North Carolina is a ticket to a brighter future. Tens of thousands of applicants compete for a small number of coveted spots. 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*, 590 U. S. ——, —— (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. . . .

II

. . . 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.

Put the two provisions side by side. Title VI says: "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." § 2000d. The Equal Protection Clause reads: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, § 1. That such differently worded provisions should mean the same thing is implausible on its face.

Consider just some of the obvious differences. The Equal Protection Clause operates on States. It does not purport to regulate the conduct of private parties. By contrast, Title VI applies to recipients of federal funds—covering not just many state actors, but many private actors too. In this way, Title VI reaches entities and organizations that the Equal Protection Clause does not.

In other respects, however, the relative scope of the two provisions is inverted. The Equal Protection Clause addresses all manner of distinctions between persons and this Court has held that it implies different degrees of judicial scrutiny for different kinds of classifications. So, for example, courts apply strict scrutiny for classifications based on race, color, and national origin; intermediate scrutiny for classifications based on sex; and rational-basis review for classifications based on more prosaic grounds. See, *e.g.*, *Fisher*, 579 U.S. at 376; *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493–495 (1989) (plurality opinion); *United States v. Virginia*, 518 U.S. 515, 555–556 (1996); *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–367 (2001). By contrast, Title VI targets only certain classifications—those based on race, color, or national origin. And that law does not direct courts to subject these classifications to one degree of scrutiny or another. Instead, as we have seen, its rule is as uncomplicated as it is momentous. Under Title VI, it is *always* unlawful to discriminate among persons even in part because of race, color, or national origin.

In truth, neither Justice Powell's nor Justice Brennan's opinion in *Bakke* focused on the text of Title VI. Instead, both leapt almost immediately to its "voluminous legislative history," from which they proceeded to divine an implicit "congressional intent" to link the statute with the Equal Protection Clause. 438 U.S. at 284–285 (opinion of Powell, J.); *id.,* at 328–336 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.). Along the way, as Justice Stevens documented, both opinions did more than a little cherry-picking from the legislative record. See *id.*, at 413–417. Justice Brennan went so far as to declare that "any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history." *Id.,* at 340. And once liberated from the statute's firm rule against discrimination based on race, both opinions proceeded to devise their own and very different arrangements in the name of the Equal Protection Clause.

The moves made in *Bakke* were not statutory interpretation. They were judicial improvisation. Under our Constitution, judges have never been entitled to disregard the plain terms of a valid congressional enactment based on surmise about unenacted legislative intentions. Instead, it has always been this Court's duty "to give effect, if possible, to every clause and word of a statute," *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883), and of the Constitution itself, see *Knowlton v. Moore*, 178 U.S. 41, 87 (1900). In this country, "[o]nly the written word is the law, and all persons are entitled to its benefit." *Bostock*, 590 U. S., at ——. When judges disregard these principles and enforce rules "inspired only by extratextual sources and [their] own

imaginations," they usurp a lawmaking function "reserved for the people's representatives." *Id.*, at ——. . . .

[The concurring opinion of Justice Kavanaugh is omitted.]

■ 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." *Id.*, at 492–495. 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

Equal educational opportunity is a prerequisite to achieving racial equality in our Nation. From its founding, the United States was a new experiment in a republican form of government where democratic participation and the capacity to engage in self-rule were vital. At the same time, American society was structured around the profitable institution that was slavery, which the original Constitution protected. . . . Thus, from this Nation's birth, the freedom to learn was neither colorblind nor equal.

With time, and at the tremendous cost of the Civil War, abolition came. More than two centuries after the first African enslaved persons were forcibly brought to our shores, Congress adopted the Thirteenth Amendment to the Constitution, which

* Justice JACKSON did not participate in the consideration or decision of the case in No. 20–1199 and joins this opinion only as it applies to the case in No. 21–707.

abolished "slavery" and "involuntary servitude, except as a punishment for crime." § 1. . . .

The fight for equal educational opportunity . . . was a key driver. . . . Black people's yearning for freedom of thought, and for a more perfect Union with educational opportunity for all, played a crucial role during the Reconstruction era.

Yet emancipation marked the beginning, not the end, of that era. Abolition alone could not repair centuries of racial subjugation. . . .

The Thirteenth Amendment, without more, failed to equalize society. . . .

Congress thus went further and . . . adopted the Fourteenth Amendment. Proponents of the Amendment declared that one of its key goals was to "protec[t] the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." Cong. Globe, 39th Cong., 1st Sess., 2766 (1866) (Cong. Globe) (statement of Sen. Howard). That is, the Amendment sought "to secure to a race recently emancipated, a race that through many generations [was] held in slavery, all the civil rights that the superior race enjoy." *Plessy v. Ferguson*, 163 U.S. 537, 555–556 (1896) (Harlan, J., dissenting) (internal quotation marks omitted).

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

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." *Id.*, at 97. . . .

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. See *id.*, at 474. 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." Act of Apr. 9, 1866, 14 Stat. 27. 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." *Ibid*. 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. . . .

B

The Reconstruction era marked a transformational point in the history of American democracy. . . .

It was not until half a century later, in *Brown*, that the Court honored the guarantee of equality in the Equal Protection Clause and Justice Harlan's vision of a Constitution that "neither knows nor tolerates classes among citizens." Plessy, 163 U.S. at 559-560 (Harlan, J., dissenting). Considering the "effect[s] of segregation" and the role of education "in the light of its full development and its present place in American life throughout the Nation," *Brown* overruled *Plessy*. 347 U.S. at 492–495. The *Brown* Court held that "[s]eparate educational facilities are inherently unequal," and that such racial segregation deprives Black students "of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.*, at 494–495 . The Court thus ordered segregated schools to transition to a racially integrated system of public education "with all deliberate speed," "ordering the immediate admission of [Black children] to schools previously attended only by white children." *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).

Brown was a race-conscious decision that emphasized the importance of education in our society. Central to the Court's holding was the recognition that, as Justice Harlan emphasized in *Plessy*, segregation perpetuates a caste system wherein Black children receive inferior educational opportunities "solely because of their race," denoting "inferiority as to their status in the community." 347 U.S. at 494, and n. 10. Moreover, because education is "the very foundation of good citizenship," segregation in public education harms "our democratic society" more broadly as well. *Id.*, at 493. In light of the harmful effects of entrenched racial subordination on racial minorities and American democracy, *Brown* recognized the constitutional necessity of a racially integrated system of schools where education is "available to all on equal terms." *Ibid*.

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

If there was a Member of this Court who understood the *Brown* litigation, it was Justice Thurgood Marshall, who "led the litigation campaign" to dismantle segregation as a civil rights lawyer and "rejected the hollow, race-ignorant conception of equal protection" endorsed by the Court's ruling today. Brief for NAACP Legal Defense and Educational Fund, Inc., et al. as *Amici Curiae* 9. Justice Marshall joined the *Bakke* plurality and "applaud[ed] the judgment of the Court that a university

may consider race in its admissions process." 438 U.S. at 400, 98 S.Ct. 2733. In fact, Justice Marshall's view was that *Bakke*'s holding should have been even more protective of race-conscious college admissions programs in light of the remedial purpose of the Fourteenth Amendment and the legacy of racial inequality in our society. See *id.*, at 396–402 (arguing that "a class-based remedy" should be constitutionally permissible in light of the hundreds of "years of class-based discrimination against [Black Americans]"). The Court's recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness. . .

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. . . .

III

The Court concludes that Harvard's and UNC's policies are unconstitutional because they serve objectives that are insufficiently measurable, employ racial categories that are imprecise and overbroad, rely on racial stereotypes and disadvantage nonminority groups, and do not have an end point. In reaching this conclusion, the Court claims those supposed issues with respondents' programs render the programs insufficiently "narrow" under the strict scrutiny framework that the Court's precedents command. In reality, however, "the Court today cuts through the kudzu" and overrules its "higher-education precedents" following *Bakke*. *Ante* (GORSUCH, J., concurring). . . .

The Court offers no justification, much less "a 'special justification,' " for its costly endeavor. *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ——, (2022) (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (quoting *Gamble* v. *United States*, 587 U. S. —— (2019)). Nor could it. There is no basis for overruling *Bakke*, *Grutter*, and *Fisher*. The Court's precedents were correctly decided, the opinion today is not workable and creates serious equal protection problems, important reliance interests favor respondents, and there are no legal or factual developments favoring the Court's reckless course. See 597 U. S., at —— (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting). At bottom, the six unelected members of today's majority upend the status quo based on their policy preferences about what race in America should be like, but is not, and

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

B

. . . The majority's true objection appears to be that a limited use of race in college admissions does, in fact, achieve what it is designed to achieve: It helps equalize opportunity and advances respondents' objectives by increasing the number of underrepresented racial minorities on college campuses, particularly Black and Latino students. . . . Reduced to its simplest terms, the Court's conclusion is that an increase in the representation of racial minorities at institutions of higher learning that were historically reserved for white Americans is an unfair and repugnant outcome that offends the Equal Protection Clause. It provides a license to discriminate against white Americans, the Court says, which requires the courts and state actors to "pic[k] the right races to benefit." *Ante*.

Nothing in the Fourteenth Amendment or its history supports the Court's shocking proposition, which echoes arguments made by opponents of Reconstruction-era laws and this Court's decision in *Brown*. In a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law, including at Harvard and UNC. Quite the opposite: A racially integrated vision of society, in which institutions reflect all sectors of the American public and where "the sons of former slaves and the sons of former slave owners [are] able to sit down together at the table of brotherhood," is precisely what the Equal Protection Clause commands. Martin Luther King "I Have a Dream" Speech (Aug. 28, 1963). It is "essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332.

By singling out race, the Court imposes a special burden on racial minorities for whom race is a crucial component of their identity. Holistic admissions require "truly individualized consideration" of the whole person. *Id.*, at 334. Yet, "by foreclosing racial considerations, colorblindness denies those who racially self-identify the full expression of their identity" and treats "racial identity as inferior" among all "other forms of social identity." E. Boddie, The Indignities of Colorblindness, 64 UCLA L. Rev. Discourse, 64, 67 (2016). The Court's approach thus turns the Fourteenth Amendment's equal protection guarantee on its head and creates an equal protection problem of its own. . . .

In a single paragraph at the end of its lengthy opinion, the Court suggests that "nothing" in today's opinion prohibits universities from considering a student's essay that explains "how race affected [that student's] life." *Ante*. This supposed recognition that universities can, in some situations, consider race in application essays is nothing but an attempt to put lipstick on a pig. The Court's opinion circumscribes universities' ability to consider race in any form by meticulously gutting respondents' asserted diversity interests. Yet, because the Court cannot

escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear attuned to reality. No one is fooled. . .

* * *

True equality of educational opportunity in racially diverse schools is an essential component of the fabric of our democratic society. It is an interest of the highest order and a foundational requirement for the promotion of equal protection under the law. *Brown* recognized that passive race neutrality was inadequate to achieve the constitutional guarantee of racial equality in a Nation where the effects of segregation persist. In a society where race continues to matter, there is no constitutional requirement that institutions attempting to remedy their legacies of racial exclusion must operate with a blindfold.

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

* Justice JACKSON did not participate in the consideration or decision of the case in No. 20–1199, and issues this opinion with respect to the case in No. 21–707.

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. See, *e.g.*, Tr. of Oral Arg. 19.

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

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

I

A

[*Justice Jackson recounted the legacy of slavery leading up to Jim Crow . . .* – Editors.]

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.[19] 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

19 T. Shanks, The Homestead Act: A Major Asset-Building Policy in American History, in Inclusion in the American Dream: Assets, Poverty, and Public Policy 23–25 (M. Sherraden ed. 2005) (Shanks). M. Baradaran, The Color of Money: Black Banks and the Racial Wealth Gap 18 (2017)

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."[29] Green meant safe; red meant risky. And, regardless of class, every neighborhood with Black people earned the red designation. . . .

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 Rather, it was always simply what Justice Harlan recognized 140 years ago—the persistent and pernicious denial of "what had already been done in every State of the Union for the white race." *Civil Rights Cases*, 109 U.S. at 61 (dissenting opinion).

B

History speaks. In some form, it can be heard forever. 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

29 R. Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 64 (2017) (Rothstein) . . .

40 I. Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 53 (2005) (Katznelson).

41 Katznelson 113-114 . . .

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] This disparity has also accelerated over time—from a roughly $40,000 gap between White and Black household median net worth in 1993 to a roughly $135,000 gap in 2019. Median income numbers from 2019 tell the same story: $76,057 for White households, $98,174 for Asian households, $56,113 for Latino households, and $45,438 for Black households.

These financial gaps are unsurprising in light of the link between home ownership and wealth. Today, as was true 50 years ago, Black home ownership trails White home ownership by approximately 25 percentage points. Moreover, Black Americans' homes (relative to White Americans') constitute a greater percentage of household wealth, yet tend to be worth less, are subject to higher effective property taxes, and generally lost more value in the Great Recession.

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. And because lower family income and wealth force students to borrow more, those Black students who do graduate college find themselves four years out with about $50,000 in student debt—nearly twice as much as their White compatriots.

As for postsecondary professional arenas, despite being about 13% of the population, Black people make up only about 5% of lawyers.56 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). Furthermore, as the COVID–19 pandemic raged, Black-owned small businesses failed at dramatically higher rates than White-owned small businesses, partly due to the disproportionate denial of the forgivable loans needed to survive the economic downturn.

Health gaps track financial ones. When tested, Black children have blood lead levels that are twice the rate of White children—"irreversible" contamination working irremediable harm on developing brains. Black (and Latino) children with heart conditions are more likely to die than their White counterparts. Race-linked mortality-rate disparity has also persisted, and is highest among infants.

So, too, for adults: Black men are twice as likely to die from prostate cancer as White men and have lower 5-year cancer survival rates. Uterine cancer has spiked in recent years among all women—but has spiked highest for Black women, who die of uterine cancer at nearly twice the rate of "any other racial or ethnic group." Black mothers are up to four times more likely than White mothers to die as a result of childbirth. And COVID killed Black Americans at higher rates than White Americans.

"Across the board, Black Americans experience the highest rates of obesity, hypertension, maternal mortality, infant mortality, stroke,

48 Baradaran 249 . . .

and asthma."[66] These and other disparities—the predictable result of opportunity disparities—lead to at least 50,000 excess deaths a year for Black Americans vis-à-vis White Americans. That is 80 million excess years of life lost from just 1999 through 2020. . . .

III-B

The overarching reason the majority gives for becoming an impediment to racial progress—that its own conception of the Fourteenth Amendment's Equal Protection Clause leaves it no other option—has a wholly self-referential, two-dimensional flatness. The majority and concurring opinions rehearse this Court's idealistic vision of racial equality, from *Brown* forward, with appropriate lament for past indiscretions. But the race-linked gaps that the law (aided by this Court) previously founded and fostered—which indisputably define our present reality—are strangely absent and do not seem to matter.

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.

The only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish.

* * *

As the Civil War neared its conclusion, General William T. Sherman and Secretary of War Edwin Stanton convened a meeting of Black leaders in Savannah, Georgia. During the meeting, someone asked Garrison Frazier, the group's spokesperson, what "freedom" meant to him. He answered, " 'placing us where we could reap the fruit of our own labor, and take care of ourselves ... to have land, and turn it and till it by our own labor.' "

Today's gaps exist because that freedom was denied far longer than it was ever afforded. Therefore, as Justice SOTOMAYOR correctly and amply explains,

66 L. Bollinger & G. Stone, A Legacy of Discrimination: The Essential Constitutionality of Affirmative Action 101 (2023).

UNC's holistic review program pursues a righteous end—legitimate " 'because it is defined by the Constitution itself. The end is the maintenance of freedom.' " *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443–444 (1968) (quoting Cong. Globe, 39th Cong., 1st Sess., 1118 (1866) (Rep. Wilson)).

Viewed from this perspective, beleaguered admissions programs such as UNC's are not pursuing a patently unfair, ends-justified ideal of a multiracial democracy at all. Instead, they are engaged in an earnest effort to secure a more functional one. The admissions rubrics they have constructed now recognize that an individual's "merit"—his ability to succeed in an institute of higher learning and ultimately contribute something to our society—cannot be fully determined without understanding that individual in full. There are no special favorites here.

UNC has thus built a review process that *more accurately* assesses merit than most of the admissions programs that have existed since this country's founding. Moreover, in so doing, universities like UNC create pathways to upward mobility for long excluded and historically disempowered racial groups. Our Nation's history more than justifies this course of action. And our present reality indisputably establishes that such programs are still needed—for the general public good—because after centuries of state-sanctioned (and enacted) race discrimination, the aforementioned intergenerational race-based gaps in health, wealth, and well-being stubbornly persist.

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. Also, by latching onto arbitrary timelines and professing insecurity about missing metrics, the Court sidesteps unrefuted proof of the compelling benefits of holistic admissions programs that factor in race (hard to do, for there is plenty), simply proceeding as if no such evidence exists. Then, ultimately, the Court surges to vindicate equality, but Don Quixote style—pitifully perceiving itself as the sole vanguard of legal high ground when, in reality, its perspective is not constitutionally compelled and will hamper the best judgments of our world-class educational institutions about who they need to bring onto their campuses right now to benefit every American, no matter their race.

The Court has come to rest on the bottom-line conclusion that racial diversity in higher education is only worth potentially preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the

bunker, not the boardroom (a particularly awkward place to land, in light of the history the majority opts to ignore). It would be deeply unfortunate if the Equal Protection Clause actually demanded this perverse, ahistorical, and counterproductive outcome. To impose this result in that Clause's name when it requires no such thing, and to thereby obstruct our collective progress toward the full realization of the Clause's promise, is truly a tragedy for us all.

NOTES

1. Consider the constitutional arguments in these opinions.

   a. *Text*. Is there a strong textual basis for the majority opinion? Is the phrase "equal protection" sufficiently clear to resolve this issue? Not only does the text say nothing about colorblindness or affirmative action, but it says nothing about race at all. For that matter this case is not really about "protection" either. Does that matter?

   b. *Historical Context*. Who has the more persuasive account of the historical context of the Fourteenth Amendment: Justice Thomas, or Justice Sotomayor? First consider their specific disputes about the Freedmen's Bureau, or especially about the Civil Rights Act of 1866, which was central to Section One of the Fourteenth Amendment. The Civil Rights Act of 1866 (p. 1369) said that:

   > citizens, of every race and color . . . shall have the same right . . . 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.

   Does the Act require colorblindness, because it gives "the same right" to citizens of all races? Or does it permit special rights for racial minorities, because it uses the rights of "white citizens" as the basline?

   Alternatively, consider the broader intellectual framework of the Republicans who wrote and proposed the Amendment. They believed that citizens should be judged by the content of their character and not the color of their skin. (This framework also explains Section Two and Section Three of the Amendment, see generally Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 Yale L. J. 1584 (2012).) Doesn't that support the colorblindness approach of the majority? But they also believed that the Fourteenth Amendment was supposed to destroy the basic idea of "caste legislation," of which race discrimination and the Black Codes were a primary example. Does that support the anti-subordination approach of the dissent?

   c. *Structure*. Does the structure of the Constitution shed any light here? Is it relevant that the Civil Rights Act of 1866 and the Freedmen's Bureau were *federal* legislation, while the admissions practices here occur at the *state* level? Is it possible that there is more government power to use race at the federal level than at the state level, and that this would be sensible for the reasons given by James Madison in Federalist No. 10)? Or is that "unthinkable," as *Bolling v. Sharpe*, p. 1482, put it?

d. *Precedent and Practice*. There are obviously cases and elements of practice supporting both sides of this case. But as a matter of doctrine, what has the majority opinion done to *Bakke*, *Grutter*, and *Fisher*? Are those cases overruled? If so, why doesn't the majority say so? But if not, how can they be reconciled? How are lower courts—and for that matter college admissions officers—supposed to treat *Bakke*, *Grutter*, and *Fisher*?

e. *Consequences.* The consequences of this decision for colleges and universities and their students are of course significant. But what about for society more generally? According to the briefs the Court received, 3/5 of American universities already did not consider race in admissions (partly because many universities are not very selective, and the vast majority of college students go to schools that accept most of those who apply). Does that suggest that this is more of an "elite" issue? Does that mean it is not so important?

One consequentialist argument made by opponents of affirmative action is that it harms the racial minorities it purports to benefit, either by stigmatizing them as unable to succeed on a level playing field, or by sending them to institutions where they are in fact not prepared to thrive. What is the best response to these arguments by defenders of affirmative action? Is it that it does not matter if these things are true? (Why not?) Or is it that these things are simply not true, as an empirical matter? (How do we know?)

2. Practically speaking, what happens next? May colleges still give applicants the option of checking a box that indicates their race? What lawful purpose could that serve? But if not, will the Court's concession about race-based admissions essays effectively lead to the same thing? Why not?

Beyond that, here is the million-dollar question: What happens if a university adopts or changes its admissions policies in a facially neutral way, but has a race-based motivation? For instance, a university might stop using a standardized test that seems to disfavor racial minorities, or adopt something like Texas's "Top 10% plan" that admits the top students from every high school, believing it will indirectly produce racial diversity. If a plaintiff can prove that race was a motivating factor for the change, does that make it unconstitutional? On one hand, if one really believes that discrimination against white people and discrimination against non-white people are constitutionally indistinguishable, then such motivations seem constitutionally suspects. On the other hand, few opponents of affirmative action have wished to take on facially neutral programs such as the Top 10% plan. Is there a principled argument distinguishing race-motivated-but-facially-neutral policies from affirmative action programs? There is likely to be more litigation on these questions, and soon. See Sonja B. Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76 Stan. L. Rev. (forthcoming 2024).

3. Is Justice Gorsuch right that it would have been easier to resolve these cases on statutory grounds? What is the best justification for not doing so?