Sylvia BURWELL, Secretary of Health and Human Services, et al., Petitioners

v.

HOBBY LOBBY STORES, INC., et al.

Conestoga Wood Specialties Corporation et al., Petitioners

v.

Sylvia Burwell, Secretary of Health and Human Services, et al.

Nos. 13–354, 13–356.

Argued March 25, 2014.

Decided June 30, 2014.

Background: In first case, for-profit closely held corporations, and individuals who owned or controlled the corporations, brought action against Secretary of Health and Human Services (HHS) and other government officials and agencies, seeking declaratory and injunctive relief regarding regulations issued under Patient Protection and Affordable Care Act (ACA), based on allegations that the preventive services coverage mandate for employers violated constitutional and statutory protections of religious freedom by forcing them to provide health insurance coverage for abortion-inducing drugs and devices, as well as related education and counseling. The United States District Court for the Western District of Oklahoma, Joe Heaton, J., 870 F.Supp.2d 1278, denied plaintiffs' motion for preliminary injunction. Plaintiffs appealed. The United States Court of Appeals for the Tenth Circuit, en banc, Tymkovich, Circuit Judge, 723 F.3d 1114, reversed and remanded. In second case, for-profit closely held corporation and its shareholders brought similar claims for declaratory and injunctive relief against federal officials and agencies. The United States District Court for the Eastern District of Pennsylvania, Mitchell S. Goldberg, J., 917 F.Supp.2d 394, denied plaintiffs' motion for preliminary injunction. Plaintiffs appealed. After denial of stay pending appeal, 2013 WL 1277419, the United States Court of Appeals for the Third Circuit, Cowen, Circuit Judge, 724 F.3d 377, affirmed. Certiorari was granted in each case and cases were consolidated.

Holdings: The Supreme Court, Justice Alito, held that:

(1) "person," within meaning of RFRA's protection of a person's exercise of religion, includes for-profit corporations, abrogating *Autocam Corp. v. Sebelius*, 730 F.3d 618;

(2) the HHS contraceptives mandate, as applied to for-profit closely held corporations, substantially burdened the exercise of religion, for purposes of RFRA; and

(3) the HHS contraceptives mandate did not satisfy RFRA's least-restrictive-means requirement.

Affirmed in first case; reversed and remanded in second case.

Justice Kennedy filed a concurring opinion.

Justice Ginsburg filed a dissenting opinion, which Justice Sotomayor joined, and Justices Breyer and Kagan joined except for one part.

Justices Breyer and Kagan filed a dissenting opinion.

1. Civil Rights ⚿1032

By enacting RFRA, which includes a least-restrictive means test, Congress did more than merely restore the balancing test used in the *Sherbert* line of Free Exercise Clause cases; it provided even broader protection for religious liberty than was available under those decisions. U.S.C.A. Const.Amend. 1; Religious Free-

dom Restoration Act of 1993, § 3(b), 42 U.S.C.A. § 2000bb–1(b).

2. Civil Rights ⚿1032, 1362

As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work. Religious Freedom Restoration Act of 1993, § 2 et seq., 42 U.S.C.A. § 2000bb et seq.

3. Civil Rights ⚿1032

"Exercise of religion," under RFRA, must be given the same broad meaning that applies under RLUIPA. Religious Freedom Restoration Act of 1993, § 5(4), 42 U.S.C.A. § 2000bb–2(4); Religious Land Use and Institutionalized Persons Act of 2000, §§ 5(g), 8(7)(A), 42 U.S.C.A. §§ 2000cc–3(g), 2000cc–5(7)(A).

4. Corporations and Business Organizations ⚿1007

When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of people, including shareholders, officers, and employees, who are associated with a corporation in one way or another.

5. Civil Rights ⚿1331(6)

"Person," within meaning of RFRA's protection of a person's exercise of religion, includes for-profit corporations; abrogating *Autocam Corp. v. Sebelius,* 730 F.3d 618. Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb–1(a, b).

See publication Words and Phrases for other judicial constructions and definitions.

6. Civil Rights ⚿1032

Constitutional Law ⚿1303

The "exercise of religion," for purposes of the Free Exercise Clause and RFRA, involves not only belief and profession, but the performance of, or abstention from, physical acts that are engaged in for religious reasons. U.S.C.A. Const.Amend. 1; Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb–1(a, b).

See publication Words and Phrases for other judicial constructions and definitions.

7. Civil Rights ⚿1041

A law that operates so as to make the practice of religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion, for purposes of RFRA. Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb–1(a, b).

8. Corporations and Business Organizations ⚿2253

Modern corporate law allows for-profit corporations to perpetuate religious values.

9. Statutes ⚿1202

When Congress wants to link the meaning of a statutory provision to a body of the Supreme Court's case law, it knows how to do so.

10. Civil Rights ⚿1010, 1041

To qualify for RFRA's protection, an asserted religious belief must be sincere, and a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail. Religious Freedom Restoration Act of 1993, § 2 et seq., 42 U.S.C.A. § 2000bb et seq.

11. Insurance ⚿2489(1, 4)

Labor and Employment ⚿408

Department of Health and Human Services' (HHS) contraceptives mandate, implementing Patient Protection and Affordable Care Act's (ACA) general requirement that an employer's group health insurance provide coverage for preventive care and screenings for women without

any cost sharing requirements, substantially burdened the exercise of religion, for purposes of RFRA, to extent that for-profit closely held corporations were required to provide their employees with insurance coverage for four contraceptive methods that violated the sincerely held religious beliefs of corporations' owners; owners believed that their compliance with the HHS contraceptives mandate would facilitate abortions, while non-compliance would expose them to substantial economic consequences. Patient Protection and Affordable Care Act, § 1001(a)(5), 42 U.S.C.A. § 300gg–13(a)(4); Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb–1(a, b); 45 C.F.R. § 147.130(a)(1)(iv).

12. Federal Courts ⚿3181

Supreme Court does not generally entertain arguments that were not raised below and are not advanced in the Supreme Court by any party.

13. Amicus Curiae ⚿3
Federal Courts ⚿3181

Supreme Court would not entertain argument by amici supporting Department of Health and Human Services (HHS), which was not raised below and was not advanced in the Supreme Court by HHS, that per-employee penalty under Patient Protection and Affordable Care Act (ACA), for failing to comply with HHS mandate to provide employees with group health insurance coverage for contraceptives, would be less than the average cost of providing health insurance, so that corporations could readily eliminate any substantial burden on exercise of religion by forcing their employees to obtain insurance in government exchanges; Court did not even know what government's position might be with respect to amici's intensely empirical argument, and corporations and their owners had never had an opportunity to respond to this novel claim. Patient Protection and Affordable Care Act, § 1001(a)(4), 42 U.S.C.A. § 300gg–13(a)(4); Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb–1(a, b).

14. Civil Rights ⚿1010

Courts have no business addressing whether sincerely held religious beliefs asserted in a RFRA case are reasonable. Religious Freedom Restoration Act of 1993, § 2 et seq., 42 U.S.C.A. § 2000bb et seq.

15. Civil Rights ⚿1032

In RFRA cases, when determining whether a substantial burden on the exercise of religion is in furtherance of a compelling governmental interest, the court must look beyond broadly formulated interests and scrutinize the asserted harm of granting specific exemptions to particular religious claimants. Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb–1(a, b).

16. Abortion and Birth Control ⚿133

Women and men have a constitutional right to obtain contraceptives.

17. Civil Rights ⚿1032

RFRA's least-restrictive-means standard, for substantial burdens on the exercise of religion, is exceptionally demanding. Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb–1(a, b).

18. Insurance ⚿2489(1)
Labor and Employment ⚿408

Assuming that Department of Health and Human Services' (HHS) contraceptives mandate, that employers provide group health insurance coverage for contraceptives without cost sharing, furthered a compelling governmental interest, the HHS mandate was not the least restrictive means of furthering that interest, for pur-

poses of RFRA; government could simply assume the cost of providing the contraceptives to any women unable to obtain them under their health insurance coverage, or could adopt an approach similar to the accommodation given to nonprofit organizations with religious objections to contraceptives. Religious Freedom Restoration Act of 1993, § 3(b), 42 U.S.C.A. § 2000bb–1(b); 45 C.F.R. § 147.130(a)(1)(iv).

19. Civil Rights ⇨1032

In applying RFRA, courts must take adequate account of the burdens a requested accommodation of religious beliefs may impose on nonbeneficiaries, and that consideration will often inform the analysis of the government's compelling interest and the availability of a less restrictive means of advancing that interest, but it cannot reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties. Religious Freedom Restoration Act of 1993, § 3(a, b), 42 U.S.C.A. § 2000bb–1(a, b).

West Codenotes

Held Invalid

26 C.F.R. § 54.9815–2713(a)(1)(iv); 29 C.F.R. § 2590.715–2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv)

Prior Version Recognized as Unconstitutional

42 U.S.C.A. § 2000bb-2

Syllabus *

The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A).

At issue here are regulations promulgated by the Department of Health and Human Services (HHS) under the Patient Protection and Affordable Care Act of 2010(ACA), which, as relevant here, requires specified employers' group health plans to furnish "preventive care and screenings" for women without "any cost sharing requirements," 42 U.S.C. § 300gg–13(a)(4). Congress did not specify what types of preventive care must be covered; it authorized the Health Resources and Services Administration, a component of HHS, to decide. *Ibid.* Nonexempt employers are generally required to provide coverage for the 20 contraceptive methods approved by the Food and Drug Administration, including the 4 that may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus. Religious employers, such as churches, are exempt from this contraceptive mandate. HHS has also effectively exempted reli-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

gious nonprofit organizations with religious objections to providing coverage for contraceptive services. Under this accommodation, the insurance issuer must exclude contraceptive coverage from the employer's plan and provide plan participants with separate payments for contraceptive services without imposing any cost-sharing requirements on the employer, its insurance plan, or its employee beneficiaries.

In these cases, the owners of three closely held for-profit corporations have sincere Christian beliefs that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. In separate actions, they sued HHS and other federal officials and agencies (collectively HHS) under RFRA and the Free Exercise Clause, seeking to enjoin application of the contraceptive mandate insofar as it requires them to provide health coverage for the four objectionable contraceptives. In No. 13–356, the District Court denied the Hahns and their company—Conestoga Wood Specialties—a preliminary injunction. Affirming, the Third Circuit held that a for-profit corporation could not "engage in religious exercise" under RFRA or the First Amendment, and that the mandate imposed no requirements on the Hahns in their personal capacity. In No. 13–354, the Greens, their children, and their companies—Hobby Lobby Stores and Mardel—were also denied a preliminary injunction, but the Tenth Circuit reversed. It held that the Greens' businesses are "persons" under RFRA, and that the corporations had established a likelihood of success on their RFRA claim because the contraceptive mandate substantially burdened their exercise of religion and HHS had not demonstrated a compelling interest in enforcing the mandate against them; in the alternative, the court held that HHS had not proved that the mandate was the "least restrictive means" of furthering a compelling governmental interest.

Held: As applied to closely held corporations, the HHS regulations imposing the contraceptive mandate violate RFRA. Pp. 2761 – 2785.

(a) RFRA applies to regulations that govern the activities of closely held for-profit corporations like Conestoga, Hobby Lobby, and Mardel. Pp. 2761 – 2775.

(1) HHS argues that the companies cannot sue because they are for-profit corporations, and that the owners cannot sue because the regulations apply only to the companies, but that would leave merchants with a difficult choice: give up the right to seek judicial protection of their religious liberty or forgo the benefits of operating as corporations. RFRA's text shows that Congress designed the statute to provide very broad protection for religious liberty and did not intend to put merchants to such a choice. It employed the familiar legal fiction of including corporations within RFRA's definition of "persons," but the purpose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees. Protecting the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and control them. Pp. 2761 – 2768.

(2) HHS and the dissent make several unpersuasive arguments. Pp. 2768 – 2775.

(i) Nothing in RFRA suggests a congressional intent to depart from the Dictionary Act definition of "person," which "include[s] corporations, . . . as well as individuals." 1 U.S.C. § 1. The Court has entertained RFRA and free-exercise claims brought by nonprofit corporations. See, *e.g.*, *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017.

And HHS's concession that a nonprofit corporation can be a "person" under RFRA effectively dispatches any argument that the term does not reach for-profit corporations; no conceivable definition of "person" includes natural persons and nonprofit corporations, but not for-profit corporations. Pp. 2768 – 2769.

(ii) HHS and the dissent nonetheless argue that RFRA does not cover Conestoga, Hobby Lobby, and Mardel because they cannot "exercise . . . religion." They offer no persuasive explanation for this conclusion. The corporate form alone cannot explain it because RFRA indisputably protects nonprofit corporations. And the profit-making objective of the corporations cannot explain it because the Court has entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants. *Braunfeld v. Brown,* 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563. Business practices compelled or limited by the tenets of a religious doctrine fall comfortably within the understanding of the "exercise of religion" that this Court set out in *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876. Any suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money flies in the face of modern corporate law. States, including those in which the plaintiff corporations were incorporated, authorize corporations to pursue any lawful purpose or business, including the pursuit of profit in conformity with the owners' religious principles. Pp. 2769 – 2772.

(iii) Also flawed is the claim that RFRA offers no protection because it only codified pre-*Smith* Free Exercise Clause precedents, none of which squarely recognized free-exercise rights for for-profit corporations. First, nothing in RFRA as originally enacted suggested that its definition of "exercise of religion" was meant to be tied to pre-*Smith* interpretations of the First Amendment. Second, if RFRA's original text were not clear enough, the RLUIPA amendment surely dispels any doubt that Congress intended to separate the definition of the phrase from that in First Amendment case law. Third, the pre-*Smith* case of *Gallagher v. Crown Kosher Super Market of Mass., Inc.,* 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536, suggests, if anything, that for-profit corporations can exercise religion. Finally, the results would be absurd if RFRA, a law enacted to provide very broad protection for religious liberty, merely restored this Court's pre-*Smith* decisions in ossified form and restricted RFRA claims to plaintiffs who fell within a category of plaintiffs whose claims the Court had recognized before *Smith.* Pp. 2772 – 2774.

(3) Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because of the difficulty of ascertaining the "beliefs" of large, publicly traded corporations, but HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. HHS has also provided no evidence that the purported problem of determining the sincerity of an asserted religious belief moved Congress to exclude for-profit corporations from RFRA's protection. That disputes among the owners of corporations might arise is not a problem unique to this context. State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. Courts will turn to that structure and the underlying state law in resolving disputes. Pp. 2774 – 2775.

(b) HHS's contraceptive mandate substantially burdens the exercise of religion. Pp. 2775 – 2779.

(1) It requires the Hahns and Greens to engage in conduct that seriously violates their sincere religious belief that life begins at conception. If they and their companies refuse to provide contraceptive coverage, they face severe economic consequences: about $475 million per year for Hobby Lobby, $33 million per year for Conestoga, and $15 million per year for Mardel. And if they drop coverage altogether, they could face penalties of roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel. Pp. 2775 – 2776.

(2) *Amici* supporting HHS argue that the $2,000 per-employee penalty is less than the average cost of providing insurance, and therefore that dropping insurance coverage eliminates any substantial burden imposed by the mandate. HHS has never argued this and the Court does not know its position with respect to the argument. But even if the Court reached the argument, it would find it unpersuasive: It ignores the fact that the plaintiffs have religious reasons for providing health-insurance coverage for their employees, and it is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty. Pp. 2776 – 2777.

(3) HHS argues that the connection between what the objecting parties must do and the end that they find to be morally wrong is too attenuated because it is the employee who will choose the coverage and contraceptive method she uses. But RFRA's question is whether the mandate imposes a substantial burden on the objecting parties' ability to conduct business in accordance with *their religious beliefs*. The belief of the Hahns and Greens implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is immoral for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable. In fact, this Court considered and rejected a nearly identical argument in *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624. The Court's "narrow function . . . is to determine" whether the plaintiffs' asserted religious belief reflects "an honest conviction," *id.*, at 716, 101 S.Ct. 1425, and there is no dispute here that it does. *Tilton v. Richardson*, 403 U.S. 672, 689, 91 S.Ct. 2091, 29 L.Ed.2d 790; and *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 248–249, 88 S.Ct. 1923, 20 L.Ed.2d 1060, distinguished. Pp. 2777 – 2779.

(c) The Court assumes that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is a compelling governmental interest, but the Government has failed to show that the contraceptive mandate is the least restrictive means of furthering that interest. Pp. 2779 – 2785.

(1) The Court assumes that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA. Pp. 2779 – 2780.

(2) The Government has failed to satisfy RFRA's least-restrictive-means standard. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion. The Government could, *e.g.*, assume the cost of providing the four contraceptives to women unable to obtain coverage due to their

employers' religious objections. Or it could extend the accommodation that HHS has already established for religious nonprofit organizations to non-profit employers with religious objections to the contraceptive mandate. That accommodation does not impinge on the plaintiffs' religious beliefs that providing insurance coverage for the contraceptives at issue here violates their religion and it still serves HHS's stated interests. Pp. 2780 – 2783.

(3) This decision concerns only the contraceptive mandate and should not be understood to hold that all insurance-coverage mandates, *e.g.,* for vaccinations or blood transfusions, must necessarily fall if they conflict with an employer's religious beliefs. Nor does it provide a shield for employers who might cloak illegal discrimination as a religious practice. *United States v. Lee,* 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127, which upheld the payment of Social Security taxes despite an employer's religious objection, is not analogous. It turned primarily on the special problems associated with a national system of taxation; and if *Lee* were a RFRA case, the fundamental point would still be that there is no less restrictive alternative to the categorical requirement to pay taxes. Here, there is an alternative to the contraceptive mandate. Pp. 2783 – 2785.

No. 13–354, 723 F.3d 1114, affirmed; No. 13–356, 724 F.3d 377, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which BREYER and KAGAN, JJ., joined as to all but Part III–C–1. BREYER AND KAGAN, JJ., filed a dissenting opinion.

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For U.S. Supreme Court briefs, see:

2014 WL 985095 (Reply.Brief)

2014 WL 546899 (Resp.Brief)

2014 WL 173486 (Pet.Brief)

2014 WL 975500 (Reply.Brief)

2014 WL 546900 (Resp.Brief)

Justice ALITO delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the

HHS contraceptive mandate against the objecting parties in these cases is unlawful.

As this description of our reasoning shows, our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs." *Post*, at 2787 (opinion of GINSBURG, J.). Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose "disadvantages ... on others" or that require "the general public [to] pick up the tab." *Post*, at 2787. And we certainly do not hold or suggest that "RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on ... thousands of women employed by Hobby Lobby." *Post*, at 2787.[1] The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.

I

A

Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In determining whether challenged government actions violated the Free Exercise Clause of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. Applying this test, the Court held in *Sherbert* that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits. 374 U.S., at 408–409, 83 S.Ct. 1790. And in *Yoder*, the Court held that Amish children could not be required to comply with a state law demanding that they remain in school until the age of 16 even though their religion required them to focus on uniquely Amish values and beliefs during their formative adolescent years. 406 U.S., at 210–211, 234–236, 92 S.Ct. 1526.

In *Smith*, however, the Court rejected "the balancing test set forth in *Sherbert*." 494 U.S., at 883, 110 S.Ct. 1595. *Smith* concerned two members of the Native American Church who were fired for ingesting peyote for sacramental purposes. When they sought unemployment benefits, the State of Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the *Sherbert* test, held that the denial of benefits violated the Free Exercise Clause. 494 U.S., at 875, 110 S.Ct. 1595.

This Court then reversed, observing that use of the *Sherbert* test whenever a person objected on religious grounds to the enforcement of a generally applicable law "would open the prospect of constitu-

1. See also *post,* at 2790 ("The exemption sought by Hobby Lobby and Conestoga ... would deny [their employees] access to contraceptive coverage that the ACA would otherwise secure")

tionally required religious exemptions from civic obligations of almost every conceivable kind." 494 U.S., at 888, 110 S.Ct. 1595. The Court therefore held that, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne v. Flores,* 521 U.S. 507, 514, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

[1] Congress responded to *Smith* by enacting RFRA. "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2); see also § 2000bb(a)(4). In order to ensure broad protection for religious liberty, RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." § 2000bb–1(a).[2] If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb–1(b).[3]

[2] As enacted in 1993, RFRA applied to both the Federal Government and the States, but the constitutional authority invoked for regulating federal and state agencies differed. As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work,[4] but in attempting to regulate the States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment. 521 U.S., at 516–517, 117 S.Ct. 2157. In *City of Boerne,* however, we held that Congress had overstepped its Section 5 authority because "[t]he stringent test RFRA demands" "far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." *Id.,* at 533–534, 117 S.Ct. 2157. See also *id.,* at 532, 117 S.Ct. 2157.

[3] Following our decision in *City of Boerne,* Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.* That statute, enacted under Congress's Commerce and Spending Clause powers, imposes the same general test as RFRA but on a more limited category of governmental actions. See *Cutter v. Wilkinson,* 544 U.S. 709, 715–716, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). And, what is most relevant for present purposes, RLUIPA amended RFRA's definition of the "exercise of religion." See § 2000bb–2(4) (importing RLUIPA definition). Before RLUIPA, RFRA's definition made reference to the First Amendment. See § 2000bb–2(4) (1994 ed.) (defining "exercise of religion" as "the exercise of religion under the First Amendment"). In RLUIPA, in an obvious

2. The Act defines "government" to include any "department" or "agency" of the United States. § 2000bb–2(1).

3. In *City of Boerne v. Flores,* 521 U.S., 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), we wrote that RFRA's "least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify." *Id.,* at 509, 117 S.Ct. 2157. On this understanding of our pre-*Smith* cases, RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions.

4. See, *e.g., Hankins v. Lyght,* 441 F.3d 96, 108 (C.A.2 2006); *Guam v. Guerrero,* 290 F.3d 1210, 1220 (C.A.9 2002).

effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A). And Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc–3(g).[5]

B

At issue in these cases are HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010(ACA), 124 Stat. 119. ACA generally requires employers with 50 or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage." 26 U.S.C. § 5000A(f)(2); §§ 4980H(a), (c)(2). Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to comply with ACA's group-health-plan requirements, the employer may be required to pay $100 per day for each affected "individual." §§ 4980D(a)-(b). And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per year for each of its full-time employees. §§ 4980H(a), (c)(1).

Unless an exception applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish "preventive care and screenings" for women without "any cost sharing requirements." 42 U.S.C. § 300gg–13(a)(4). Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision. *Ibid.* The HRSA in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require. See 77 Fed.Reg. 8725–8726 (2012).

In August 2011, based on the Institute's recommendations, the HRSA promulgated the Women's Preventive Services Guidelines. See *id.,* at 8725–8726, and n. 1; online at http://hrsa.gov/womensguidelines (all Internet materials as visited June 26, 2014, and available in Clerk of Court's case file). The Guidelines provide that nonexempt employers are generally required to provide "coverage, without cost sharing" for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling." 77 Fed.Reg. 8725 (internal quotation marks omitted). Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from

5. The principal dissent appears to contend that this rule of construction should apply only when defining the "exercise of religion" in an RLUIPA case, but not in a RFRA case. See *post,* at 2792, n. 10. That argument is plainly wrong. Under this rule of construction, the phrase "exercise of religion," as it appears in RLUIPA, must be interpreted broadly, and RFRA states that the same phrase, as used in RFRA, means "religious exercis[e] as defined in [RLUIPA]." 42 U.S.C. § 2000bb–2(4). It necessarily follows that the "exercise of religion" under RFRA must be given the same broad meaning that applies under RLUIPA.

developing any further by inhibiting its attachment to the uterus. See Brief for HHS in No. 13–354, pp. 9–10, n. 4; [6] FDA, Birth Control: Medicines to Help You.[7]

HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for "religious employers." 45 CFR § 147.131(a). That category encompasses "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." See *ibid* (citing 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii)). In its Guidelines, HRSA exempted these organizations from the requirement to cover contraceptive services. See http://hrsa.gov/womensguidelines.

In addition, HHS has effectively exempted certain religious nonprofit organizations, described under HHS regulations as "eligible organizations," from the contraceptive mandate. See 45 CFR § 147.131(b); 78 Fed.Reg. 39874 (2013). An "eligible organization" means a nonprofit organization that "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections." 45 CFR § 147.131(b). To qualify for this accommodation, an employer must certify that it is such an organization. § 147.131(b)(4). When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. § 147.131(c).[8] Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services. 78 Fed.Reg. 39877.[9]

In addition to these exemptions for religious organizations, ACA exempts a great

6. We will use "Brief for HHS" to refer to the Brief for Petitioners in No. 13–354 and the Brief for Respondents in No. 13–356. The federal parties are the Departments of HHS, Treasury, and Labor, and the Secretaries of those Departments.

7. Online at http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm. The owners of the companies involved in these cases and others who believe that life begins at conception regard these four methods as causing abortions, but federal regulations, which define pregnancy as beginning at implantation, see, *e.g.*, 62 Fed.Reg. 8611 (1997); 45 CFR § 46.202(f) (2013), do not so classify them.

8. In the case of self-insured religious organizations entitled to the accommodation, the third-party administrator of the organization must "provide or arrange payments for contraceptive services" for the organization's employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. 78 Fed.Reg. 39893 (to be codified in 26 CFR § 54.9815–2713A(b)(2)). The regulations establish a mechanism for these third-party administrators to be compensated for their expenses by obtaining a reduction in the fee paid by insurers to participate in the federally facilitated exchanges. See 78 Fed.Reg. 39893 (to be codified in 26 CFR § 54.9815–2713A(b)(3)). HHS believes that these fee reductions will not materially affect funding of the exchanges because "payments for contraceptive services will represent only a small portion of total [exchange] user fees." 78 Fed. Reg. 39882.

9. In a separate challenge to this framework for religious nonprofit organizations, the Court recently ordered that, pending appeal, the eligible organizations be permitted to opt out of the contraceptive mandate by providing written notification of their objections to the Secretary of HHS, rather than to their insurance issuers or third-party administrators. See *Little Sisters of the Poor v. Sebelius*, 571

many employers from most of its coverage requirements. Employers providing "grandfathered health plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act's requirements, including the contraceptive mandate. 42 U.S.C. §§ 18011(a), (e). And employers with fewer than 50 employees are not required to provide health insurance at all. 26 U.S.C. § 4980H(c)(2).

All told, the contraceptive mandate "presently does not apply to tens of millions of people." 723 F.3d 1114, 1143 (C.A.10 2013). This is attributable, in large part, to grandfathered health plans: Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. Brief for HHS in No. 13–354, at 53; Kaiser Family Foundation & Health Research & Educational Trust, Employer Health Benefits, 2013 Annual Survey 43, 221.[10] The count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers. See The Whitehouse, Health Reform for Small Businesses: The Affordable Care Act Increases Choice and Saving Money for Small Businesses 1.[11]

II

A

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that "[t]he fetus in its earliest stages ... shares humanity with those who conceived it." [12]

Fifty years ago, Norman Hahn started a wood-working business in his garage, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees. Conestoga is organized under Pennsylvania law as a for-profit corporation. The Hahns exercise sole ownership of the closely held business; they control its board of directors and hold all of its voting shares. One of the Hahn sons serves as the president and CEO.

The Hahns believe that they are required to run their business "in accordance with their religious beliefs and moral principles." 917 F.Supp.2d 394, 402 (E.D.Pa. 2013). To that end, the company's mission, as they see it, is to "operate in a professional environment founded upon the highest ethical, moral, and Christian principles." *Ibid.* (internal quotation marks omitted). The company's "Vision and Values Statements" affirms that Conestoga endeavors to "ensur[e] a reasonable profit in [a] manner that reflects [the Hahns'] Christian heritage." App. in No. 13–356, p. 94 (complaint).

As explained in Conestoga's board-adopted "Statement on the Sanctity of Human Life," the Hahns believe that "human life begins at conception." 724 F.3d 377,

U.S. ——, 134 S.Ct. 1022, 187 L.Ed.2d 867 (2014).

10. While the Government predicts that this number will decline over time, the total number of Americans working for employers to whom the contraceptive mandate does not apply is still substantial, and there is no legal requirement that grandfathered plans ever be phased out.

11. Online at http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf.

12. Mennonite Church USA, Statement on Abortion, online at http://www.mennoniteusa.org/resource-center/resources/statements-and-resolutions/statement-on-abortion/.

382, and n. 5 (C.A.3 2013) (internal quotation marks omitted). It is therefore "against [their] moral conviction to be involved in the termination of human life" after conception, which they believe is a "sin against God to which they are held accountable." *Ibid.* (internal quotation marks omitted). The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients. *Id.,* at 382.

The Hahns and Conestoga sued HHS and other federal officials and agencies under RFRA and the Free Exercise Clause of the First Amendment, seeking to enjoin application of ACA's contraceptive mandate insofar as it requires them to provide health-insurance coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg.[13] These include two forms of emergency contraception commonly called "morning after" pills and two types of intrauterine devices.[14]

In opposing the requirement to provide coverage for the contraceptives to which they object, the Hahns argued that "it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs." *Ibid.* The District Court denied a preliminary injunction, see 917 F.Supp.2d, at 419, and the Third Circuit affirmed in a divided opinion, holding that "for-profit, secular corporations cannot engage in religious exercise" within the meaning of RFRA or the First Amendment. 724 F.3d, at 381. The Third Circuit also rejected the claims brought by the Hahns themselves because it concluded that the HHS "[m]andate does not impose any requirements on the Hahns" in their personal capacity. *Id.,* at 389.

B

David and Barbara Green and their three children are Christians who own and operate two family businesses. Forty-five years ago, David Green started an arts-and-crafts store that has grown into a nationwide chain called Hobby Lobby. There are now 500 Hobby Lobby stores, and the company has more than 13,000 employees. 723 F.3d, at 1122. Hobby Lobby is organized as a for-profit corporation under Oklahoma law.

One of David's sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people. *Ibid.* Mardel is also organized as a for-profit corporation under Oklahoma law.

Though these two businesses have expanded over the years, they remain closely held, and David, Barbara, and their children retain exclusive control of both companies. *Ibid.* David serves as the CEO of Hobby Lobby, and his three children serve as the president, vice president, and vice CEO. See Brief for Respondents in No. 13–354, p. 8.[15]

13. The Hahns and Conestoga also claimed that the contraceptive mandate violates the Fifth Amendment and the Administrative Procedure Act, 5 U.S.C. § 553, but those claims are not before us.

14. See, *e.g.,* WebMD Health News, New Morning–After Pill Ella Wins FDA Approval, online at http://www.webmd.com/sex/birth-control/news/20100813/new-morning-after-pill-ella-wins-fda-approval.

15. The Greens operate Hobby Lobby and Mardel through a management trust, of which each member of the family serves as trustee. 723 F.3d 1114, 1122 (C.A.10 2013). The family provided that the trust would also be governed according to their religious principles. *Ibid.*

Hobby Lobby's statement of purpose commits the Greens to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." App. in No. 13–354, pp. 134–135 (complaint). Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. 723 F.3d, at 1122. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. *Id.*, at 1122; App. in No. 13–354, at 136–137. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior." *Ibid.* (internal quotation marks omitted).

Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. 723 F.3d, at 1122. They specifically object to the same four contraceptive methods as the Hahns and, like the Hahns, they have no objection to the other 16 FDA-approved methods of birth control. *Id.*, at 1125. Although their group-health-insurance plan predates the enactment of ACA, it is not a grandfathered plan because Hobby Lobby elected not to retain grandfathered status before the contraceptive mandate was proposed. *Id.*, at 1124.

The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause.[16] The District Court denied a preliminary injunction, see 870 F.Supp.2d 1278 (W.D.Okla.2012), and the plaintiffs appealed, moving for initial en banc consideration. The Tenth Circuit granted that motion and reversed in a divided opinion. Contrary to the conclusion of the Third Circuit, the Tenth Circuit held that the Greens' two for-profit businesses are "persons" within the meaning of RFRA and therefore may bring suit under that law.

The court then held that the corporations had established a likelihood of success on their RFRA claim. 723 F.3d, at 1140–1147. The court concluded that the contraceptive mandate substantially burdened the exercise of religion by requiring the companies to choose between "compromis[ing] their religious beliefs" and paying a heavy fee—either "close to $475 million more in taxes every year" if they simply refused to provide coverage for the contraceptives at issue, or "roughly $26 million" annually if they "drop[ped] health-insurance benefits for all employees." *Id.*, at 1141.

The court next held that HHS had failed to demonstrate a compelling interest in enforcing the mandate against the Greens' businesses and, in the alternative, that HHS had failed to prove that enforcement of the mandate was the "least restrictive means" of furthering the Government's asserted interests. *Id.*, at 1143–1144 (emphasis deleted; internal quotation marks omitted). After concluding that the companies had "demonstrated irreparable harm," the court reversed and remanded for the District Court to consider the remaining factors of the preliminary-injunction test. *Id.*, at 1147.[17]

16. They also raised a claim under the Administrative Procedure Act, 5 U.S.C. § 553.

17. Given its RFRA ruling, the court declined to address the plaintiffs' free-exercise claim or the question whether the Greens could bring RFRA claims as individual owners of Hobby

We granted certiorari. 571 U.S. ——, 134 S.Ct. 678, 187 L.Ed.2d 544 (2013).

III

A

RFRA prohibits the "Government [from] substantially burden[ing] *a person's* exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b) (emphasis added). The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations like Hobby Lobby, Conestoga, and Mardel.

HHS contends that neither these companies nor their owners can even be heard under RFRA. According to HHS, the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations, at least as a formal matter, apply only to the companies and not to the owners as individuals. HHS's argument would have dramatic consequences.

Consider this Court's decision in *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion). In that case, five Orthodox Jewish merchants who ran small retail businesses in Philadelphia challenged a Pennsylvania Sunday closing law as a violation of the Free Exercise Clause. Because of their faith, these merchants closed their shops on Saturday, and they argued that requiring them to remain shut on Sunday threatened them with financial ruin. The Court entertained their claim (although it ruled against them on the merits), and if a similar claim were raised today under RFRA against a jurisdiction still subject to the Act (for example, the District of Columbia, see 42 U.S.C. § 2000bb–2(2)), the merchants would be entitled to be heard. According to HHS, however, if these merchants chose to incorporate their businesses—without in any way changing the size or nature of their businesses—they would forfeit all RFRA (and free-exercise) rights. HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.

As we have seen, RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.[18] Is there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests? An examination of

Lobby and Mardel. Four judges, however, concluded that the Greens could do so, see 723 F.3d, at 1156 (Gorsuch, J., concurring); *id.*, at 1184 (Matheson, J., concurring in part and dissenting in part), and three of those judges would have granted plaintiffs a preliminary injunction, see *id.*, at 1156 (Gorsuch, J., concurring).

18. As discussed, n. 3, *supra*, in *City of Boerne* we stated that RFRA, by imposing a least-restrictive-means test, went beyond what was required by our pre-*Smith* decisions. Although the author of the principal dissent joined the Court's opinion in *City of Boerne*, she now claims that the statement was incorrect. *Post*, at 2793. For present purposes, it is unnecessary to adjudicate this dispute. Even if RFRA simply restored the status quo ante, there is no reason to believe, as HHS and the dissent seem to suggest, that the law was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases. See *infra*, at 2771 – 2774.

RFRA's text, to which we turn in the next part of this opinion, reveals that Congress did no such thing.

[4] As we will show, Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of "persons." But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.

In holding that Conestoga, as a "secular, for-profit corporation," lacks RFRA protection, the Third Circuit wrote as follows:

> "General business corporations do not, *separate and apart from the actions or belief systems of their individual owners or employees,* exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." 724 F.3d, at 385 (emphasis added).

All of this is true—but quite beside the point. Corporations, "separate and apart from" the human beings who own, run, and are employed by them, cannot do anything at all.

B

1

[5] As we noted above, RFRA applies to "a person's" exercise of religion, 42 U.S.C. §§ 2000bb–1(a), (b), and RFRA itself does not define the term "person." We therefore look to the Dictionary Act, which we must consult "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." 1 U.S.C. § 1.

Under the Dictionary Act, "the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *Ibid.*; see *FCC v. AT & T Inc.*, 562 U.S. ——, ——, 131 S.Ct. 1177, 1182–1183, 179 L.Ed.2d 132 (2011) ("We have no doubt that 'person,' in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear"). Thus, unless there is something about the RFRA context that "indicates otherwise," the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard.

We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition, and HHS makes little effort to argue otherwise. We have entertained RFRA and free-exercise claims brought by nonprofit corporations, see *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal,* 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (RFRA); *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. ——, 132 S.Ct. 694, 181 L.Ed.2d

650 (2012) (Free Exercise); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (Free Exercise), and HHS concedes that a nonprofit corporation can be a "person" within the meaning of RFRA. See Brief for HHS in No. 13–354, at 17; Reply Brief in No. 13–354, at 7–8.[19]

This concession effectively dispatches any argument that the term "person" as used in RFRA does not reach the closely held corporations involved in these cases. No known understanding of the term "person" includes *some* but not all corporations. The term "person" sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.[20] Cf. *Clark v. Martinez*, 543 U.S. 371, 378, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) ("To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one").

2

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel focuses not on the statutory term "person," but on the phrase "exercise of religion." According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.

Is it because of the corporate form? The corporate form alone cannot provide the explanation because, as we have pointed out, HHS concedes that nonprofit corporations can be protected by RFRA. The dissent suggests that nonprofit corporations are special because furthering their religious "autonomy . . . often furthers individual religious freedom as well." *Post*, at 2794 (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter–day Saints v. Amos*, 483 U.S. 327, 342, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (Brennan, J., concurring in judgment)). But this principle applies equally to for-profit corporations: Furthering their religious freedom also "furthers individual religious freedom." In these cases, for example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns.[21]

[6, 7] If the corporate form is not enough, what about the profit-making objective? In *Braunfeld*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563, we entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their

19. Cf. Brief for Federal Petitioners in *O Centro*, O.T. 2004, No. 04–1084, p. II (stating that the organizational respondent was "a New Mexico Corporation"); Brief for Federal Respondent in *Hosanna–Tabor*, O.T. 2011, No. 10–553, p. 3 (stating that the petitioner was an "ecclesiastical corporation").

20. Not only does the Government concede that the term "persons" in RFRA includes nonprofit corporations, it goes further and appears to concede that the term might also encompass other artificial entities, namely, general partnerships and unincorporated associations. See Brief for HHS in No. 13–354, at 28, 40.

21. Although the principal dissent seems to think that Justice Brennan's statement in *Amos* provides a ground for holding that for-profit corporations may not assert free-exercise claims, that was not Justice Brennan's view. See *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, 366 U.S. 617, 642, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961) (dissenting opinion); *infra*, at 2772 – 2773.

claims. As the Court explained in a later case, the "exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious reasons." *Smith*, 494 U.S., at 877, 110 S.Ct. 1595. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus, a law that "operates so as to make the practice of . . . religious beliefs more expensive" in the context of business activities imposes a burden on the exercise of religion. *Braunfeld*, *supra*, at 605, 81 S.Ct. 1144; see *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (recognizing that "compulsory participation in the social security system interferes with [Amish employers'] free exercise rights").

If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim,[22] why can't Hobby Lobby, Conestoga, and Mardel do the same?

[8] Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money.[23] This argument flies in the face of modern corporate law. "Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act

22. It is revealing that the principal dissent cannot even bring itself to acknowledge that *Braunfeld* was correct in entertaining the merchants' claims. See *post*, at 2797 (dismissing the relevance of *Braunfeld* in part because "[t]he free exercise claim asserted there was promptly rejected on the merits").

23. See, *e.g.*, 724 F.3d, at 385 ("We do not see how a for-profit, 'artificial being,' . . . that was created to make money" could exercise religion); *Grote v. Sebelius*, 708 F.3d 850, 857 (C.A.7 2013) (Rovner, J. dissenting) ("So far as it appears, the mission of Grote Industries, like that of any other for-profit, secular business, is to make money in the commercial sphere"); *Autocam Corp. v. Sebelius*, 730 F.3d 618, 626 (C.A.7 2013) ("Congress did not intend to include corporations primarily organized for secular, profit-seeking purposes as 'persons' under RFRA"); see also 723 F.3d, at 1171–1172 (Briscoe, C.J., dissenting) ("[T]he specific purpose for which [a corporation] is created matters greatly to how it will be categorized and treated under the law" and "it is undisputed that Hobby Lobby and Mardel are for-profit corporations focused on selling merchandise to consumers").

The principal dissent makes a similar point, stating that "[f]or-profit corporations are different from religious nonprofits in that they use labor to make a profit, rather than to perpetuate the religious values shared by a community of believers." *Post*, at 2797 (internal quotation marks omitted). The first half of this statement is a tautology; for-profit corporations do indeed differ from nonprofits insofar as they seek to make a profit for their owners, but the second part is factually untrue. As the activities of the for-profit corporations involved in these cases show, some for-profit corporations do seek "to perpetuate the religious values shared," in these cases, by their owners. Conestoga's Vision and Values Statement declares that the company is dedicated to operating "in [a] manner that reflects our Christian heritage and the highest ethical and moral principles of business." App. in No. 13–356, p. 94. Similarly, Hobby Lobby's statement of purpose proclaims that the company "is committed to . . . Honoring the Lord in all we do by operating . . . in a manner consistent with Biblical principles." App. in No. 13–354, p. 135. The dissent also believes that history is not on our side because even Blackstone recognized the distinction between "ecclesiastical and lay" corporations. *Post*, at 2796. What Blackstone illustrates, however, is that dating back to 1765, there was no sharp divide among corporations in their capacity to exercise religion; Blackstone recognized that even what he termed "lay" corporations might serve "the promotion of piety." 1 W. Blackstone, Commentaries on the Law of England 458–459 (1765). And whatever may have been the case at the time of Blackstone, modern corporate law (and the law of the States in which these three companies are incorporated) allows for-profit corporations to "perpetuat[e] religious values."

for *any lawful purpose* or business." 1 J. Cox & T. Hazen, Treatise of the Law of Corporations § 4:1, p. 224 (3d ed. 2010) (emphasis added); see 1A W. Fletcher, Cyclopedia of the Law of Corporations § 102 (rev. ed. 2010). While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.

HHS would draw a sharp line between nonprofit corporations (which, HHS concedes, are protected by RFRA) and for-profit corporations (which HHS would leave unprotected), but the actual picture is less clear-cut. Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals.[24] In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the "benefit corporation," a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.[25]

In any event, the objectives that may properly be pursued by the companies in these cases are governed by the laws of the States in which they were incorporated—Pennsylvania and Oklahoma—and the laws of those States permit for-profit corporations to pursue "any lawful purpose" or "act," including the pursuit of profit in conformity with the owners' religious principles. 15 Pa. Cons.Stat. § 1301 (2001) ("Corporations may be incorporated under

24. See, *e.g.,* M. Sanders, Joint Ventures Involving Tax–Exempt Organizations 555 (4th ed. 2013) (describing Google.org, which "advance[s] its charitable goals" while operating as a for-profit corporation to be able to "invest in for-profit endeavors, lobby for policies that support its philanthropic goals, and tap Google's innovative technology and workforce" (internal quotation marks and alterations omitted)); cf. 26 CFR § 1.501(c)(3)–1(c)(3).

25. See Benefit Corp Information Center, online at http://www.benefitcorp.net/state-by-state-legislative-status; *e.g.,* Va.Code Ann. §§ 13.1–787, 13.1–626, 13.1–782 (Lexis 2011) ("A benefit corporation shall have as one of its purposes the purpose of creating a general public benefit," and "may identify one or more specific public benefits that it is the purpose of the benefit corporation to create.... This purpose is in addition to [the purpose of engaging in any lawful business]." " 'Specific public benefit' means a benefit that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purpose or benefit beyond the strict interest of the shareholders of the benefit corporation...."); S.C. Code Ann. §§ 33–38–300 (2012 Cum. Supp.), 33–3–101 (2006), 33–38–130 (2012 Cum. Supp.) (similar).

this subpart for any lawful purpose or purposes"); Okla. Stat., Tit. 18, §§ 1002, 1005 (West 2012) ("[E]very corporation, whether profit or not for profit" may "be incorporated or organized . . . to conduct or promote any lawful business or purposes"); see also § 1006(A)(3); Brief for State of Oklahoma as *Amicus Curiae* in No. 13–354.

3

HHS and the principal dissent make one additional argument in an effort to show that a for-profit corporation cannot engage in the "exercise of religion" within the meaning of RFRA: HHS argues that RFRA did no more than codify this Court's pre-*Smith* Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection. This argument has many flaws.

[9] First, nothing in the text of RFRA as originally enacted suggested that the statutory phrase "exercise of religion under the First Amendment" was meant to be tied to this Court's pre-*Smith* interpretation of that Amendment. When first enacted, RFRA defined the "exercise of religion" to mean "the exercise of religion under the First Amendment"—not the exercise of religion as recognized only by then-existing Supreme Court precedents. 42 U.S.C. § 2000bb–2(4) (1994 ed.). When Congress wants to link the meaning of a statutory provision to a body of this Court's case law, it knows how to do so. See, *e.g.,* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (authorizing habeas relief from a state-court decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

Second, if the original text of RFRA was not clear enough on this point—and we think it was—the amendment of RFRA through RLUIPA surely dispels any doubt. That amendment deleted the prior reference to the First Amendment, see 42 U.S.C. § 2000bb–2(4) (2000 ed.) (incorporating § 2000cc–5), and neither HHS nor the principal dissent can explain why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases. Moreover, as discussed, the amendment went further, providing that the exercise of religion "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc–3(g). It is simply not possible to read these provisions as restricting the concept of the "exercise of religion" to those practices specifically addressed in our pre-*Smith* decisions.

Third, the one pre-*Smith* case involving the free-exercise rights of a for-profit corporation suggests, if anything, that for-profit corporations possess such rights. In *Gallagher v. Crown Kosher Super Market of Mass., Inc.,* 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961), the Massachusetts Sunday closing law was challenged by a kosher market that was organized as a for-profit corporation, by customers of the market, and by a rabbi. The Commonwealth argued that the corporation lacked "standing" to assert a free-exercise claim,[26] but not one member of the Court expressed agreement with that argument. The plurality opinion for four Justices rejected the First Amendment claim on the

26. See Brief for Appellants in *Gallagher,* O.T. 1960 No. 11, pp. 16, 28–31 (arguing that corporation "has no 'religious belief' or 'religious liberty,' and had no standing in court to assert that its free exercise of religion was impaired").

merits based on the reasoning in *Braunfeld*, and reserved decision on the question whether the corporation had "standing" to raise the claim. See 366 U.S., at 631, 81 S.Ct. 1122. The three dissenters, Justices Douglas, Brennan, and Stewart, found the law unconstitutional as applied to the corporation and the other challengers and thus implicitly recognized their right to assert a free-exercise claim. See *id.*, at 642, 81 S.Ct. 1122 (Brennan, J., joined by Stewart, J., dissenting); *McGowan v. Maryland*, 366 U.S. 420, 578–579, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (Douglas, J., dissenting as to related cases including *Gallagher*). Finally, Justice Frankfurter's opinion, which was joined by Justice Harlan, upheld the Massachusetts law on the merits but did not question or reserve decision on the issue of the right of the corporation or any of the other challengers to be heard. See *McGowan*, 366 U.S., at 521–522, 81 S.Ct. 1101. It is quite a stretch to argue that RFRA, a law enacted to provide very broad protection for religious liberty, left for-profit corporations unprotected simply because in *Gallagher*—the only pre-*Smith* case in which the issue was raised—a majority of the Justices did not find it necessary to decide whether the kosher market's corporate status barred it from raising a free-exercise claim.

Finally, the results would be absurd if RFRA merely restored this Court's pre-*Smith* decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before *Smith*. For example, we are not aware of any pre-*Smith* case in which this Court entertained a free-exercise claim brought by a resident noncitizen. Are such persons also beyond RFRA's protective reach simply because the Court never addressed their rights before *Smith*?

Presumably in recognition of the weakness of this argument, both HHS and the principal dissent fall back on the broader contention that the Nation lacks a tradition of exempting for-profit corporations from generally applicable laws. By contrast, HHS contends, statutes like Title VII, 42 U.S.C. § 2000e–19(A), expressly exempt churches and other nonprofit religious institutions but not for-profit corporations. See Brief for HHS in No. 13–356, p. 26. In making this argument, however, HHS did not call to our attention the fact that some federal statutes *do* exempt categories of entities that include for-profit corporations from laws that would otherwise require these entities to engage in activities to which they object on grounds of conscience. See, *e.g.*, 42 U.S.C. § 300a–7(b)(2); § 238n(a).[27] If Title VII and simi-

27. The principal dissent points out that "the exemption codified in § 238n(a) was not enacted until three years after RFRA's passage." *Post*, at 2795, n. 15. The dissent takes this to mean that RFRA did not, in fact, "ope[n] all statutory schemes to religion-based challenges by for-profit corporations" because if it had "there would be no need for a statute-specific, post-RFRA exemption of this sort." *Ibid.*

This argument fails to recognize that the protection provided by § 238n(a) differs significantly from the protection provided by RFRA. Section 238n(a) flatly prohibits discrimination against a covered healthcare facility for refusing to engage in certain activities related to abortion. If a covered healthcare facility challenged such discrimination under RFRA, by contrast, the discrimination would be unlawful only if a court concluded, among other things, that there was a less restrictive means of achieving any compelling government interest.

In addition, the dissent's argument proves too much. Section 238n(a) applies evenly to "any health care entity"—whether it is a religious nonprofit entity or a for-profit entity. There is no dispute that RFRA protects religious nonprofit corporations, so if § 238n(a) were redundant as applied to for-profit corpo-

lar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.

4

Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere "beliefs" of a corporation. HHS goes so far as to raise the specter of "divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric." Brief for HHS in No. 13–356, at 30.

[10] These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable. In any event, we have no occasion in these cases to consider RFRA's applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.[28]

HHS has also provided no evidence that the purported problem of determining the sincerity of an asserted religious belief moved Congress to exclude for-profit corporations from RFRA's protection. On the contrary, the scope of RLUIPA shows that Congress was confident of the ability of the federal courts to weed out insincere claims. RLUIPA applies to "institutionalized persons," a category that consists primarily of prisoners, and by the time of RLUIPA's enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented.[29] Nevertheless, after our decision in *City of Boerne,* Congress enacted RLUIPA to preserve the right of prisoners to raise religious liberty claims. If Congress thought that the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe that Congress limited RFRA's reach out of concern for the seemingly less difficult task of doing the same in corporate cases. And if, as HHS seems to concede, Congress wanted RFRA to apply to nonprofit corporations, see, Reply Brief in No. 13–354, at 7–8, what reason is there to think that Congress believed that spotting insincere claims would be tougher in cases involving for-profits?

HHS and the principal dissent express concern about the possibility of disputes among the owners of corporations, but that is not a problem that arises because of RFRA or that is unique to this context. The owners of closely held corporations may—and sometimes do—disagree about

rations, it would be equally redundant as applied to nonprofits.

28. To qualify for RFRA's protection, an asserted belief must be "sincere"; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail. Cf., *e.g., United States v. Quaintance,* 608 F.3d 717, 718–719 (C.A.10 2010).

29. See, *e.g., Ochs v. Thalacker,* 90 F.3d 293, 296 (C.A.8 1996); *Green v. White,* 525 F.Supp. 81, 83–84 (E.D.Mo.1981); *Abate v. Walton,* 1996 WL 5320, *5 (C.A.9, Jan. 5, 1996); *Winters v. State,* 549 N.W.2d 819–820 (Iowa 1996).

the conduct of business. 1 Treatise of the Law of Corporations § 14:11. And even if RFRA did not exist, the owners of a company might well have a dispute relating to religion. For example, some might want a company's stores to remain open on the Sabbath in order to make more money, and others might want the stores to close for religious reasons. State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. See, *e.g.*, *ibid;* *id.*, § 3:2; Del. Code Ann., Tit. 8, § 351 (2011) (providing that certificate of incorporation may provide how "the business of the corporation shall be managed"). Courts will turn to that structure and the underlying state law in resolving disputes.

For all these reasons, we hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.[30]

IV

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate "substantially burden[s]" the exercise of religion. 42 U.S.C. § 2000bb–1(a). We have little trouble concluding that it does.

A

[11] As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, see Brief for HHS in No. 13–354, at 9, n. 4, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed $100 per day for each affected individual. 26 U.S.C. § 4980D. For Hobby Lobby, the bill could amount to $1.3 million per day or

30. The principal dissent attaches significance to the fact that the "Senate voted down [a] so-called 'conscience amendment,' which would have enabled any employer or insurance provider to deny coverage based on its asserted religious beliefs or moral convictions." *Post,* at 2789. The dissent would evidently glean from that vote an intent by the Senate to prohibit for-profit corporate employers from refusing to offer contraceptive coverage for religious reasons, regardless of whether the contraceptive mandate could pass muster under RFRA's standards. But that is not the only plausible inference from the failed amendment—or even the most likely. For one thing, the text of the amendment was "written so broadly that it would allow any employer to deny any health service to any American for virtually any reason—*not just for religious objections*." 158 Cong. Rec. S1165 (Mar. 1, 2012) (emphasis added). Moreover, the amendment would have authorized a blanket exemption for religious or moral objectors; it would not have subjected religious-based objections to the judicial scrutiny called for by RFRA, in which a court must consider not only the burden of a requirement on religious adherents, but also the government's interest and how narrowly tailored the requirement is. It is thus perfectly reasonable to believe that the amendment was voted down because it extended more broadly than the pre-existing protections of RFRA. And in any event, even if a rejected amendment to a bill could be relevant in other contexts, it surely cannot be relevant here, because any "Federal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law *explicitly excludes* such application by reference to [RFRA]." 42 U.S.C. § 2000bb–3(b) (emphasis added). It is not plausible to find such an explicit reference in the meager legislative history on which the dissent relies.

about $475 million per year; for Conestoga, the assessment could be $90,000 per day or $33 million per year; and for Mardel, it could be $40,000 per day or about $15 million per year. These sums are surely substantial.

It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, this course would also entail substantial economic consequences. The companies could face penalties of $2,000 per employee each year. § 4980H. These penalties would amount to roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel.

B

[12, 13] Although these totals are high, *amici* supporting HHS have suggested that the $2,000 per-employee penalty is actually less than the average cost of providing health insurance, see Brief for Religious Organizations 22, and therefore, they claim, the companies could readily eliminate any substantial burden by forcing their employees to obtain insurance in the government exchanges. We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party, see *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 60, n. 2, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981); *Bell v. Wolfish,* 441 U.S. 520, 532, n. 13, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Knetsch v. United States,* 364 U.S. 361, 370, 81 S.Ct. 132, 5 L.Ed.2d 128 (1960), and there are strong reasons to adhere to that practice in these cases. HHS, which presumably could have compiled the relevant statistics, has never made this argument—not in its voluminous briefing or at oral argument in this Court nor, to our knowledge, in any of the numerous cases in which the issue now before us has been litigated around the country. As things now stand, we do not even know what the Government's position might be with respect to these *amici's* intensely empirical argument.[31] For this same reason, the plaintiffs have never had an opportunity to respond to this novel claim that—contrary to their longstanding practice and that of most large employers—they would be better off discarding their employer insurance plans altogether.

Even if we were to reach this argument, we would find it unpersuasive. As an initial matter, it entirely ignores the fact that the Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees. Before the advent of ACA, they were not legally compelled to provide insurance, but they nevertheless did so—in part, no doubt, for conventional business reasons, but also in part because their religious beliefs govern their relations with their employees. See App. to Pet. for Cert. in No. 13–356, p. 11g; App. in No. 13–354, at 139.

Putting aside the religious dimension of the decision to provide insurance, moreover, it is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty. Health insurance is a benefit that employees value. If the companies simply eliminated that benefit and forced employees to

31. Indeed, one of HHS's stated reasons for establishing the religious accommodation was to "encourag[e] eligible organizations to *continue* to offer health coverage." 78 Fed.Reg. 39882 (2013) (emphasis added).

purchase their own insurance on the exchanges, without offering additional compensation, it is predictable that the companies would face a competitive disadvantage in retaining and attracting skilled workers. See App. in No. 13–354, at 153.

The companies could attempt to make up for the elimination of a group health plan by increasing wages, but this would be costly. Group health insurance is generally less expensive than comparable individual coverage, so the amount of the salary increase needed to fully compensate for the termination of insurance coverage may well exceed the cost to the companies of providing the insurance. In addition, any salary increase would have to take into account the fact that employees must pay income taxes on wages but not on the value of employer-provided health insurance. 26 U.S.C. § 106(a). Likewise, employers can deduct the cost of providing health insurance, see § 162(a)(1), but apparently cannot deduct the amount of the penalty that they must pay if insurance is not provided; that difference also must be taken into account. Given these economic incentives, it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty.[32]

In sum, we refuse to sustain the challenged regulations on the ground—never maintained by the Government—that dropping insurance coverage eliminates the substantial burden that the HHS mandate imposes. We doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.

C

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. Brief for HHS in 13–354, pp. 31–34; *post*, at 2798 – 2799. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue.[33] *Ibid.*

32. Attempting to compensate for dropped insurance by raising wages would also present administrative difficulties. In order to provide full compensation for employees, the companies would have to calculate the value to employees of the convenience of retaining their employer-provided coverage and thus being spared the task of attempting to find and sign up for a comparable plan on an exchange. And because some but not all of the companies' employees may qualify for subsidies on an exchange, it would be nearly impossible to calculate a salary increase that would accurately restore the status quo ante for all employees.

33. This argument is not easy to square with the position taken by HHS in providing exemptions from the contraceptive mandate for religious employers, such as churches, that have the very same religious objections as the Hahns and Greens and their companies. The connection between what these religious employers would be required to do if not exempted (provide insurance coverage for particular contraceptives) and the ultimate event that they find morally wrong (destruction of an embryo) is exactly the same. Nevertheless, as discussed, HHS and the Labor and Treasury Departments authorized the exemption from the contraceptive mandate of group health plans of certain religious employers,

[14] This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.[34] Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step. See, *e.g.*, *Smith*, 494 U.S., at 887, 110 S.Ct. 1595 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim"); *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969).

Moreover, in *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), we considered and rejected an argument that is nearly identical to the one now urged by HHS and the dissent. In *Thomas*, a Jehovah's Witness was initially employed making sheet steel for a variety of industrial uses, but he was later transferred to a job making turrets for tanks. *Id.*, at 710, 101 S.Ct. 1425. Because he objected on religious grounds to participating in the manufacture of weapons, he lost his job and sought unemployment compensation. Ruling against the employee, the state court had difficulty with the line that the employee drew between work that he found to be consistent with his religious beliefs (helping to manufacture steel that was used in making weapons) and work that he found morally objectionable (helping to make the weapons themselves). This Court, however, held that "it is not for us to say that the line he drew was an unreasonable one." *Id.*, at 715, 101 S.Ct. 1425.[35]

and later expanded the exemption to include certain nonprofit organizations with religious objections to contraceptive coverage. 78 Fed. Reg. 39871. When this was done, the Government made clear that its objective was to "protec[t]" these religious objectors "from having to contract, arrange, pay, or refer for such coverage." *Ibid.* Those exemptions would be hard to understand if the plaintiffs' objections here were not substantial.

34. See, *e.g.*, Oderberg, The Ethics of Co-operation in Wrongdoing, in Modern Moral Philosophy 203–228 (A. O'Hear ed. 2004); T. Higgins, Man as Man: The Science and Art of Ethics 353, 355 (1949) ("The general principles governing cooperation" in wrongdoing—*i.e.*, "physical activity (or its omission) by which a person assists in the evil act of another who is the principal agent"—"present troublesome difficulties in application"); 1 H. Davis, Moral and Pastoral Theology 341 (1935) (Cooperation occurs "when A helps B to accomplish an external act by an act that is not sinful, and without approving of what B does").

35. The principal dissent makes no effort to reconcile its view about the substantial-burden requirement with our decision in *Thomas*.

Similarly, in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function . . . in this context is to determine" whether the line drawn reflects "an honest conviction," *id.*, at 716, 101 S.Ct. 1425, and there is no dispute that it does.

HHS nevertheless compares these cases to decisions in which we rejected the argument that the use of general tax revenue to subsidize the secular activities of religious institutions violated the Free Exercise Clause. See *Tilton v. Richardson,* 403 U.S. 672, 689, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (plurality); *Board of Ed. of Central School Dist. No. 1 v. Allen,* 392 U.S. 236, 248–249, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). But in those cases, while the subsidies were clearly contrary to the challengers' views on a secular issue, namely, proper church-state relations, the challengers never articulated a *religious* objection to the subsidies. As we put it in *Tilton,* they were "unable to identify any coercion directed at the practice or exercise of their religious beliefs." 403 U.S., at 689, 91 S.Ct. 2091 (plurality opinion); see *Allen, supra,* at 249, 88 S.Ct. 1923 ("[A]ppellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion"). Here, in contrast, the plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity. Because the contraceptive mandate forces them to pay an enormous sum of money—as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.

V

Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(b).

A

[15] HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting "public health" and "gender equality." Brief for HHS in No. 13–354, at 46, 49. RFRA, however, contemplates a "more focused" inquiry: It "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro,* 546 U.S., at 430–431, 126 S.Ct. 1211 (quoting § 2000bb–1(b)). This requires us to "loo[k] beyond broadly formulated interests" and to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants"—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases. *O Centro, supra,* at 431, 126 S.Ct. 1211.

[16] In addition to asserting these very broadly framed interests, HHS maintains that the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing. See Brief for HHS in No. 13–354, at 14–15, 49; see Brief for HHS in No. 13–356, at 10, 48. Under our

cases, women (and men) have a constitutional right to obtain contraceptives, see *Griswold v. Connecticut*, 381 U.S. 479, 485–486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and HHS tells us that "[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services." Brief for HHS in No. 13–354, at 50 (internal quotation marks omitted).

The objecting parties contend that HHS has not shown that the mandate serves a compelling government interest, and it is arguable that there are features of ACA that support that view. As we have noted, many employees—those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all.

HHS responds that many legal requirements have exceptions and the existence of exceptions does not in itself indicate that the principal interest served by a law is not compelling. Even a compelling interest may be outweighed in some circumstances by another even weightier consideration. In these cases, however, the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required "to comply with a subset of the Affordable Care Act's health reform provisions" that provide what HHS has described as "particularly significant protections." 75 Fed.Reg. 34540 (2010). But the contraceptive mandate is expressly excluded from this subset. *Ibid.*

We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, *i.e.*, whether HHS has shown that the contraceptive mandate is "the least restrictive means of furthering that compelling governmental interest." § 2000bb–1(b)(2).

B

[17, 18] The least-restrictive-means standard is exceptionally demanding, see *City of Boerne*, 521 U.S., at 532, 117 S.Ct. 2157, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. See §§ 2000bb–1(a), (b) (requiring the Government to "demonstrat[e] that application of [a substantial] burden to *the person* . . . is the least restrictive means of furthering [a] compelling governmental interest" (emphasis added)).

The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown, see § 2000bb–1(b)(2), that this is not a viable alternative. HHS has not provided any estimate of the average cost per employee of providing access to these contraceptives, two of which, according to the FDA, are designed primarily for emergency use. See Birth Control: Medicines to Help You, online at http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm. Nor has HHS provided any statistics regarding the number of employees who might be affected because they work for corporations like Hobby Lobby, Conestoga, and Mardel. Nor has HHS told us that it is unable to provide such

statistics. It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. According to one of the Congressional Budget Office's most recent forecasts, ACA's insurance-coverage provisions will cost the Federal Government more than $1.3 trillion through the next decade. See CBO, Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014, p. 2.[36] If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal.

[19] HHS contends that RFRA does not permit us to take this option into account because "RFRA cannot be used to require creation of entirely new programs." Brief for HHS in 13–354, at 15.[37] But we see nothing in RFRA that supports this argument, and drawing the line between the "creation of an entirely new program" and the modification of an existing program (which RFRA surely allows) would be fraught with problems. We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. Cf. § 2000cc–3(c) (RLUIPA: "[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."). HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.

In the end, however, we need not rely on the option of a new, government-funded

36. Online at http://cbo.gov/publication/45231.

37. In a related argument, HHS appears to maintain that a plaintiff cannot prevail on a RFRA claim that seeks an exemption from a legal obligation requiring the plaintiff to confer benefits on third parties. Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals. It is certainly true that in applying RFRA "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (applying RLUIPA). That consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest. But it could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties. Otherwise, for example, the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants). By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless. In any event, our decision in these cases need not result in any detrimental effect on any third party. As we explain, see *infra*, at 2781 – 2782, the Government can readily arrange for other methods of providing contraceptives, without cost sharing, to employees who are unable to obtain them under their health-insurance plans due to their employers' religious objections.

program in order to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. See *supra*, at 2763 – 2764, and nn. 8–9. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. See 45 CFR §§ 147.131(b)(4), (c)(1); 26 CFR §§ 54.9815–2713A(a)(4), (b). If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries." 45 CFR § 147.131(c)(2); 26 CFR § 54.9815–2713A(c)(2).[38]

We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims.[39] At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.[40]

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none.[41] Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to "face minimal logistical and administrative obstacles," *post*, at 2802 (internal quotation marks omitted), because their employers' insurers would be responsible for providing information and coverage, see, *e.g.*, 45 CFR §§ 147.131(c)-(d); cf.

38. HHS has concluded that insurers that insure eligible employers opting out of the contraceptive mandate and that are required to pay for contraceptive coverage under the accommodation will not experience an increase in costs because the "costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women's health." 78 Fed.Reg. 39877. With respect to self-insured plans, the regulations establish a mechanism for the eligible employers' third-party administrators to obtain a compensating reduction in the fee paid by insurers to participate in the federally facilitated exchanges. HHS believes that this system will not have a material effect on the funding of the exchanges because the "payments for contraceptive services will represent only a small portion of total [federally facilitated exchange] user fees." *Id.*, at 39882; see 26 CFR § 54.9815–2713A(b)(3).

39. See n. 9, *supra*.

40. The principal dissent faults us for being "noncommital" in refusing to decide a case that is not before us here. *Post*, at 2803. The less restrictive approach we describe accommodates the religious beliefs asserted in these cases, and that is the only question we are permitted to address.

41. In the principal dissent's view, the Government has not had a fair opportunity to address this accommodation, *post*, at 2803, n. 27, but the Government itself apparently believes that when it "provides an exception to a general rule for secular reasons (or for only certain religious reasons), [it] must explain why extending a comparable exception to a specific plaintiff for religious reasons would undermine its compelling interests." Brief for the United States as *Amicus Curiae* in *Holt v. Hobbs*, No. 13–6827, p. 10, now pending before the Court.

26 CFR §§ 54.9815–2713A(b), (d). Ironically, it is the dissent's approach that would "[i]mped[e] women's receipt of benefits by 'requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit,' " *post,* at 2802, because the dissent would effectively compel religious employers to drop health-insurance coverage altogether, leaving their employees to find individual plans on government-run exchanges or elsewhere. This is indeed "scarcely what Congress contemplated." *Ibid.*

C

HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions, but HHS has made no effort to substantiate this prediction.[42] HHS points to no evidence that insurance plans in existence prior to the enactment of ACA excluded coverage for such items. Nor has HHS provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA's coverage requirements other than the contraceptive mandate.

It is HHS's apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS's view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.

In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. See *post,* at 2804 – 2805. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

HHS also raises for the first time in this Court the argument that applying the contraceptive mandate to for-profit employers with sincere religious objections is essential to the comprehensive health-insurance scheme that ACA establishes. HHS analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in *Lee* despite the religious objection of an employer, but these

42. Cf. 42 U.S.C. § 1396s (Federal "program for distribution of pediatric vaccines" for some uninsured and underinsured children).

cases are quite different. Our holding in *Lee* turned primarily on the special problems associated with a national system of taxation. We noted that "[t]he obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes." 455 U.S., at 260, 102 S.Ct. 1051. Based on that premise, we explained that it was untenable to allow individuals to seek exemptions from taxes based on religious objections to particular Government expenditures: "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax." *Ibid.* We observed that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Ibid.*; see *O Centro,* 546 U.S., at 435, 126 S.Ct. 1211.

Lee was a free-exercise, not a RFRA, case, but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes. Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos. Recognizing exemptions from the contraceptive mandate is very different. ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage. Rather, individual employers like the plaintiffs purchase insurance for their own employees. And contrary to the principal dissent's characterization, the employers' contributions do not necessarily funnel into "undifferentiated funds." *Post,* at 2799. The accommodation established by HHS requires issuers to have a mechanism by which to "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." 45 CFR § 147.131(c)(2)(ii). Recognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would.[43]

In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business. See *post,* at 2804 – 2806. In making this plea, the dissent reiterates a point made forcefully by the Court in *Smith.* 494 U.S., at 888–889, 110 S.Ct. 1595 (applying the *Sherbert* test to all free-

43. HHS highlights certain statements in the opinion in *Lee* that it regards as supporting its position in these cases. In particular, HHS notes the statement that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." 455 U.S., at 261, 102 S.Ct. 1051. *Lee* was a free exercise, not a RFRA, case, and the statement to which HHS points, if taken at face value, is squarely inconsistent with the plain meaning of RFRA. Under RFRA, when followers of a particular religion choose to enter into commercial activity, the Government does not have a free hand in imposing obligations that substantially burden their exercise of religion. Rather, the Government can impose such a burden only if the strict RFRA test is met.

exercise claims "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind"). But Congress, in enacting RFRA, took the position that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). The wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

* * *

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.

The judgment of the Tenth Circuit in No. 13–354 is affirmed; the judgment of the Third Circuit in No. 13–356 is reversed, and that case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, concurring.

It seems to me appropriate, in joining the Court's opinion, to add these few remarks. At the outset it should be said that the Court's opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent. The Court and the dissent disagree on the proper interpretation of the Religious Freedom and Restoration Act of 1993 (RFRA), but do agree on the purpose of that statute. 42 U.S.C. § 2000bb *et seq.* It is to ensure that interests in religious freedom are protected. *Ante,* at 2760 – 2761; *post,* at 2790 – 2791 (GINSBURG, J., dissenting).

In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. See *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community. But in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult. In these cases the plaintiffs deem it necessary to exercise their religious beliefs within the context of their own closely held, for-profit corporations. They claim protection under RFRA, the federal statute discussed with care and in detail in the Court's opinion.

As the Court notes, under our precedents, RFRA imposes a " 'stringent test.' " *Ante,* at 2761 (quoting *City of Boerne v. Flores,* 521 U.S. 507, 533, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)). The Government must demonstrate that the application of a substantial burden to a person's exercise of religion "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb–1(b).

As to RFRA's first requirement, the Department of Health and Human Services (HHS) makes the case that the mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of

female employees, coverage that is significantly more costly than for a male employee. *Ante,* at 2779; see, *e.g.*, Brief for HHS in No. 13–354, pp. 14–15. There are many medical conditions for which pregnancy is contraindicated. See, *e.g., id.*, at 2784. It is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees. *Ante,* at 2780.

But the Government has not made the second showing required by RFRA, that the means it uses to regulate is the least restrictive way to further its interest. As the Court's opinion explains, the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage. That framework is one that HHS has itself devised, that the plaintiffs have not criticized with a specific objection that has been considered in detail by the courts in this litigation, and that is less restrictive than the means challenged by the plaintiffs in these cases. *Ante,* at 2763 – 2764, and n. 9, 2781 – 2782.

The means the Government chose is the imposition of a direct mandate on the employers in these cases. *Ante,* at 2762 – 2763. But in other instances the Government has allowed the same contraception coverage in issue here to be provided to employees of nonprofit religious organizations, as an accommodation to the religious objections of those entities. See *ante,* at 2763 – 2764, and n. 9, 2781 – 2782. The accommodation works by requiring insurance companies to cover, without cost sharing, contraception coverage for female employees who wish it. That accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs. See *ante,* at 2782.

On this record and as explained by the Court, the Government has not met its burden of showing that it cannot accommodate the plaintiffs' similar religious objections under this established framework. RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.

The parties who were the plaintiffs in the District Courts argue that the Government could pay for the methods that are found objectionable. Brief for Respondents in No. 13–354, p. 58. In discussing this alternative, the Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program. *Ante,* at 2780 – 2782. The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government. As the Court makes clear, this is not a case where it can be established that it is difficult to accommodate the government's interest, and in fact the mechanism for doing so is already in place. *Ante,* at 2781 – 2782.

"[T]he American community is today, as it long has been, a rich mosaic of religious faiths." *Town of Greece v. Galloway,* 572 U.S. ——, ——, 134 S.Ct. 1811, 1849, 188 L.Ed.2d 835 (2014) (KAGAN, J., dissenting). Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that

same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise. *Ante,* at 2782 – 2783.

For these reasons and others put forth by the Court, I join its opinion.

Justice GINSBURG, with whom Justice Sotomayor joins, and with whom Justice BREYER and Justice KAGAN join as to all but Part III–C–1, dissenting.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. See *ante,* at 2767 – 2785. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a "less restrictive alternative." And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, *i.e.,* the general public, can pick up the tab. See *ante,* at 2780 – 2782.[1]

The Court does not pretend that the First Amendment's Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. See *infra,* at 2789 – 2791. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.,* dictated the extraordinary religion-based exemptions today's decision endorses. In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.

I

"The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 856, 112 S.Ct. 2791,

1. The Court insists it has held none of these things, for another less restrictive alternative is at hand: extending an existing accommodation, currently limited to religious nonprofit organizations, to encompass commercial enterprises. See *ante,* at 2759 – 2760. With that accommodation extended, the Court asserts, "women would still be entitled to all [Food and Drug Administration]-approved contraceptives without cost sharing." *Ante,* at 2760. In the end, however, the Court is not so sure. In stark contrast to the Court's initial emphasis on this accommodation, it ultimately declines to decide whether the highlighted accommodation is even lawful. See *ante,* at 2782 ("We do not decide today whether an approach of this type complies with RFRA. . . .").

120 L.Ed.2d 674 (1992). Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women's needs. Carrying out Congress' direction, the Department of Health and Human Services (HHS), in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA). The genesis of this coverage should enlighten the Court's resolution of these cases.

A

The Affordable Care Act (ACA), in its initial form, specified three categories of preventive care that health plans must cover at no added cost to the plan participant or beneficiary.[2] Particular services were to be recommended by the U.S. Preventive Services Task Force, an independent panel of experts. The scheme had a large gap, however; it left out preventive services that "many women's health advocates and medical professionals believe are critically important." 155 Cong. Rec. 28841 (2009) (statement of Sen. Boxer). To correct this oversight, Senator Barbara Mikulski introduced the Women's Health Amendment, which added to the ACA's minimum coverage requirements a new category of preventive services specific to women's health.

Women paid significantly more than men for preventive care, the amendment's proponents noted; in fact, cost barriers operated to block many women from obtaining needed care at all. See, *e.g.*, *id.*, at 29070 (statement of Sen. Feinstein) ("Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men."); *id.*, at 29302 (statement of Sen. Mikulski) ("copayments are [often] so high that [women] avoid getting [preventive and screening services] in the first place"). And increased access to contraceptive services, the sponsors comprehended, would yield important public health gains. See, *e.g.*, *id.*, at 29768 (statement of Sen. Durbin) ("This bill will expand health insurance coverage to the vast majority of [the 17 million women of reproductive age in the United States who are uninsured]. . . . This expanded access will reduce unintended pregnancies.").

As altered by the Women's Health Amendment's passage, the ACA requires new insurance plans to include coverage without cost sharing of "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]," a unit of HHS. 42 U.S.C. § 300gg–13(a)(4). Thus charged, the HRSA developed recommendations in consultation with the Institute of Medicine (IOM). See 77 Fed.Reg. 8725–8726 (2012).[3] The IOM convened a group of independent experts, including "specialists in disease prevention [and] women's health"; those experts prepared a report

2. See 42 U.S.C. § 300gg–13(a)(1)–(3) (group health plans must provide coverage, without cost sharing, for (1) certain "evidence-based items or services" recommended by the U.S. Preventive Services Task Force; (2) immunizations recommended by an advisory committee of the Centers for Disease Control and Prevention; and (3) "with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration").

3. The IOM is an arm of the National Academy of Sciences, an organization Congress established "for the explicit purpose of furnishing advice to the Government." *Public Citizen v. Department of Justice,* 491 U.S. 440, 460, n. 11, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (internal quotation marks omitted).

evaluating the efficacy of a number of preventive services. IOM, Clinical Prevention Services for Women: Closing the Gaps 2 (2011) (hereinafter IOM Report). Consistent with the findings of "[n]umerous health professional associations" and other organizations, the IOM experts determined that preventive coverage should include the "full range" of FDA-approved contraceptive methods. *Id.*, at 10. See also *id.*, at 102–110.

In making that recommendation, the IOM's report expressed concerns similar to those voiced by congressional proponents of the Women's Health Amendment. The report noted the disproportionate burden women carried for comprehensive health services and the adverse health consequences of excluding contraception from preventive care available to employees without cost sharing. See, *e.g.*, *id.*, at 19 ("[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving . . . medical tests and treatments and to filling prescriptions for themselves and their families."); *id.*, at 103–104, 107 (pregnancy may be contraindicated for women with certain medical conditions, for example, some congenital heart diseases, pulmonary hypertension, and Marfan syndrome, and contraceptives may be used to reduce risk of endometrial cancer, among other serious medical conditions); *id.*, at 103 (women with unintended pregnancies are more likely to experience depression and anxiety, and their children face "increased odds of preterm birth and low birth weight").

In line with the IOM's suggestions, the HRSA adopted guidelines recommending coverage of "[a]ll [FDA-] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." [4] Thereafter, HHS, the Department of Labor, and the Department of Treasury promulgated regulations requiring group health plans to include coverage of the contraceptive services recommended in the HRSA guidelines, subject to certain exceptions, described *infra*, at 2800 – 2801.[5] This opinion refers to these regulations as the contraceptive coverage requirement.

B

While the Women's Health Amendment succeeded, a countermove proved unavailing. The Senate voted down the so-called "conscience amendment," which would have enabled any employer or insurance provider to deny coverage based on its asserted "religious beliefs or moral convictions." 158 Cong. Rec. S539 (Feb. 9, 2012); see *id.*, at S1162–S1173 (Mar. 1, 2012) (debate and vote).[6] That amendment, Senator Mikulski observed, would have "pu[t] the personal opinion of employers and insurers over the practice of medicine." *Id.*, at S1127 (Feb. 29, 2012). Rejecting the "conscience amendment," Congress left health care decisions—including the choice among contraceptive

4. HRSA, HHS, Women's Preventive Services Guidelines, available at http://www.hrsa.gov/womensguidelines/ (all Internet materials as visited June 27, 2014, and available in Clerk of Court's case file), reprinted in App. to Brief for Petitioners in No. 13–354, pp. 43–44a. See also 77 Fed.Reg. 8725–8726 (2012).

5. 45 CFR § 147.130(a)(1)(iv) (2013) (HHS); 29 CFR § 2590.715–2713(a)(1)(iv) (2013) (Labor); 26 CFR § 54.9815–2713(a)(1)(iv) (2013) (Treasury).

6. Separating moral convictions from religious beliefs would be of questionable legitimacy. See *Welsh v. United States*, 398 U.S. 333, 357–358, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970) (Harlan, J., concurring in result).

methods—in the hands of women, with the aid of their health care providers.

II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga [7] might assert is foreclosed by this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In *Smith*, two members of the Native American Church were dismissed from their jobs and denied unemployment benefits because they ingested peyote at, and as an essential element of, a religious ceremony. Oregon law forbade the consumption of peyote, and this Court, relying on that prohibition, rejected the employees' claim that the denial of unemployment benefits violated their free exercise rights. The First Amendment is not offended, *Smith* held, when "prohibiting the exercise of religion ... is not the object of [governmental regulation] but merely the incidental effect of a generally applicable and otherwise valid provision." *Id.*, at 878, 110 S.Ct. 1595; see *id.*, at 878–879, 110 S.Ct. 1595 ("an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"). The ACA's contraceptive coverage requirement applies generally, it is "otherwise valid," it trains on women's well being, not on the exercise of religion, and any effect it has on such exercise is incidental.

Even if *Smith* did not control, the Free Exercise Clause would not require the exemption Hobby Lobby and Conestoga seek. Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.[8]

The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations' employees and covered dependents. It would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal.4th 527, 565, 10 Cal.Rptr.3d 283, 85 P.3d 67, 93 (2004) ("We are unaware of any decision in which ... [the U.S. Supreme Court] has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the re-

7. As the Court explains, see *ante*, at 2764–2767, these cases arise from two separate lawsuits, one filed by Hobby Lobby, its affiliated business (Mardel), and the family that operates these businesses (the Greens); the other filed by Conestoga and the family that owns and controls that business (the Hahns). Unless otherwise specified, this opinion refers to the respective groups of plaintiffs as Hobby Lobby and Conestoga.

8. See *Wisconsin v. Yoder*, 406 U.S. 205, 230, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985) (invalidating state statute requiring employers to accommodate an employee's Sabbath observance where that statute failed to take into account the burden such an accommodation would impose on the employer or other employees). Notably, in construing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, the Court has cautioned that "adequate account" must be taken of "the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005); see *id.*, at 722, 125 S.Ct. 2113 ("an accommodation must be measured so that it does not override other significant interests"). A balanced approach is all the more in order when the Free Exercise Clause itself is at stake, not a statute designed to promote accommodation to religious beliefs and practices.

quested exemption would detrimentally affect the rights of third parties."). In sum, with respect to free exercise claims no less than free speech claims, " '[y]our right to swing your arms ends just where the other man's nose begins.' " Chafee, Freedom of Speech in War Time, 32 Harv. L.Rev. 932, 957 (1919).

III

A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government shows that application of the burden is "the least restrictive means" to further a "compelling governmental interest." 42 U.S.C. § 2000bb–1(a), (b)(2). In RFRA, Congress "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006).

RFRA's purpose is specific and written into the statute itself. The Act was crafted to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." § 2000bb(b)(1).[9] See also § 2000bb(a)(5) ("[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."); *ante*, at 2785 (agreeing that the pre-*Smith* compelling interest test is "workable" and "strike[s] sensible balances").

The legislative history is correspondingly emphatic on RFRA's aim. See, *e.g.*, S.Rep. No. 103–111, p. 12 (1993) (hereinafter Senate Report) (RFRA's purpose was "only to overturn the Supreme Court's decision in *Smith*," not to "unsettle other areas of the law."); 139 Cong. Rec. 26178 (1993) (statement of Sen. Kennedy) (RFRA was "designed to restore the compelling interest test for deciding free exercise claims."). In line with this restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." Senate Report 8. See also H.R.Rep. No. 103–88, pp. 6–7 (1993) (hereinafter House Report) (same). In short, the Act reinstates the law as it was prior to *Smith*, without "creat[ing] . . . new rights for any religious practice or for any potential litigant." 139 Cong. Rec. 26178 (statement of Sen. Kennedy). Given the Act's moderate purpose, it is hardly surprising that RFRA's enactment in 1993 provoked little controversy. See Brief for Senator Murray et al. as *Amici Curiae* 8 (hereinafter Senators Brief) (RFRA was approved by a 97–to–3 vote in the Senate and a voice vote in the House of Representatives).

B

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-

9. Under *Sherbert* and *Yoder*, the Court "requir[ed] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 894, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (O'Connor, J., concurring in judgment).

Smith jurisprudence. See *ante,* at 2761, n. 3, 2761 – 2762, 2767, 2771 – 2773. To support its conception of RFRA as a measure detached from this Court's decisions, one that sets a new course, the Court points first to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.,* which altered RFRA's definition of the term "exercise of religion." RFRA, as originally enacted, defined that term to mean "the exercise of religion under the First Amendment to the Constitution." § 2000bb–2(4) (1994 ed.). See *ante,* at 2761 – 2762. As amended by RLUIPA, RFRA's definition now includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000bb–2(4) (2012 ed.) (cross-referencing § 2000cc–5). That definitional change, according to the Court, reflects "an obvious effort to effect a complete separation from First Amendment case law." *Ante,* at 2761 – 2762.

The Court's reading is not plausible. RLUIPA's alteration clarifies that courts should not question the centrality of a particular religious exercise. But the amendment in no way suggests that Congress meant to expand the class of entities qualified to mount religious accommodation claims, nor does it relieve courts of the obligation to inquire whether a government action substantially burdens a religious exercise. See *Rasul v. Myers,* 563 F.3d 527, 535 (C.A.D.C.2009) (Brown, J., concurring) ("There is no doubt that RLUIPA's drafters, in changing the definition of 'exercise of religion,' wanted to broaden the scope of the kinds of practices protected by RFRA, not increase the universe of individuals protected by RFRA."); H.R.Rep. No. 106–219, p. 30 (1999). See also *Gilardi v. United States Dept. of Health and Human Servs.,* 733 F.3d 1208, 1211 (C.A.D.C.2013) (RFRA, as amended, "provides us with no helpful definition of 'exercise of religion.' "); *Henderson v. Kennedy,* 265 F.3d 1072, 1073 (C.A.D.C. 2001) ("The [RLUIPA] amendments did not alter RFRA's basic prohibition that the '[g]overnment shall not substantially burden a person's exercise of religion.' ").[10]

Next, the Court highlights RFRA's requirement that the government, if its action substantially burdens a person's religious observance, must demonstrate that it chose the least restrictive means for furthering a compelling interest. "[B]y imposing a least-restrictive-means test," the Court suggests, RFRA "went beyond what was required by our pre-*Smith* decisions." *Ante,* at 2767, n. 18 (citing *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)). See also *ante,* at 2761, n. 3. But as RFRA's statements of purpose and legislative history make clear, Congress intended only to restore, not to scrap or alter, the balancing test as this Court had applied it pre-*Smith.* See *supra,* at 2790 – 2791. See also Senate Report 9 (RFRA's "compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith.*"); House Report 7 (same).

The Congress that passed RFRA correctly read this Court's pre-*Smith* case law as including within the "compelling interest test" a "least restrictive means" requirement. See, *e.g.,* Senate Report 5 ("Where [a substantial] burden is placed

10. RLUIPA, the Court notes, includes a provision directing that "[t]his chapter [*i.e.,* RLUIPA] shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the Act] and the Constitution." 42 U.S.C. § 2000cc–3(g); see *ante,* at 2761 – 2762, 2772. RFRA incorporates RLUIPA's definition of "exercise of religion," as RLUIPA does, but contains no omnibus rule of construction governing the statute in its entirety.

upon the free exercise of religion, the Court ruled [in *Sherbert*], the Government must demonstrate that it is the least restrictive means to achieve a compelling governmental interest."). And the view that the pre-*Smith* test included a "least restrictive means" requirement had been aired in testimony before the Senate Judiciary Committee by experts on religious freedom. See, *e.g.,* Hearing on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess., 78–79 (1993) (statement of Prof. Douglas Laycock).

Our decision in *City of Boerne,* it is true, states that the least restrictive means requirement "was not used in the pre-*Smith* jurisprudence RFRA purported to codify." See *ante,* at 2761, n. 3, 2767, n. 18. As just indicated, however, that statement does not accurately convey the Court's pre-*Smith* jurisprudence. See *Sherbert,* 374 U.S., at 407, 83 S.Ct. 1790 ("[I]t would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat [the problem] without infringing First Amendment rights."); *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 718, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."). See also Berg, The New Attacks on Religious Freedom Legislation and Why They Are Wrong, 21 Cardozo L.Rev. 415, 424 (1999) ("In *Boerne,* the Court erroneously said that the least restrictive means test 'was not used in the pre-*Smith* jurisprudence.' ").[11]

C

With RFRA's restorative purpose in mind, I turn to the Act's application to the instant lawsuits. That task, in view of the positions taken by the Court, requires consideration of several questions, each potentially dispositive of Hobby Lobby's and Conestoga's claims: Do for-profit corporations rank among "person[s]" who "exercise . . . religion"? Assuming that they do, does the contraceptive coverage requirement "substantially burden" their religious exercise? If so, is the requirement "in furtherance of a compelling government interest"? And last, does the requirement represent the least restrictive means for furthering that interest?

Misguided by its errant premise that RFRA moved beyond the pre-*Smith* case law, the Court falters at each step of its analysis.

1

RFRA's compelling interest test, as noted, see *supra,* at 2790, applies to government actions that "substantially burden *a person's exercise of religion.*" 42 U.S.C. § 2000bb–1(a) (emphasis added). This reference, the Court submits, incorporates the definition of "person" found in the Dictionary Act, 1 U.S.C. § 1, which extends to "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." See *ante,* at 2768. The Dictionary Act's definition, however, controls only where "context" does not "indicat[e] otherwise." § 1. Here, context does so indicate. RFRA speaks of "a person's *exercise of religion.*" 42 U.S.C. § 2000bb–1(a) (emphasis added). See also §§ 2000bb–2(4),

11. The Court points out that I joined the majority opinion in *City of Boerne* and did not then question the statement that "least restrictive means . . . was not used [pre-*Smith*]." *Ante,* at 2767, n. 18. Concerning that observation, I remind my colleagues of Justice Jackson's sage comment: "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday." *Massachusetts v. United States,* 333 U.S. 611, 639–640, 68 S.Ct. 747, 92 L.Ed. 968 (1948) (dissenting opinion).

2000cc–5(7)(a).[12] Whether a corporation qualifies as a "person" capable of exercising religion is an inquiry one cannot answer without reference to the "full body" of pre-*Smith* "free-exercise caselaw." *Gilardi,* 733 F.3d, at 1212. There is in that case law no support for the notion that free exercise rights pertain to for-profit corporations.

Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA.[13] The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518, 636, 4 L.Ed. 629 (1819). Corporations, Justice Stevens more recently reminded, "have no consciences, no beliefs, no feelings, no thoughts, no desires." *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 466, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (opinion concurring in part and dissenting in part).

The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations.[14] "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community," and "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter–day Saints v. Amos,* 483 U.S. 327, 342, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (Brennan, J., concurring in judgment). The Court's "special solicitude to the rights of religious organizations," *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. ——, ——, 132 S.Ct. 694, 706, 181 L.Ed.2d

12. As earlier explained, see *supra,* at 2791 – 2792, RLUIPA's amendment of the definition of "exercise of religion" does not bear the weight the Court places on it. Moreover, it is passing strange to attribute to RLUIPA any purpose to cover entities other than "religious assembl[ies] or institution[s]." 42 U.S.C. § 2000cc(a)(1). But cf. *ante,* at 2772. That law applies to land-use regulation. § 2000cc(a)(1). To permit commercial enterprises to challenge zoning and other land-use regulations under RLUIPA would "dramatically expand the statute's reach" and deeply intrude on local prerogatives, contrary to Congress' intent. Brief for National League of Cities et al. as *Amici Curiae* 26.

13. The Court regards *Gallagher v. Crown Kosher Super Market of Mass., Inc.,* 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961), as "suggest[ing] . . . that for-profit corporations possess [free-exercise] rights." *Ante,* at 2772 – 2773. See also *ante,* at 2769, n. 21. The suggestion is barely there. True, one of the five challengers to the Sunday closing law assailed in *Gallagher* was a corporation owned by four Orthodox Jews. The other challengers were human individuals, not artificial, law-created entities, so there was no need to determine whether the corporation could institute the litigation. Accordingly, the plurality stated it could pretermit the question "whether appellees ha[d] standing" because *Braunfeld v. Brown,* 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), which upheld a similar closing law, was fatal to their claim on the merits. 366 U.S., at 631, 81 S.Ct. 1122.

14. See, *e.g., Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. ——, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012); *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal,* 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006); *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Jimmy Swaggart Ministries v. Board of Equalization of Cal.,* 493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990).

650 (2012), however, is just that. No such solicitude is traditional for commercial organizations.[15] Indeed, until today, religious exemptions had never been extended to any entity operating in "the commercial, profit-making world." *Amos*, 483 U.S., at 337, 107 S.Ct. 2862.[16]

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. See 42 U.S.C. §§ 2000e(b), 2000e–1(a), 2000e–2(a); cf. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80–81, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977) (Title VII requires reasonable accommodation of an employee's religious exercise, but such accommodation must not come "at the expense of other[employees]").

15. Typically, Congress has accorded to organizations religious in character religion-based exemptions from statutes of general application. *E.g.*, 42 U.S.C. § 2000e–1(a) (Title VII exemption from prohibition against employment discrimination based on religion for "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on ... of its activities"); 42 U.S.C. § 12113(d)(1) (parallel exemption in Americans With Disabilities Act of 1990). It can scarcely be maintained that RFRA enlarges these exemptions to allow Hobby Lobby and Conestoga to hire only persons who share the religious beliefs of the Greens or Hahns. Nor does the Court suggest otherwise. Cf. *ante*, at 2773.

The Court does identify two statutory exemptions it reads to cover for-profit corporations, 42 U.S.C. §§ 300a–7(b)(2) and 238n(a), and infers from them that "Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations," *ante*, at 2774. The Court's inference is unwarranted. The exemptions the Court cites cover certain medical personnel who object to performing or assisting with abortions. Cf. *ante*, at 2773, n. 27 ("the protection provided by § 238n(a) differs significantly from the protection provided by RFRA"). Notably, the Court does not assert that these exemptions have in fact been afforded to for-profit corporations. See § 238n(c) ("health care entity" covered by exemption is a term defined to include "an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions"); Tozzi, Whither Free Exercise: *Employment Division v. Smith* and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence?, 48 J. Catholic Legal Studies 269, 296, n. 133 (2009) ("Catholic physicians, but not necessarily hospitals, ... may be able to invoke [§ 238n(a)]...."); cf. S. 137, 113th Cong., 1st Sess. (2013) (as introduced) (Abortion Non–Discrimination Act of 2013, which would amend the definition of "health care entity" in § 238n to include "hospital[s]," "health insurance plan[s]," and other health care facilities). These provisions are revealing in a way that detracts from one of the Court's main arguments. They show that Congress is not content to rest on the Dictionary Act when it wishes to ensure that particular entities are among those eligible for a religious accommodation.

Moreover, the exemption codified in § 238n(a) was not enacted until three years after RFRA's passage. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, § 515, 110 Stat. 1321–245. If, as the Court believes, RFRA opened all statutory schemes to religion-based challenges by for-profit corporations, there would be no need for a statute-specific, post-RFRA exemption of this sort.

16. That is not to say that a category of plaintiffs, such as resident aliens, may bring RFRA claims only if this Court expressly "addressed their [free-exercise] rights before *Smith*." *Ante*, at 2773. Continuing with the Court's example, resident aliens, unlike corporations, are flesh-and-blood individuals who plainly count as persons sheltered by the First Amendment, see *United States v. Verdugo–Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (citing *Bridges v. Wixon*, 326 U.S. 135, 148, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945)), and *a fortiori*, RFRA.

The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention.[17] One can only wonder why the Court shuts this key difference from sight.

Reading RFRA, as the Court does, to require extension of religion-based exemptions to for-profit corporations surely is not grounded in the pre-*Smith* precedent Congress sought to preserve. Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. See *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (Congress does not "hide elephants in mouseholes"). The text of RFRA makes no such statement and the legislative history does not so much as mention for-profit corporations. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1169 (C.A.10 2013) (Briscoe, C.J., concurring in part and dissenting in part) (legislative record lacks "any suggestion that Congress foresaw, let alone intended that, RFRA would cover for-profit corporations"). See also Senators Brief 10–13 (none of the cases cited in House or Senate Judiciary Committee reports accompanying RFRA, or mentioned during floor speeches, recognized the free exercise rights of for-profit corporations).

The Court notes that for-profit corporations may support charitable causes and use their funds for religious ends, and therefore questions the distinction between such corporations and religious nonprofit organizations. See *ante*, at 2769 – 2772. See also *ante*, at 2786 (KENNEDY, J., concurring) (criticizing the Government for "distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation").[18] Again, the Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. Moreover, history is not on the Court's side. Recognition of the discrete characters of "ecclesiastical and lay" corporations dates back to Blackstone, see 1 W. Blackstone, Commentaries on the Laws of England 458 (1765), and was reiterated by this Court centuries before the enactment of the Internal Revenue Code. See *Terrett v. Taylor*, 9 Cranch 43, 49, 3 L.Ed. 650 (1815) (describing religious corporations); *Trustees of Dartmouth College*, 4 Wheat., at 645 (discussing "eleemosynary" corporations, including those "created for the promotion of religion"). To reiterate, "for-

17. I part ways with Justice KENNEDY on the context relevant here. He sees it as the employers' "exercise [of] their religious beliefs within the context of their own closely held, for-profit corporations." *Ante*, at 2785 (concurring opinion). See also *ante*, at 2782 – 2783 (opinion of the Court) (similarly concentrating on religious faith of employers without reference to the different beliefs and liberty interests of employees). I see as the relevant context the employers' asserted right to exercise religion within a nationwide program designed to protect against health hazards employees who do not subscribe to their employers' religious beliefs.

18. According to the Court, the Government "concedes" that "nonprofit corporation[s]" are protected by RFRA. *Ante*, at 2768. See also *ante*, at 2769, 2771, 2774. That is not an accurate description of the Government's position, which encompasses only "churches," "*religious* institutions," and "*religious* nonprofits." Brief for Respondents in No. 13–356, p. 28 (emphasis added). See also Reply Brief in No. 13–354, p. 8 ("RFRA incorporates the longstanding and common-sense distinction between religious organizations, which sometimes have been accorded accommodations under generally applicable laws in recognition of their accepted religious character, and for-profit corporations organized to do business in the commercial world.").

profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers]." *Gilardi*, 733 F.3d, at 1242 (Edwards, J., concurring in part and dissenting in part) (emphasis deleted).

Citing *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), the Court questions why, if "a sole proprietorship that seeks to make a profit may assert a free-exercise claim, [Hobby Lobby and Conestoga] can't ... do the same?" *Ante*, at 2770 (footnote omitted). See also *ante*, at 2767 – 2768. But even accepting, *arguendo*, the premise that unincorporated business enterprises may gain religious accommodations under the Free Exercise Clause, the Court's conclusion is unsound. In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation. In any event, *Braunfeld* is hardly impressive authority for the entitlement Hobby Lobby and Conestoga seek. The free exercise claim asserted there was promptly rejected on the merits.

The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.[19] Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.

2

Even if Hobby Lobby and Conestoga were deemed RFRA "person[s]," to gain an exemption, they must demonstrate that the contraceptive coverage require-

19. The Court does not even begin to explain how one might go about ascertaining the religious scruples of a corporation where shares are sold to the public. No need to speculate on that, the Court says, for "it seems unlikely" that large corporations "will often assert RFRA claims." *Ante*, at 2774. Perhaps so, but as Hobby Lobby's case demonstrates, such claims are indeed pursued by large corporations, employing thousands of persons of different faiths, whose ownership is not diffuse. "Closely held" is not synonymous with "small." Hobby Lobby is hardly the only enterprise of sizable scale that is family owned or closely held. For example, the family-owned candy giant Mars, Inc., takes in $33 billion in revenues and has some 72,000 employees, and closely held Cargill, Inc., takes in more than $136 billion in revenues and employs some 140,000 persons. See Forbes, America's Largest Private Companies 2013, available at http://www.forbes.com/largest-private-companies/.

Nor does the Court offer any instruction on how to resolve the disputes that may crop up among corporate owners over religious values and accommodations. The Court is satisfied that "[s]tate corporate law provides a ready means for resolving any conflicts," *ante*, at 2775, but the authorities cited in support of that proposition are hardly helpful. See Del.Code Ann., Tit. 8, § 351 (2011) (certificates of incorporation may specify how the business is managed); 1 J. Cox & T. Hazen, Treatise on the Law of Corporations § 3:2 (3d ed. 2010) (section entitled "Selecting the state of incorporation"); *id.*, § 14:11 (observing that "[d]espite the frequency of dissension and deadlock in close corporations, in some states neither legislatures nor courts have provided satisfactory solutions"). And even if a dispute settlement mechanism is in place, how is the arbiter of a religion-based intra-corporate controversy to resolve the disagreement, given this Court's instruction that "courts have no business addressing [whether an asserted religious belief] is substantial," *ante*, at 2778?

ment "substantially burden[s] [their] exercise of religion." 42 U.S.C. § 2000bb–1(a). Congress no doubt meant the modifier "substantially" to carry weight. In the original draft of RFRA, the word "burden" appeared unmodified. The word "substantially" was inserted pursuant to a clarifying amendment offered by Senators Kennedy and Hatch. See 139 Cong. Rec. 26180. In proposing the amendment, Senator Kennedy stated that RFRA, in accord with the Court's pre-*Smith* case law, "does not require the Government to justify every action that has some effect on religious exercise." *Ibid.*

The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens' and Hahns' "belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." *Ante,* at 2778.[20] I agree with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held. See *Thomas,* 450 U.S., at 715, 101 S.Ct. 1425 (courts are not to question where an individual "dr[aws] the line" in defining which practices run afoul of her religious beliefs). See also 42 U.S.C. §§ 2000bb–1(a), 2000bb–2(4), 2000cc–5(7)(A).[21] But those beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake. *Kaemmerling v. Lappin,* 553 F.3d 669, 679 (C.A.D.C.2008).

That distinction is a facet of the pre-*Smith* jurisprudence RFRA incorporates. *Bowen v. Roy,* 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986), is instructive. There, the Court rejected a free exercise challenge to the Government's use of a Native American child's Social Security number for purposes of administering benefit programs. Without questioning the sincerity of the father's religious belief that "use of [his daughter's Social Security] number may harm [her] spirit," the Court concluded that the Government's internal uses of that number "place[d] [no] restriction on what [the father] may believe or what he may do." *Id.,* at 699, 106 S.Ct. 2147. Recognizing that the father's "religious views may not accept" the position that the challenged uses concerned only the Government's internal affairs, the Court explained that "for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must

20. The Court dismisses the argument, advanced by some *amici,* that the $2,000–per–employee tax charged to certain employers that fail to provide health insurance is less than the average cost of offering health insurance, noting that the Government has not provided the statistics that could support such an argument. See *ante,* at 2775 – 2777. The Court overlooks, however, that it is not the Government's obligation to prove that an asserted burden is *in*substantial. Instead, it is incumbent upon plaintiffs to demonstrate, in support of a RFRA claim, the substantiality of the alleged burden.

21. The Court levels a criticism that is as wrongheaded as can be. In no way does the dissent "tell the plaintiffs that their beliefs are flawed." *Ante,* at 2778. Right or wrong in this domain is a judgment no Member of this Court, or any civil court, is authorized or equipped to make. What the Court must decide is not "the plausibility of a religious claim," *ante,* at 2778 (internal quotation marks omitted), but whether accommodating that claim risks depriving others of rights accorded them by the laws of the United States. See *supra,* at 2790 – 2791; *infra,* at 2801.

supply the frame of reference." *Id.,* at 700–701, n. 6, 106 S.Ct. 2147. See also *Hernandez v. Commissioner,* 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (distinguishing between, on the one hand, "question[s] [of] the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds," and, on the other, "whether the alleged burden imposed [by the challenged government action] is a substantial one"). Inattentive to this guidance, today's decision elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger.

Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, see *supra,* at 2788 – 2790, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But "[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action." *Grote v. Sebelius,* 708 F.3d 850, 865 (C.A.7 2013) (Rovner, J., dissenting). It is doubtful that Congress, when it specified that burdens must be "substantia[l]," had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults.

3

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. See IOM Report 102–107. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. See Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 14–15. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain. Brief for Ovarian Cancer National Alliance et al. as *Amici Curiae* 4, 6–7, 15–16; 78 Fed.Reg. 39872 (2013); IOM Report 107.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-ap-

proved contraceptives does not lessen these compelling interests. Notably, the corporations exclude intrauterine devices (IUDs), devices significantly more effective, and significantly more expensive than other contraceptive methods. See *id.,* at 105.[22] Moreover, the Court's reasoning appears to permit commercial enterprises like Hobby Lobby and Conestoga to exclude from their group health plans all forms of contraceptives. See Tr. of Oral Arg. 38–39 (counsel for Hobby Lobby acknowledged that his "argument . . . would apply just as well if the employer said 'no contraceptives' " (internal quotation marks added)).

Perhaps the gravity of the interests at stake has led the Court to assume, for purposes of its RFRA analysis, that the compelling interest criterion is met in these cases. See *ante,* at 2780.[23] It bears note in this regard that the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage, Brief for Guttmacher Institute et al. as *Amici Curiae* 16; that almost one-third of women would change their contraceptive method if costs were not a factor, Frost & Darroch, Factors Associated With Contraceptive Choice and Inconsistent Method Use, United States, 2004, 40 Perspectives on Sexual & Reproductive Health 94, 98 (2008); and that only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be, Gariepy, Simon, Patel, Creinin, & Schwarz, The Impact of Out–of–Pocket Expense on IUD Utilization Among Women With Private Insurance, 84 Contraception e39, e40 (2011). See also Eisenberg, *supra,* at S60 (recent study found that women who face out-of-pocket IUD costs in excess of $50 were "11–times less likely to obtain an IUD than women who had to pay less than $50"); Postlethwaite, Trussell, Zoolakis, Shabear, & Petitti, A Comparison of Contraceptive Procurement Pre- and Post–Benefit Change, 76 Contraception 360, 361–362 (2007) (when one health system eliminated patient cost sharing for IUDs, use of this form of contraception more than doubled).

Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. If there is a compelling interest in contraceptive coverage, the Court suggests, Congress would not have created these exclusions. See *ante,* at 2779 – 2780.

Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes. See, *e.g.,* Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4)(A)(i) (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (originally exempting employers with fewer than 50 employees, 81 Stat. 605, the statute now

22. IUDs, which are among the most reliable forms of contraception, generally cost women more than $1,000 when the expenses of the office visit and insertion procedure are taken into account. See Eisenberg, McNicholas, & Peipert, Cost as a Barrier to Long–Acting Reversible Contraceptive (LARC) Use in Adolescents, 52 J. Adolescent Health S59, S60 (2013). See also Winner et al., Effectiveness of Long–Acting Reversible Contraception, 366 New Eng. J. Medicine 1998, 1999 (2012).

23. Although the Court's opinion makes this assumption grudgingly, see *ante,* at 2779 – 2780, one Member of the majority recognizes, without reservation, that "the [contraceptive coverage] mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees." *Ante,* at 2785 – 2786 (opinion of KENNEDY, J.).

governs employers with 20 or more employees); Americans With Disabilities Act, 42 U.S.C. § 12111(5)(A) (applicable to employers with 15 or more employees); Title VII, 42 U.S.C. § 2000e(b) (originally exempting employers with fewer than 25 employees, see *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505, n. 2, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), the statute now governs employers with 15 or more employees).

The ACA's grandfathering provision, 42 U.S.C. § 18011, allows a phasing-in period for compliance with a number of the Act's requirements (not just the contraceptive coverage or other preventive services provisions). Once specified changes are made, grandfathered status ceases. See 45 CFR § 147.140(g). Hobby Lobby's own situation is illustrative. By the time this litigation commenced, Hobby Lobby did not have grandfathered status. Asked why by the District Court, Hobby Lobby's counsel explained that the "grandfathering requirements mean that you can't make a whole menu of changes to your plan that involve things like the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing." App. in No. 13–354, pp. 39–40. Counsel acknowledged that, "just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shif[t] over time." *Id.*, at 40.[24] The percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. Kaiser Family Foundation & Health Research & Educ. Trust, Employer Benefits 2013 Annual Survey 7, 196. In short, far from ranking as a categorical exemption, the grandfathering provision is "temporary, intended to be a means for gradually transitioning employers into mandatory coverage." *Gilardi*, 733 F.3d, at 1241 (Edwards, J., concurring in part and dissenting in part).

The Court ultimately acknowledges a critical point: RFRA's application "*must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Ante*, at 2781, n. 37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005); emphasis added). No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect. Cf. *supra*, at 2790 – 2791; *Prince v. Massachusetts*, 321 U.S. 158, 177, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (Jackson, J., dissenting) ("[The] limitations which of necessity bound religious freedom . . . begin to operate whenever activities begin to affect or collide with liberties of others or of the public.").

4

After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage requirement fails to satisfy RFRA's least restrictive means test. But the Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers' religious objections to providing insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women employ-

24. Hobby Lobby's *amicus* National Religious Broadcasters similarly states that, "[g]iven the nature of employers' needs to meet changing economic and staffing circumstances, and to adjust insurance coverage accordingly, the actual benefit of the 'grandfather' exclusion is *de minimis* and transitory at best." Brief for National Religious Broadcasters as *Amicus Curiae* in No. 13–354, p. 28.

ees receive, at no cost to them, the preventive care needed to safeguard their health and well being. A "least restrictive means" cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets. See *supra*, at 2790 – 2791, 2801.[25]

Then let the government pay (rather than the employees who do not share their employer's faith), the Court suggests. "The most straightforward [alternative]," the Court asserts, "would be for the Government to assume the cost of providing ... contraceptives ... to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Ante*, at 2780. The ACA, however, requires coverage of preventive services through the existing employer-based system of health insurance "so that [employees] face minimal logistical and administrative obstacles." 78 Fed.Reg. 39888. Impeding women's receipt of benefits "by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit" was scarcely what Congress contemplated. *Ibid.* Moreover, Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq.*, "is the nation's only dedicated source of federal funding for safety net family planning services." Brief for National Health Law Program et al. as *Amici Curiae* 23. "Safety net programs like Title X are not designed to absorb the unmet needs of ... insured individuals." *Id.*, at 24. Note, too, that Congress declined to write into law the preferential treatment Hobby Lobby and Conestoga describe as a less restrictive alternative. See *supra*, at 2789.

And where is the stopping point to the "let the government pay" alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, see *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985), or according women equal pay for substantially similar work, see *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (C.A.4 1990)? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection? [26] Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. See *ante*, at 2759 – 2760, 2763 – 2764, 2781 – 2783. "At a minimum," according to the Court, such an approach would not "impinge on [Hobby Lobby's and Conestoga's] religious belief." *Ante*, at 2782. I have already discussed the "special solicitude"

25. As the Court made clear in *Cutter*, the government's license to grant religion-based exemptions from generally applicable laws is constrained by the Establishment Clause. 544 U.S., at 720–722, 125 S.Ct. 2113. "[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S., at 606, 81 S.Ct. 1144, a "rich mosaic of religious faiths," *Town of Greece v. Galloway*, 572 U.S. ——, ——, 134 S.Ct. 1811, 1849, 188 L.Ed.2d 835 (2014) (KAGAN, J., dissenting). Consequently, one person's right to free exercise must be kept in harmony with the rights of her fellow citizens, and "some religious practices [must] yield to the common good." *United States v. Lee*, 455 U.S. 252, 259, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982).

26. Cf. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) (in context of First Amendment Speech Clause challenge to a content-based speech restriction, courts must determine "whether the challenged regulation is the least restrictive means among *available*, effective alternatives" (emphasis added)).

generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths. See *supra*, at 2794 – 2796.

Ultimately, the Court hedges on its proposal to align for-profit enterprises with nonprofit religion-based organizations. "We do not decide today whether [the] approach [the opinion advances] complies with RFRA for purposes of all religious claims." *Ante*, at 2782. Counsel for Hobby Lobby was similarly noncommittal. Asked at oral argument whether the Court-proposed alternative was acceptable,[27] counsel responded: "We haven't been offered that accommodation, so we haven't had to decide what kind of objection, if any, we would make to that." Tr. of Oral Arg. 86–87.

Conestoga suggests that, if its employees had to acquire and pay for the contraceptives (to which the corporation objects) on their own, a tax credit would qualify as a less restrictive alternative. See Brief for Petitioners in No. 13–356, p. 64. A tax credit, of course, is one variety of "let the government pay." In addition to departing from the existing employer-based system of health insurance, Conestoga's alternative would require a woman to reach into her own pocket in the first instance, and it would do nothing for the woman too poor to be aided by a tax credit.

In sum, in view of what Congress sought to accomplish, *i.e.*, comprehensive preventive care for women furnished through employer-based health plans, none of the proffered alternatives would satisfactorily serve the compelling interests to which Congress responded.

IV

Among the pathmarking pre-*Smith* decisions RFRA preserved is *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982). Lee, a sole proprietor engaged in farming and carpentry, was a member of the Old Order Amish. He sincerely believed that withholding Social Security taxes from his employees or paying the employer's share of such taxes would violate the Amish faith. This Court held that, although the obligations imposed by the Social Security system conflicted with Lee's religious beliefs, the burden was not unconstitutional. *Id.*, at 260–261, 102 S.Ct. 1051. See also *id.*, at 258, 102 S.Ct. 1051 (recognizing the important governmental interest in providing a "nationwide ... comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees").[28] The Government

27. On brief, Hobby Lobby and Conestoga barely addressed the extension solution, which would bracket commercial enterprises with nonprofit religion-based organizations for religious accommodations purposes. The hesitation is understandable, for challenges to the adequacy of the accommodation accorded religious nonprofit organizations are currently *sub judice*. See, *e.g.*, *Little Sisters of the Poor Home for the Aged v. Sebelius*, —— F.Supp.2d ——, 2013 WL 6839900 (D.Colo., Dec. 27, 2013), injunction pending appeal granted, 571 U.S. ——, 134 S.Ct. 1022, 187 L.Ed.2d 867 (2014). At another point in today's decision, the Court refuses to consider an argument neither "raised below [nor] advanced in this Court by any party," giving Hobby Lobby and Conestoga "[no] opportunity to respond to [that] novel claim." *Ante*, at 2776. Yet the Court is content to decide this case (and this case only) on the ground that HHS could make an accommodation never suggested in the parties' presentations. RFRA cannot sensibly be read to "requir[e] the government to ... refute each and every conceivable alternative regulation," *United States v. Wilgus*, 638 F.3d 1274, 1289 (C.A.10 2011), especially where the alternative on which the Court seizes was not pressed by any challenger.

28. As a sole proprietor, Lee was subject to personal liability for violating the law of gen-

urges that *Lee* should control the challenges brought by Hobby Lobby and Conestoga. See Brief for Respondents in No. 13–356, p. 18. In contrast, today's Court dismisses *Lee* as a tax case. See *ante,* at 2783 – 2784. Indeed, it was a tax case and the Court in *Lee* homed in on "[t]he difficulty in attempting to accommodate religious beliefs in the area of taxation." 455 U.S., at 259, 102 S.Ct. 1051.

But the *Lee* Court made two key points one cannot confine to tax cases. "When followers of a particular sect enter into commercial activity as a matter of choice," the Court observed, "the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity." *Id.,* at 261, 102 S.Ct. 1051. The statutory scheme of employer-based comprehensive health coverage involved in these cases is surely binding on others engaged in the same trade or business as the corporate challengers here, Hobby Lobby and Conestoga. Further, the Court recognized in *Lee* that allowing a religion-based exemption to a commercial employer would "operat[e] to impose the employer's religious faith on the employees." *Ibid.*[29] No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Working for Hobby Lobby or Conestoga, in other words, should not deprive employees of the preventive care available to workers at the shop next door,[30] at least in the absence of directions from the Legislature or Administration to do so.

Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. See, *e.g., Newman v. Piggie Park Enterprises, Inc.,* 256 F.Supp. 941, 945 (D.S.C.1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), aff'd in relevant part and rev'd in part on other grounds, 377 F.2d 433 (C.A.4 1967), aff'd and modified on other grounds, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968); *In re Minnesota ex rel. McClure,* 370 N.W.2d 844, 847 (Minn.1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an "individua[l] living with but not married to a person of the opposite sex," "a young, single woman working without her father's consent or a married woman working without her husband's consent," and any person "antago-

eral application he opposed. His claim to a religion-based exemption would have been even thinner had he conducted his business as a corporation, thus avoiding personal liability.

29. Congress amended the Social Security Act in response to *Lee*. The amended statute permits Amish sole proprietors and partnerships (but not Amish-owned corporations) to obtain an exemption from the obligation to pay Social Security taxes only for employees who are co-religionists and who likewise seek an exemption and agree to give up their Social Security benefits. See 26 U.S.C. § 3127(a)(2), (b)(1). Thus, employers with sincere religious beliefs have no right to a religion-based exemption that would deprive employees of Social Security benefits without the employee's consent—an exemption analogous to the one Hobby Lobby and Conestoga seek here.

30. Cf. *Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 299, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985) (disallowing religion-based exemption that "would undoubtedly give [the commercial enterprise seeking the exemption] and similar organizations an advantage over their competitors").

nistic to the Bible," including "fornicators and homosexuals" (internal quotation marks omitted)), appeal dismissed, 478 U.S. 1015, 106 S.Ct. 3315, 92 L.Ed.2d 730 (1986); *Elane Photography, LLC v. Willock*, 2013–NMSC–040, —— N.M. ——, 309 P.3d 53 (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners), cert. denied, 572 U.S. ——, 134 S.Ct. 1787, 188 L.Ed.2d 757 (2014). Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not presume to determine ... the plausibility of a religious claim"? *Ante*, at 2778.

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? [31] According to counsel for Hobby Lobby, "each one of these cases ... would have to be evaluated on its own ... apply[ing] the compelling interest-least restrictive alternative test." Tr. of Oral Arg. 6. Not much help there for the lower courts bound by today's decision.

The Court, however, sees nothing to worry about. Today's cases, the Court concludes, are "concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them." *Ante*, at 2783. But the Court has assumed, for RFRA purposes, that the interest in women's health and well being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women's Health Amendment.

There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," *Lee*, 455 U.S., at 263, n. 2, 102 S.Ct. 1051 (Stevens, J., concurring in judgment), or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be "perceived as favoring one religion over another," the very "risk the Establishment Clause was designed to preclude." *Ibid.* The Court, I fear, has ventured into a minefield, cf. *Spencer v. World Vision, Inc.*, 633 F.3d 723, 730 (C.A.9 2010) (O'Scannlain, J., concurring), by its immoderate reading of RFRA. I would confine religious exemptions under that Act to organizations formed "for a religious purpose," "engage[d] primarily in carrying out that religious purpose," and not "engaged ...

31. Religious objections to immunization programs are not hypothetical. See *Phillips v. New York*, —— F.Supp.2d ——, 2014 WL 2547584 (E.D.N.Y., June 5, 2014) (dismissing free exercise challenges to New York's vaccination practices); Liberty Counsel, Compulsory Vaccinations Threaten Religious Freedom (2007), available at http://www.lc.org/media/9980/attachments/memo_vaccination.pdf.

substantially in the exchange of goods or services for money beyond nominal amounts." See *id.*, at 748 (Kleinfeld, J., concurring).

* * *

For the reasons stated, I would reverse the judgment of the Court of Appeals for the Tenth Circuit and affirm the judgment of the Court of Appeals for the Third Circuit.

Justice BREYER and Justice KAGAN, dissenting.

We agree with Justice GINSBURG that the plaintiffs' challenge to the contraceptive coverage requirement fails on the merits. We need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993. Accordingly, we join all but Part III–C–1 of Justice GINSBURG's dissenting opinion.

WHEATON COLLEGE

v.

Sylvia BURWELL, Secretary of Health and Human Services, et al.

No. 13A1284.

July 3, 2014.

Background: College brought action challenging, on religious grounds, the mandate under Patient Protection and Affordable Care Act (ACA) and related regulations that it provide its employees and students with health insurance coverage for contraceptive services. The United States District Court for the Northern District of Illinois, Robert M. Dow, Jr., J., —— F.Supp.2d ——, 2014 WL 2826336, denied college's motion for preliminary injunction. College submitted to Justice Kagan an application for injunction pending appeal. Justice Kagan referred the application to the Court, which issued a temporary injunction, —— U.S. ——, 134 S.Ct. 2898, —— L.Ed.2d ——, 2014 WL 2931263.

Holding: The Supreme Court held that to obtain injunction pending appeal, college was not required to follow notice procedures for a nonprofit organization's claim for religious accommodation, to which procedures the college objected on religious grounds.

Ordered accordingly.

Justice Scalia concurred in the result.

Justice Sotomayor filed a dissenting opinion, in which Justices Ginsburg and Kagan joined.

Federal Courts ⚿3191

College, as applicant for injunction pending appeal, to enjoin government from enforcing provisions of Patient Protection and Affordable Care Act (ACA) and related regulations requiring health insurance coverage for contraceptive services, would not be required, as condition for injunction pending appeal, to use government-prescribed EBSA Form 700 for providing notice of a claim for religious accommodation or to send copies to health insurance issuers or third-party administrators, which actions college objected to on religious grounds, as facilitating the provision of contraceptive services; rather, college could inform Secretary of Health and Human Services (HHS) in writing that it was a non-profit organization holding itself out as religious and having religious objections to providing coverage for contraceptive services. 45 C.F.R. § 147.131(b).

has adopted a blanket ban, based on its judgment that "[t]he sawed-off shotgun has no legitimate use in the society whatsoever." *State v. Ellenberger*, 543 N.W.2d 673, 676 (Minn.App.1996) (internal quotation marks and citation omitted). Possession of a sawed-off shotgun in Minnesota is thus an inherently criminal act. It is fanciful to assume that a person who chooses to break the law and risk the heavy criminal penalty incurred by possessing a notoriously dangerous weapon is unlikely to use that weapon in violent ways.

B

If we were to abandon the categorical approach, the facts of Johnson's offense would satisfy the residual clause as well. According to the record in this case, Johnson possessed his sawed-off shotgun while dealing drugs. When police responded to reports of drug activity in a parking lot, they were told by two people that "Johnson and another individual had approached them and offered to sell drugs." PSR ¶ 45. The police then searched the vehicle where Johnson was seated as a passenger, and they found a sawed-off shotgun and five bags of marijuana. Johnson admitted that the gun was his.

Understood in this context, Johnson's conduct posed an acute risk of physical injury to another. Drugs and guns are never a safe combination. If one of his drug deals had gone bad or if a rival dealer had arrived on the scene, Johnson's deadly weapon was close at hand. The sawed-off nature of the gun elevated the risk of collateral damage beyond any intended targets. And the location of the crime—a public parking lot—significantly increased the chance that innocent bystanders might be caught up in the carnage. This is not a case of "mere possession" as Johnson suggests. Brief for Petitioner i. He was not storing the gun in a safe, nor was it a family heirloom or collector's item. He illegally possessed the weapon in case he needed to use it during another crime. A judge or jury could thus conclude that Johnson's offense qualified as a violent felony.

There should be no doubt that Samuel Johnson was an armed career criminal. His record includes a number of serious felonies. And he has been caught with dangerous weapons on numerous occasions. That this case has led to the residual clause's demise is confounding. I only hope that Congress can take the Court at its word that either amending the list of enumerated offenses or abandoning the categorical approach would solve the problem that the Court perceives.

James OBERGEFELL, et al., Petitioners

v.

Richard HODGES, Director, Ohio Department of Health, et al.;

Valeria Tanco, et al., Petitioners

v.

Bill Haslam, Governor of Tennessee, et al.;

April DeBoer, et al., Petitioners

v.

Rick Snyder, Governor of Michigan, et al.; and

Gregory Bourke, et al., Petitioners

v.

Steve Beshear, Governor of Kentucky.

Nos. 14–556, 14–562, 14–571, 14–574.

Argued April 28, 2015.

Decided June 26, 2015.

Background: Same-sex couple brought action alleging that voter-approved Michi-

gan Marriage Amendment (MMA), which prohibited same-sex marriage, violated Equal Protection and Due Process Clauses. The United States District Court for the Eastern District of Michigan, Bernard A. Friedman, J., 973 F.Supp.2d 757, entered judgment in couple's favor, and state appealed. Same-sex couples married in jurisdictions that provided for such marriages brought actions alleging that Ohio's ban on same-sex marriages violated Fourteenth Amendment. The United States District Court for the Southern District of Ohio, Timothy S. Black, J., 14 F.Supp.3d 1036, entered judgment in couples' favor, and state appealed. Same-sex spouses, who entered legal same-sex marriages in Maryland and Delaware, and Ohio funeral director sued Ohio officials responsible for death certificates that denied recognition of spouses' same-sex legal marriages after death of their partners, seeking declaratory judgment and permanent injunction. The United States District Court for the Southern District of Ohio, Timothy S. Black, J., 962 F.Supp.2d 968, entered judgment in plaintiffs' favor, and state appealed. Same-sex couples validly married outside Kentucky brought § 1983 actions challenging constitutionality of Kentucky's marriage-licensing law and denial of recognition for valid same-sex marriages. The United States District Court for the Western District of Kentucky, John G. Heyburn II, J., 996 F.Supp.2d 542, entered judgment in couples' favor, and state appealed. Same-sex couples who were legally married in other states before moving to Tennessee brought action challenging constitutionality of Tennessee's laws that voided and rendered unenforceable in Tennessee any marriage prohibited in state. The United States District Court for the Middle District of Tennessee, Aleta Arthur Trauger, J., 7 F.Supp.3d 759, granted couples' motion for preliminary injunction, and state appealed. The United States Court of Appeals for the Sixth Circuit, Sutton, Circuit Judge, 772 F.3d 388, reversed. Cases were consolidated and certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

(1) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty, overruling *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, and abrogating *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, *Adams v. Howerton*, 673 F.2d 1036, and other cases, and

(2) States must recognize lawful same-sex marriages performed in other States.

Reversed.

Chief Justice Roberts filed a dissenting opinion, in which Justices Scalia and Thomas joined.

Justice Scalia filed a dissenting opinion, in which Justice Thomas joined.

Justice Thomas filed a dissenting opinion, in which Justice Scalia joined.

Justice Alito filed a dissenting opinion, in which Justices Scalia and Thomas joined.

1. Constitutional Law ⚿3850, 3873

The fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment include most of the rights enumerated in the Bill of Rights, and in addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. U.S.C.A. Const.Amend. 14.

2. Constitutional Law ⚿1052

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution, but that responsibility has not been reduced to any formula; rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.

3. Constitutional Law ⚿1052

History and tradition guide and discipline courts when identifying interests of the person so fundamental that the State must accord them its respect, but do not set its outer boundaries; that method respects our history and learns from it without allowing the past alone to rule the present.

4. Constitutional Law ⚿1067, 1073, 1079

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning; when new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed. U.S.C.A. Const.Amend. 14.

5. Marriage ⚿1

Marriage is one of the vital personal rights essential to the orderly pursuit of happiness by free men.

6. Constitutional Law ⚿4384

The right to marry is fundamental under the Due Process Clause. U.S.C.A. Const.Amend. 14.

7. Marriage ⚿1

The right to personal choice regarding marriage is inherent in the concept of individual autonomy.

8. Marriage ⚿1, 17.5(1)

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality, and this is true for all persons, whatever their sexual orientation.

9. Marriage ⚿1

The right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.

10. Constitutional Law ⚿1442

Same-sex couples have the same right as opposite-sex couples to enjoy intimate association.

11. Marriage ⚿1

Marriage safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.

12. Constitutional Law ⚿1052

If fundamental rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.

13. Constitutional Law ⚿3861

The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles; rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other, and in any particular case one Clause may be thought to capture the essence of the right in a

more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. U.S.C.A. Const.Amend. 14.

14. Constitutional Law ⚿3736

The Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution. U.S.C.A. Const.Amend. 14.

15. Constitutional Law ⚿3438, 4385

Marriage ⚿17.5(1)

The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty; overruling *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, and abrogating *Citizens for Equal Protection v. Bruning,* 455 F.3d 859, *Adams v. Howerton,* 673 F.2d 1036, and other cases. U.S.C.A. Const.Amend. 14.

16. Constitutional Law ⚿1052

The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.

17. Constitutional Law ⚿1050, 2311

The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power; thus, when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking, and this holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

18. Constitutional Law ⚿665, 672

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right; the Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter, and an individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.

19. Constitutional Law ⚿501

The idea of the Constitution was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts.

20. Constitutional Law ⚿1052

Fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

21. Constitutional Law ⚿1406

Religions, and those who adhere to religious doctrines, may advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned; the First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. U.S.C.A. Const.Amend. 1.

22. Marriage ⚿17.5(2)

There is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

West Codenotes

Held Unconstitutional

Ky.Const. § 233A; KRS 402.005, 402.020(1)(d), 402.040(2), 402.045; M.C.L.A. Const. Art. 1, § 25; M.C.L.A. §§ 551.1, 551.271, 551.272; Ohio Const. Art. 15, § 11; Ohio R.C. § 3101.01; T.C.A. Const. Art. 11, § 18; T.C.A. § 36-3-113.

Recognized as Unconstitutional

1 U.S.C.A. § 7

Syllabus *

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

Held: The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Pp. 2593 – 2608.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. Pp. 2593 – 2598.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the petitioners' own experiences. Pp. 2593 – 2595.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S.Ct. 2472,

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

156 L.Ed.2d 508. In 2012, the federal Defense of Marriage Act was also struck down. *United States v. Windsor,* 570 U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue. Pp. 2595 – 2598.

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex. Pp. 2597 – 2607.

(1) The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, *e.g., Eisenstadt v. Baird,* 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349; *Griswold v. Connecticut,* 381 U.S. 479, 484–486, 85 S.Ct. 1678, 14 L.Ed.2d 510. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010, invalidated bans on interracial unions, and *Turner v. Safley,* 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship involving opposite-sex partners, as did *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, *e.g., Lawrence, supra,* at 574, 123 S.Ct. 2472. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g., Eisenstadt, supra,* at 453–454, 92 S.Ct. 1029. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. 2597 – 2599.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U.S., at 12, 87 S.Ct. 1817. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence, supra,* at 574, 123 S.Ct. 2472. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold v. Connecticut,* which held the Constitution protects the right of married couples to use contraception, 381 U.S., at 485, 85 S.Ct. 1678, and was acknowledged in *Turner, supra,* at 95, 107 S.Ct. 2254. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence, supra,* at 567, 123 S.Ct. 2472.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, *e.g., Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor, supra,* at ——, 133 S.Ct., at 2694–2695. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard v. Hill,* 125 U.S. 190, 211, 8 S.Ct. 723, 31 L.Ed. 654. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. Pp. 2598 – 2602.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving*, where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, *e.g., Kirchberg v. Feenstra,* 450 U.S. 455, 460–461, 101 S.Ct. 1195, 67 L.Ed.2d 428, and confirmed the relation between liberty and equality, see, *e.g., M.L.B. v. S.L.J.,* 519 U.S. 102, 120–121, 117 S.Ct. 555, 136 L.Ed.2d 473.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence,* 539 U.S., at 575, 123 S.Ct. 2472. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this de-

nial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. Pp. 2602 – 2605.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker v. Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Pp. 2604 – 2605.

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers*, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Pp. 2605 – 2607.

(c) The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 2607 – 2608.

772 F.3d 388, reversed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C.J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

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James D. Esseks, Steven R. Shapiro, Joshua A. Block, Chase B. Strangio, Leslie Cooper, Louise Melling, American Civil Liberties, New York, NY, Jeffrey L. Fisher, Brian Wolfman, Stanford Law School, Supreme Court Litigation Clinic, Stanford, CA, William E. Sharp, American Civil Liberties Union of Kentucky, Louisville, KY, Daniel J. Canon, Counsel of Record, Laura E. Landenwich, L. Joe Dunman, Clay Daniel Walton Adams, PLC, Louisville, KY, Shannon Fauver, Dawn Elliott, Fauver Law Office, PLLC, Louisville, KY, for Gregory Bourke, et al., and Timothy Love, et al., Petitioners.

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For U.S. Supreme Court briefs, see:

2015 WL 1776076 (Reply.Brief)
2015 WL 1384100 (Resp.Brief)
2015 WL 860738 (Pet.Brief)
2014 WL 7169722 (Resp.Brief)
2015 WL 1776077 (Reply.Brief)
2015 WL 1384102 (Resp.Brief)
2015 WL 860739 (Pet.Brief)
2015 WL 1384104 (Resp.Brief)
2015 WL 860740 (Pet.Brief)
2015 WL 1776079 (Reply.Brief)
2015 WL 1384105 (Resp.Brief)
2015 WL 860741 (Pet.Brief)

Justice KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, *e.g.,* Mich. Const., Art. I, § 25; Ky. Const. § 233A; Ohio Rev.Code Ann. § 3101.01 (Lexis 2008); Tenn. Const., Art. XI, § 18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra.* The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer v. Snyder,* 772 F.3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history

reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for

the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation 9–17 (2000); S. Coontz, Marriage, A History 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, Public Vows; S. Coontz, Marriage; H.

Hartog, Man & Wife in America: A History (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7–17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to

strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States v. Windsor*, 570 U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." *Id.*, at ——, 133 S.Ct., at 2689.

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864–868 (C.A.8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, The State of Marriage Equality in America, State–by–State Supp. (2015).

III

[1] Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U.S. 145, 147–149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d

349 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

[2, 3] The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe v. Ullman*, 367 U.S. 497, 542, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*, *supra*, at 572, 123 S.Ct. 2472. That method respects our history and learns from it without allowing the past alone to rule the present.

[4] The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

[5, 6] Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, *e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639–640, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Griswold*, *supra*, at 486, 85 S.Ct. 1678; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, *e.g.*,

Lawrence, 539 U.S., at 574, 123 S.Ct. 2472; *Turner, supra,* at 95, 107 S.Ct. 2254; *Zablocki, supra,* at 384, 98 S.Ct. 673; *Loving, supra,* at 12, 87 S.Ct. 1817; *Griswold, supra,* at 486, 85 S.Ct. 1678. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g., Eisenstadt, supra,* at 453–454, 92 S.Ct. 1029; *Poe, supra,* at 542–553, 81 S.Ct. 1752 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

[7] A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U.S., at 12, 87 S.Ct. 1817; see also *Zablocki, supra,* at 384, 98 S.Ct. 673 (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence, supra,* at 574, 123 S.Ct. 2472. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki, supra,* at 386, 98 S.Ct. 673.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge,* 440 Mass., at 322, 798 N.E.2d, at 955.

[8] The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor,* 570 U.S., at ——, 133 S.Ct., at 2693–2695. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving, supra,* at 12, 87 S.Ct. 1817 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

[9] A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut,* which held the Constitution protects the right of married couples to use contraception. 381 U.S., at 485, 85 S.Ct. 1678. Suggesting that marriage is a right "older than the Bill of Rights," *Griswold* described marriage this way:

> "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose

as any involved in our prior decisions." *Id.*, at 486, 85 S.Ct. 1678.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U.S., at 95–96, 107 S.Ct. 2254. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*, *supra*, at ——, 133 S.Ct., at 2689. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

[10] As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U.S., at 567, 123 S.Ct. 2472. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

[11] A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer*, 262 U.S., at 399, 43 S.Ct. 625. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U.S., at 384, 98 S.Ct. 673 (quoting *Meyer*, *supra*, at 399, 43 S.Ct. 625). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, *supra*, at ——, 133 S.Ct., at 2694–2695. Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue

here thus harm and humiliate the children of same-sex couples. See *Windsor, supra,* at ——, 133 S.Ct., at 2694–2695.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

> "There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. . . . [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard v. Hill,* 125 U.S. 190, 211, 8 S.Ct. 723, 31 L.Ed. 654 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been " 'a great public institution, giving character to our whole civil polity.' " *Id.,* at 213, 8 S.Ct. 723. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, Public Vows. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar Association as *Amicus Curiae* 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor,* 570 U.S., at ——–——, 133 S.Ct., at 2690–2691. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes

marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), which called for a "'careful description'" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg,* 521 U.S., at 752–773, 117 S.Ct. 2258 (Souter, J., concurring in judgment); *id.,* at 789–792, 117 S.Ct. 2258 (BREYER, J., concurring in judgments).

[12] That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving,* 388 U.S., at 12, 87 S.Ct. 1817; *Lawrence,* 539 U.S., at 566–567, 123 S.Ct. 2472.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

[13] The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection

Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M.L.B.*, 519 U.S., at 120–121, 117 S.Ct. 555; *id.*, at 128–129, 117 S.Ct. 555 (KENNEDY, J., concurring in judgment); *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U.S., at 12, 87 S.Ct. 1817. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U.S., at 383, 98 S.Ct. 673. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.*, at 383–387, 98 S.Ct. 673, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

[14] Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, see *supra*, at 2595, invidious sex-based classifications in marriage remained common through the mid–20th century. See App. to Brief for Appellant in *Reed v. Reed*, O.T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her

separately, either for her own protection, or for her benefit." Ga.Code Ann. § 53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, *e.g., Kirchberg v. Feenstra,* 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981); *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980); *Califano v. Westcott,* 443 U.S. 76, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979); *Orr v. Orr,* 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Califano v. Goldfarb,* 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977) (plurality opinion); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). Like *Loving* and *Zablocki,* these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M.L.B. v. S.L.J.,* the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U.S., at 119–124, 117 S.Ct. 555. In *Eisenstadt v. Baird,* the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U.S., at 446–454, 92 S.Ct. 1029. And in *Skinner v. Oklahoma ex rel. Williamson,* the Court invalidated under both principles a law that allowed sterilization of habitual criminals. See 316 U.S., at 538–543, 62 S.Ct. 1110.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U.S., at 575, 123 S.Ct. 2472. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid.* *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.,* at 578, 123 S.Ct. 2472.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, *e.g., Zablocki, supra,* at 383–388, 98 S.Ct. 673; *Skinner,* 316 U.S., at 541, 62 S.Ct. 1110.

[15] These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that

same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. See *DeBoer*, 772 F.3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

[16, 17] Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN*, 572 U.S. ——, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014), noting the "right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Id.*, at ——–——, 134 S.Ct., at 1636–1637. Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." *Id.*, at ——, 134 S.Ct., at 1636. Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. *Id.*, at ——, 134 S.Ct., at 1637. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

[18–20] The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of

the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Ibid.* It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers,* a bare majority upheld a law criminalizing same-sex intimacy. See 478 U.S., at 186, 190–195, 106 S.Ct. 2841. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id.,* at 199, 106 S.Ct. 2841 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *id.,* at 214, 106 S.Ct. 2841 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was "not correct when it was decided." 539 U.S., at 578, 123 S.Ct. 2472. Although *Bowers* was eventually repudiated in *Lawrence,* men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers,* would be unjustified under the Fourteenth Amendment. The petitioners' stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connec-

tion between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (C.A.10 2014) ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

[21] Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of "the most perplexing and distressing complication[s]" in the law of domestic relations. *Williams v. North Carolina*, 317 U.S. 287, 299, 63 S.Ct. 207, 87 L.Ed. 279 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

[22] As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It

follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

Appendix A

APPENDICES

A

State and Federal Judicial Decisions Addressing Same–Sex Marriage

United States Courts of Appeals Decisions

Adams v. Howerton, 673 F.2d 1036 (C.A.9 1982)

Smelt v. County of Orange, 447 F.3d 673 (C.A.9 2006)

Citizens for Equal Protection v. Bruning, 455 F.3d 859 (C.A.8 2006)

Appendix A—Continued

Windsor v. United States, 699 F.3d 169 (C.A.2 2012)

Massachusetts v. Department of Health and Human Services, 682 F.3d 1 (C.A.1 2012)

Perry v. Brown, 671 F.3d 1052 (C.A.9 2012)

Latta v. Otter, 771 F.3d 456 (C.A.9 2014)

Baskin v. Bogan, 766 F.3d 648 (C.A.7 2014)

Bishop v. Smith, 760 F.3d 1070 (C.A.10 2014)

Bostic v. Schaefer, 760 F.3d 352 (C.A.4 2014)

Kitchen v. Herbert, 755 F.3d 1193 (C.A.10 2014)

DeBoer v. Snyder, 772 F.3d 388 (C.A.6 2014)

Latta v. Otter, 779 F.3d 902 (C.A.9 2015) (O'Scannlain, J., dissenting from the denial of rehearing en banc)

United States District Court Decisions

Adams v. Howerton, 486 F.Supp. 1119 (C.D.Cal.1980)

Citizens for Equal Protection, Inc. v. Bruning, 290 F.Supp.2d 1004 (Neb.2003)

Citizens for Equal Protection v. Bruning, 368 F.Supp.2d 980 (Neb.2005)

Wilson v. Ake, 354 F.Supp.2d 1298 (M.D.Fla.2005)

Smelt v. County of Orange, 374 F.Supp.2d 861 (C.D.Cal.2005)

Bishop v. Oklahoma ex rel. Edmondson, 447 F.Supp.2d 1239 (N.D.Okla.2006)

Massachusetts v. Department of Health and Human Services, 698 F.Supp.2d 234 (Mass.2010)

Gill v. Office of Personnel Management, 699 F.Supp.2d 374 (Mass.2010)

Appendix A—Continued

Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D.Cal.2010)

Dragovich v. Department of Treasury, 764 F.Supp.2d 1178 (N.D.Cal.2011)

Golinski v. Office of Personnel Management, 824 F.Supp.2d 968 (N.D.Cal.2012)

Dragovich v. Department of Treasury, 872 F.Supp.2d 944 (N.D.Cal.2012)

Windsor v. United States, 833 F.Supp.2d 394 (S.D.N.Y.2012)

Pedersen v. Office of Personnel Management, 881 F.Supp.2d 294 (Conn.2012)

Jackson v. Abercrombie, 884 F.Supp.2d 1065 (Haw.2012)

Sevcik v. Sandoval, 911 F.Supp.2d 996 (Nev.2012)

Merritt v. Attorney General, 2013 WL 6044329 (M.D.La., Nov. 14, 2013)

Gray v. Orr, 4 F.Supp.3d 984 (N.D.Ill. 2013)

Lee v. Orr, 2013 WL 6490577 (N.D.Ill., Dec. 10, 2013)

Kitchen v. Herbert, 961 F.Supp.2d 1181 (Utah 2013)

Obergefell v. Wymyslo, 962 F.Supp.2d 968 (S.D.Ohio 2013)

Bishop v. United States ex rel. Holder, 962 F.Supp.2d 1252 (N.D.Okla.2014)

Bourke v. Beshear, 996 F.Supp.2d 542 (W.D.Ky.2014)

Lee v. Orr, 2014 WL 683680 (N.D.Ill., Feb. 21, 2014)

Bostic v. Rainey, 970 F.Supp.2d 456 (E.D.Va.2014)

De Leon v. Perry, 975 F.Supp.2d 632 (W.D.Tex.2014)

Tanco v. Haslam, 7 F.Supp.3d 759 (M.D.Tenn.2014)

DeBoer v. Snyder, 973 F.Supp.2d 757 (E.D.Mich.2014)

Appendix A—Continued

Henry v. Himes, 14 F.Supp.3d 1036 (S.D.Ohio 2014)

Latta v. Otter, 19 F.Supp.3d 1054 (Idaho 2014)

Geiger v. Kitzhaber, 994 F.Supp.2d 1128 (Ore.2014)

Evans v. Utah, 21 F.Supp.3d 1192 (Utah 2014)

Whitewood v. Wolf, 992 F.Supp.2d 410 (M.D.Pa.2014)

Wolf v. Walker, 986 F.Supp.2d 982 (W.D.Wis.2014)

Baskin v. Bogan, 12 F.Supp.3d 1144 (S.D.Ind.2014)

Love v. Beshear, 989 F.Supp.2d 536 (W.D.Ky.2014)

Burns v. Hickenlooper, 2014 WL 3634834 (Colo., July 23, 2014)

Bowling v. Pence, 39 F.Supp.3d 1025 (S.D.Ind.2014)

Brenner v. Scott, 999 F.Supp.2d 1278 (N.D.Fla.2014)

Robicheaux v. Caldwell, 2 F.Supp.3d 910 (E.D.La.2014)

General Synod of the United Church of Christ v. Resinger, 12 F.Supp.3d 790 (W.D.N.C.2014)

Hamby v. Parnell, 56 F.Supp.3d 1056 (Alaska 2014)

Fisher–Borne v. Smith, 14 F.Supp.3d 695 (M.D.N.C.2014)

Majors v. Horne, 14 F.Supp.3d 1313 (Ariz.2014)

Connolly v. Jeanes, 73 F.Supp.3d 1094, 2014 WL 5320642 (Ariz., Oct. 17, 2014)

Guzzo v. Mead, 2014 WL 5317797 (Wyo., Oct. 17, 2014)

Conde–Vidal v. Garcia–Padilla, 54 F.Supp.3d 157 (P.R.2014)

Marie v. Moser, 65 F.Supp.3d 1175, 2014 WL 5598128 (Kan., Nov. 4, 2014)

Appendix A—Continued

Lawson v. Kelly, 58 F.Supp.3d 923 (W.D.Mo.2014)

McGee v. Cole, 66 F.Supp.3d 747, 2014 WL 5802665 (S.D.W.Va., Nov. 7, 2014)

Condon v. Haley, 21 F.Supp.3d 572 (S.C. 2014)

Bradacs v. Haley, 58 F.Supp.3d 514 (S.C.2014)

Rolando v. Fox, 23 F.Supp.3d 1227 (Mont.2014)

Jernigan v. Crane, 64 F.Supp.3d 1260, 2014 WL 6685391 (E.D.Ark., Nov. 25, 2014)

Campaign for Southern Equality v. Bryant, 64 F.Supp.3d 906, 2014 WL 6680570 (S.D.Miss., Nov. 25, 2014)

Inniss v. Aderhold, 80 F.Supp.3d 1335, 2015 WL 300593 (N.D.Ga., Jan. 8, 2015)

Rosenbrahn v. Daugaard, 61 F.Supp.3d 862 (S.D.2015)

Caspar v. Snyder, 77 F.Supp.3d 616, 2015 WL 224741 (E.D.Mich., Jan. 15, 2015)

Searcey v. Strange, 2015 U.S. Dist. LEXIS 7776 (S.D.Ala., Jan. 23, 2015)

Strawser v. Strange, 44 F.Supp.3d 1206 (S.D.Ala.2015)

Waters v. Ricketts, 48 F.Supp.3d 1271 (Neb.2015)

State Highest Court Decisions

Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971)

Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973)

Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993)

Dean v. District of Columbia, 653 A.2d 307 (D.C.1995)

Baker v. State, 170 Vt. 194, 744 A.2d 864 (1999)

Appendix A—Continued

Brause v. State, 21 P.3d 357 (Alaska 2001) (ripeness)

Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003)

In re Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N.E.2d 565 (2004)

Li v. State, 338 Or. 376, 110 P.3d 91 (2005)

Cote–Whitacre v. Department of Public Health, 446 Mass. 350, 844 N.E.2d 623 (2006)

Lewis v. Harris, 188 N.J. 415, 908 A.2d 196 (2006)

Andersen v. King County, 158 Wash.2d 1, 138 P.3d 963 (2006)

Hernandez v. Robles, 7 N.Y.3d 338, 821 N.Y.S.2d 770, 855 N.E.2d 1 (2006)

Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007)

In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008)

Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 957 A.2d 407 (2008)

Strauss v. Horton, 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (2009)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

Griego v. Oliver, 2014–NMSC–003, —— N.M. ——, 316 P.3d 865 (2013)

Garden State Equality v. Dow, 216 N.J. 314, 79 A.3d 1036 (2013)

Ex parte State ex rel. Alabama Policy Institute, —— So.3d ——, 2015 WL 892752 (Ala., Mar. 3, 2015)

Appendix B

B

State Legislation and Judicial Decisions Legalizing Same–Sex Marriage

Legislation

Del.Code Ann., Tit. 13, § 129 (Cum. Supp. 2014)

D.C. Act No. 18–248, 57 D.C. Reg. 27 (2010)

Haw.Rev.Stat. § 572 –1 (2006) and (2013 Cum. Supp.)

Ill. Pub. Act No. 98–597

Me.Rev.Stat. Ann., Tit. 19, § 650–A (Cum. Supp. 2014)

2012 Md. Laws p. 9

2013 Minn Laws p. 404

2009 N.H. Laws p. 60

2011 N.Y. Laws p. 749

2013 R.I. Laws p. 7

2009 Vt. Acts & Resolves p. 33

2012 Wash. Sess. Laws p. 199

Judicial Decisions

Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003)

Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 957 A.2d 407 (2008)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

Griego v. Oliver, 2014–NMSC–003, —— N.M. ——, 316 P.3d 865 (2013)

Garden State Equality v. Dow, 216 N.J. 314, 79 A.3d 1036 (2013)

Chief Justice ROBERTS, with whom Justice SCALIA and Justice THOMAS join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That

ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." *Ante,* at 2598, 2605. As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." *Lochner v. New York,* 198 U.S. 45, 76, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id.,* at 69, 25 S.Ct. 539 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." *Ante,* at 2603. I have no choice but to dissent.

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

I

Petitioners and their *amici* base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, *ante,* at 2594, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us. *Town of Greece v. Galloway,* 572 U.S. ——, ——, 134 S.Ct. 1811, 1819, 188 L.Ed.2d 835 (2014).

A

As the majority acknowledges, marriage "has existed for millennia and across civilizations." *Ante,* at 2594. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See *ante,* at 2594; Tr. of Oral Arg. on Question 1, p. 12 (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001).

As the Court explained two Terms ago, "until recent years, . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States v. Windsor,* 570 U.S. ——, ——, 133 S.Ct. 2675, 2689, 186 L.Ed.2d 808 (2013).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, A History of Marriage Systems 2 (1988); cf. M. Cicero, De Officiis 57 (W. Miller transl. 1913) ("For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.").

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. As one prominent scholar put it, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." J.Q. Wilson, The Marriage Problem 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at "the time of the Nation's founding [marriage] was understood to be a voluntary contract between a man and a woman." *Ante,* at 2595. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between "husband and wife" as one of the "great relations in private life," and philosophers like John Locke, who described marriage as "a voluntary compact between man and woman" centered on "its chief end, procreation" and the "nourishment and support" of children. 1 W. Blackstone, Commentaries *410; J. Locke, Second Treatise of Civil Government §§ 78–79, p. 39 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family "was a given: its structure, its stability, roles, and values accepted by all." Forte, The Framers' Idea of Marriage and Family, in The Meaning of Marriage 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." *Windsor,* 570 U.S., at ——, 133

S.Ct., at 2691 (quoting *In re Burrus*, 136 U.S. 586, 593–594, 10 S.Ct. 850, 34 L.Ed. 500 (1890)). There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See *DeBoer v. Snyder*, 772 F.3d 388, 396–399 (C.A.6 2014). Even when state laws did not specify this definition expressly, no one doubted what they meant. See *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky.App.1973). The meaning of "marriage" went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as "the legal union of a man and woman for life," which served the purposes of "preventing the promiscuous intercourse of the sexes, ... promoting domestic felicity, and ... securing the maintenance and education of children." 1 An American Dictionary of the English Language (1828). An influential 19th-century treatise defined marriage as "a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex." J. Bishop, Commentaries on the Law of Marriage and Divorce 25 (1852). The first edition of Black's Law Dictionary defined marriage as "the civil status of one man and one woman united in law for life." Black's Law Dictionary 756 (1891) (emphasis deleted). The dictionary maintained essentially that same definition for the next century.

This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as "the union for life of one man and one woman," *Murphy v. Ramsey*, 114 U.S. 15, 45, 5 S.Ct. 747, 29 L.Ed. 47 (1885), which forms "the foundation of the family and of society, without which there would be neither civilization nor progress," *Maynard v. Hill*, 125 U.S. 190, 211, 8 S.Ct. 723, 31 L.Ed. 654 (1888). We later described marriage as "fundamental to our very existence and survival," an understanding that necessarily implies a procreative component. *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); see *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). More recent cases have directly connected the right to marry with the "right to procreate." *Zablocki v. Redhail*, 434 U.S. 374, 386, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978).

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant's separate status. Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy," were repealed by many States and ultimately struck down by this Court. *Loving*, 388 U.S., at 6–7, 87 S.Ct. 1817.

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." *Ante*, at 2595. They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right

that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured. *Ante,* at 2595.

B

Shortly after this Court struck down racial restrictions on marriage in *Loving,* a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving,* and this Court summarily dismissed an appeal. *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972).

In the decades after *Baker,* greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic "momentum" in favor of "expand[ing] the definition of marriage to include gay couples," but concluded that petitioners had not made "the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." 772 F.3d, at 396, 403. That decision interpreted the Constitution correctly, and I would affirm.

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1, at 38–39. The majority nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause.

The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. *Ante,* at 2599. In reality, howev-

er, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

A

Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution. See *ante*, at 2594, 2600. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment's requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). The theory is that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification. *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (Address at Stanford) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." *Id.*, at 450. In a dissent that has outlasted the majority opinion, Justice

Curtis explained that when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to control" the Constitution's meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Id.,* at 621.

Dred Scott's holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner v. New York,* this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." 198 U.S., at 60, 61, 25 S.Ct. 539. In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law." *Id.,* at 58, 25 S.Ct. 539.

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." *Id.,* at 72, 25 S.Ct. 539 (opinion of Harlan, J.). The majority's contrary conclusion required adopting as constitutional law "an economic theory which a large part of the country does not entertain." *Id.,* at 75, 25 S.Ct. 539 (opinion of Holmes, J.). As Justice Holmes memorably put it, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism. *Ibid.* The Constitution "is not intended to embody a particular economic theory.... It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution." *Id.,* at 75–76, 25 S.Ct. 539.

In the decades after *Lochner,* the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." *Adkins v. Children's Hospital of D.C.,* 261 U.S. 525, 570, 43 S.Ct. 394, 67 L.Ed. 785 (1923) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected "liberty," the *Lochner* line of cases left "no alternative to regarding the court as a ... legislative chamber." L. Hand, The Bill of Rights 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. "The doctrine that ... due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa,* 372 U.S. 726, 730, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); see *Day–Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423, 72 S.Ct. 405, 96 L.Ed. 469 (1952) ("we do not sit as a superlegislature to weigh the wisdom of legislation"). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of har-

mony with a particular school of thought." *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for "judicial self-restraint." *Collins v. Harker Heights,* 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Our precedents have required that implied fundamental rights be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg,* 521 U.S., at 720–721, 117 S.Ct. 2258 (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach. See, *e.g., District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 72, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009); *Flores,* 507 U.S., at 303, 113 S.Ct. 1439; *United States v. Salerno,* 481 U.S. 739, 751, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); *Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion); see also *id.,* at 544, 97 S.Ct. 1932 (White, J., dissenting) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."); *Troxel v. Granville,* 530 U.S. 57, 96–101, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (KENNEDY, J., dissenting) (consulting "'[o]ur Nation's history, legal traditions, and practices'" and concluding that "[w]e owe it to the Nation's domestic relations legal structure ... to proceed with caution" (quoting *Glucksberg,* 521 U.S., at 721, 117 S.Ct. 2258)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. *Ante,* at 2602. But given the few "guideposts for responsible decisionmaking in this unchartered area," *Collins,* 503 U.S., at 125, 112 S.Ct. 1061, "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula," *Moore,* 431 U.S., at 504, n. 12, 97 S.Ct. 1932 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identifying fundamental rights, *ante,* at 2597 – 2598, does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." *Griswold v. Connecticut,* 381 U.S. 479, 501, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with dec-

ades of precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. *Ante,* at 2593 – 2594, 2594, 2595, 2608. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner v. Safley,* 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); *Zablocki,* 434 U.S., at 383, 98 S.Ct. 673; see *Loving,* 388 U.S., at 12, 87 S.Ct. 1817. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving,* the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki,* restrictions based on child support debts did not suffice. In *Turner,* restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, *where neither party owes child support or is in prison*." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman *of the same race*." See Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"); *post,* at 2636 – 2637, n. 5 (THOMAS, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." *Ante,* at 2598.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See *Windsor,* 570 U.S., at ——, 133 S.Ct., at 2715 (ALITO, J., dissenting) ("What Windsor and the United States seek . . . is not the protection of a deeply rooted right but the recognition of a very new right."). Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. *Ante,* at 2598. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental "right of privacy." *Griswold,* 381 U.S., at 486, 85 S.Ct. 1678. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. *Id.,* at 485–486, 85 S.Ct. 1678. The Court stressed the invasive nature of the ban,

which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." *Id.,* at 485, 85 S.Ct. 1678. In the Court's view, such laws infringed the right to privacy in its most basic sense: the "right to be let alone." *Eisenstadt v. Baird,* 405 U.S. 438, 453–454, n. 10, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (internal quotation marks omitted); see *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home." *Id.,* at 562, 567, 123 S.Ct. 2472.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneliness" by the laws challenged in these cases—no one. *Ante,* at 2608. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in *Poe v. Ullman,* 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." *Id.,* at 542, 81 S.Ct. 1752. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that courts implying fundamental rights are not "free to roam where unguided speculation might take them." *Ibid.* They must instead have "regard to what history teaches" and exercise not only "judgment" but "restraint." *Ibid.* Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis." *Id.,* at 546, 81 S.Ct. 1752.

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney v. Winnebago County Dept. of Social Servs.,* 489 U.S. 189, 196, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 35–37, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); *post,* at 2635 – 2637 (THOMAS, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

3

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights

taken by this Court in *Glucksberg*. *Ante,* at 2602 (quoting 521 U.S., at 721, 117 S.Ct. 2258). It is revealing that the majority's position requires it to effectively overrule *Glucksberg,* the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937. The majority opens its opinion by announcing petitioners' right to "define and express their identity." *Ante,* at 2593. The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Ante,* at 2599. This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor." *Lochner,* 198 U.S., at 58, 25 S.Ct. 539 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. *Ante,* at 2597 – 2598, 2598. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." *Ante,* at 2602. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner.* See 198 U.S., at 61, 25 S.Ct. 539 ("We do not believe in the soundness of the views which uphold this law," which "is an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best").

The majority recognizes that today's cases do not mark "the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." *Ante,* at 2606. On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives the grave errors of that period.

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Cf. *Brown v. Buhman,* 947 F.Supp.2d 1170 (Utah 2013), appeal pending, No. 14–4117 (CA10). Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," *ante,* at

2599, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," *ante,* at 2600, why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," *ante,* at 2604, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N.Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L.J. 1977 (2015).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." Tr. of Oral Arg. on Question 2, p. 6. But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." *Ante,* at 2607. This argument again echoes *Lochner,* which relied on its assessment that "we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." 198 U.S., at 57, 25 S.Ct. 539.

Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes's dissent in *Lochner,* the Fourteenth Amendment does not enact John Stuart Mill's On Liberty any more than it enacts Herbert Spencer's Social Statics. See Randolph, Before *Roe v. Wade*: Judge Friendly's Draft Abortion Opinion, 29 Harv. J.L. & Pub. Pol'y 1035, 1036–1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down

democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the "nature of injustice is that we may not always see it in our own times." *Ante*, at 2598. As petitioners put it, "times can blind." Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. "The past is never dead. It's not even past." W. Faulkner, Requiem for a Nun 92 (1951).

III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. *Ante*, at 2603. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, Constitutional Law 453 (7th ed. 2013). The majority's approach today is different:

> "Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Ante*, at 2603.

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. *Ante*, at 2604 – 2605. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 197, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009). In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence*, 539 U.S., at 585, 123 S.Ct. 2472 (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to

license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." *Republican Party of Minn. v. White,* 536 U.S. 765, 793, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (KENNEDY, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making "new dimensions of freedom . . . apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary." *Ante,* at 2596 – 2597.

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" *amicus* briefs in these cases alone. *Ante,* at 2597, 2597 – 2598, 2605. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." *Ante,* at 2602. The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after "a quite extensive discussion." *Ante,* at 2596. In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. "Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette v. BAMN,* 572 U.S. ——, —— – ——, 134 S.Ct. 1623, 1637, 188 L.Ed.2d 613 (2014).

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly reexamining their positions, and either re-

versing course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. "That is exactly how our system of government is supposed to work." *Post,* at 2627 (SCALIA, J., dissenting).

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, "The political process was moving . . ., not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe* v. *Wade,* 63 N.C. L. Rev. 375, 385–386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. *Ante,* at 2607. The First Amendment guarantees, however, the freedom to "*exercise* " religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student

housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. *Ante,* at 2602 – 2603. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. *Ante,* at 2602. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. *Ante,* at 2601 – 2602, 2602 – 2603, 2604, 2606. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post,* at 2642 – 2643 (ALITO, J., dissenting). Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted. *Ante,* at 2602.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

I join THE CHIEF JUSTICE's opinion in full. I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrange-

ments it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to.[1] Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.[2]

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts," [3] denying "Full Faith and Credit" to the "public Acts" of other States,[4] prohibiting the free exercise of religion,[5] abridging the freedom of speech,[6] infringing the right to keep and bear arms,[7] authorizing unreasonable searches and seizures,[8] and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people" [9] can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the au-

1. Brief for Respondents in No. 14–571, p. 14.

2. Accord, *Schuette v. BAMN,* 572 U.S. ——, ——–——, 134 S.Ct. 1623, 1636–1637, 188 L.Ed.2d 613 (2014) (plurality opinion).

3. U.S. Const., Art. I, § 10.

4. Art. IV, § 1.

5. Amdt. 1.

6. *Ibid.*

7. Amdt. 2.

8. Amdt. 4.

9. Amdt. 10.

thor of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

> "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." [10]

> "[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." [11]

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as "due process of law" or "equal protection of the laws"—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.[12] We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect.[13] That is so because "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions . . . ." [14] One would think that sentence would continue: ". . . and therefore they provided for a means by which the People could amend the Constitution," or perhaps ". . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." [15] The "we," needless to say, is the nine of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries." [16] Thus, rather than focusing on *the People's* understanding of "liberty"—at the time of ratification or even today—the majority focuses on four "principles and traditions" that, *in the majority's view,* prohibit States from defining marriage as an institution consisting of one man and one woman.[17]

10. *United States v. Windsor,* 570 U.S. ——, ——, 133 S.Ct. 2675, 2691, 186 L.Ed.2d 808 (2013) (internal quotation marks and citation omitted).

11. *Id.,* at ——, 133 S.Ct., at 2691.

12. See *Town of Greece v. Galloway,* 572 U.S. ——, ——–——, 134 S.Ct. 1811, 1818–1819, 188 L.Ed.2d 835 (2014).

13. *Ante,* at 2598.

14. *Ante,* at 2598.

15. *Ibid.*

16. *Ante,* at 2598.

This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers [18] who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans [19]), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003.[20] They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when

17. *Ante,* at 2598 – 2602.

18. The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. See Brief for American Bar Association as *Amicus Curiae* in Nos. 14–571 and 14–574, pp. 1–5.

19. See Pew Research Center, America's Changing Religious Landscape 4 (May 12, 2015).

20. *Goodridge v. Department of Public Health,* 440 Mass. 309, 798 N.E.2d 941 (2003).

that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago,[21] cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.[22] Of course the opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality." [23] (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." [24] (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right." [25] (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

* * *

21. *Windsor,* 570 U.S., at ——, 133 S.Ct., at 2714–2715 (ALITO, J., dissenting).

22. If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

23. *Ante,* at 2599.

24. *Ante,* at 2602.

25. *Ibid.*

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments." [26] With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

I

The majority's decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing "due process" before a person is deprived of his "life, liberty, or property." I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. *McDonald v. Chicago*, 561 U.S. 742, 811–812, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. U.S. Const., Amdt. 14, § 1. Worse, it invites judges to do exactly what the majority has done here—" 'roa[m] at large in the constitutional field' guided only by their personal views" as to the " 'fundamental rights' " protected by that document. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 953, 965, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 502, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Harlan, J., concurring in judgment)).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. Petitioners argue that by enshrining the traditional definition of marriage in their State Constitutions through voter-approved amendments, the States have put the issue "beyond the reach of the normal democratic process." Brief for Petitioners in No. 14–562, p. 54. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a "bare majority" of

26. The Federalist No. 78, pp. 522, 523 (J. Cooke ed. 1961) (A. Hamilton).

this Court, *ante,* at 2606, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only "due process" is but further evidence of the danger of substantive due process.[1]

II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all—whether under a theory of "substantive" or "procedural" due process—a party must first identify a deprivation of "life, liberty, or property." The majority claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

A

1

As used in the Due Process Clauses, "liberty" most likely refers to "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 W. Blackstone, Commentaries on the Laws of England 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Both of the Constitution's Due Process Clauses reach back to Magna Carta. See *Davidson v. New Orleans,* 96 U.S. 97, 101–102, 24 L.Ed. 616 (1878). Chapter 39 of the original Magna Carta provided, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Magna Carta, ch. 39, in A. Howard, Magna Carta: Text and Commentary 43 (1964). Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land." 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797). In his influential commentary on the provision many years later, Sir Edward Coke interpreted the words "by the law of the land" to mean the same thing as "by due proces of the common law." *Id.,* at 50.

After Magna Carta became subject to renewed interest in the 17th century, see, *e.g., ibid.,* William Blackstone referred to this provision as protecting the "absolute rights of every Englishman." 1 Blackstone 123. And he formulated those absolute rights as "the right of personal security," which included the right to life; "the right of personal liberty"; and "the right of private property." *Id.,* at 125. He defined "the right of personal liberty" as "the power of locomotion, of changing situ-

1. The majority states that the right it believes is "part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Ante,* at 2602. Despite the "synergy" it finds "between th[ese] two protections," *ante,* at 2603, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.

ation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." *Id.*, at 125, 130.[2]

The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property."[3] State decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word "liberty" to refer only to freedom from physical restraint. See Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 441–445 (1926). Even one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding classically associated with obtaining freedom from physical restraint. Cf. *id.*, at 444–445.

In enacting the Fifth Amendment's Due Process Clause, the Framers similarly chose to employ the "life, liberty, or property" formulation, though they otherwise deviated substantially from the States' use of Magna Carta's language in the Clause. See Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 Harv. L. Rev. 365, 382 (1890). When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when "liberty" was paired with "life" and "property." See *id.*, at 375. And that usage avoids rendering superfluous those protections for "life" and "property."

If the Fifth Amendment uses "liberty" in this narrow sense, then the Fourteenth Amendment likely does as well. See *Hurtado v. California*, 110 U.S. 516, 534–535, 4 S.Ct. 111, 28 L.Ed. 232 (1884). Indeed, this Court has previously commented, "The conclusion is ... irresistible, that when the same phrase was employed in

2. The seeds of this articulation can also be found in Henry Care's influential treatise, English Liberties. First published in America in 1721, it described the "three things, which the Law of *England* ... principally regards and taketh Care of," as "*Life, Liberty* and *Estate,*" and described habeas corpus as the means by which one could procure one's "Liberty" from imprisonment. The Habeas Corpus Act, comment., in English Liberties, or the Free-born Subject's Inheritance 185 (H. Care comp. 5th ed. 1721). Though he used the word "Liberties" by itself more broadly, see, *e.g.*, *id.*, at 7, 34, 56, 58, 60, he used "Liberty" in a narrow sense when placed alongside the words "Life" or "Estate," see, *e.g.*, *id.*, at 185, 200.

3. Maryland, North Carolina, and South Carolina adopted the phrase "life, liberty, or property" in provisions otherwise tracking Magna Carta: "That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Md. Const., Declaration of Rights, Art. XXI (1776), in 3 Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1688 (F. Thorpe ed. 1909); see also S.C. Const., Art. XLI (1778), in 6 *id.*, at 3257; N.C. Const., Declaration of Rights, Art. XII (1776), in 5 *id.*, at 2788. Massachusetts and New Hampshire did the same, albeit with some alterations to Magna Carta's framework: "[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Mass. Const., pt. I, Art. XII (1780), in 3 *id.*, at 1891; see also N.H. Const., pt. I, Art. XV (1784), in 4 *id.*, at 2455.

the Fourteenth Amendment [as was used in the Fifth Amendment], it was used in the same sense and with no greater extent." *Ibid.* And this Court's earliest Fourteenth Amendment decisions appear to interpret the Clause as using "liberty" to mean freedom from physical restraint. In *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1877), for example, the Court recognized the relationship between the two Due Process Clauses and Magna Carta, see *id.*, at 123–124, and implicitly rejected the dissent's argument that " 'liberty' " encompassed "something more . . . than mere freedom from physical restraint or the bounds of a prison," *id.*, at 142 (Field, J., dissenting). That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

2

Even assuming that the "liberty" in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings "on natural rights and on the social and governmental contract" were cited "[i]n pamphlet after pamphlet" by American writers. B. Bailyn, The Ideological Origins of the American Revolution 27 (1967). Locke described men as existing in a state of nature, possessed of the "perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." J. Locke, Second Treatise of Civil Government, § 4, p. 4 (J. Gough ed. 1947) (Locke). Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security. See *id.*, § 97, at 49. Upon consenting to that order, men obtained civil liberty, or the freedom "to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it." *Id.*, § 22, at 13.[4]

This philosophy permeated the 18th-century political scene in America. A 1756 editorial in the Boston Gazette, for example, declared that "Liberty in the *State of*

4. Locke's theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that "natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature" and described civil liberty as that "which leaves the subject entire master of his own conduct," except as "restrained by human laws." 1 Blackstone 121–122. And in a "treatise routinely cited by the Founders," *Zivotofsky v. Kerry*, —— U.S. ——, 135 S.Ct. 2076, 192 L.Ed.2d 83, 2015 WL 2473281 (2015) (THOMAS, J., concurring in judgment in part and dissenting in part), Thomas Rutherforth wrote, "By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a mans right over his own actions." 1 T. Rutherforth, Institutes of Natural Law 146 (1754). Rutherforth explained that "[t]he only restraint, which a mans right over his own actions is originally under, is the obligation of governing himself by the law of nature, and the law of God," and that "[w]hatever right those of our own species may have . . . to restrain [those actions] within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them." *Id.*, at 147–148.

Nature " was the "inherent natural Right" "of each Man" "to make a free Use of his Reason and Understanding, and to chuse that Action which he thinks he can give the best Account of," but that, "in Society, every Man parts with a Small Share of his *natural* Liberty, or lodges it in the publick Stock, that he may possess the Remainder without Controul." Boston Gazette and Country Journal, No. 58, May 10, 1756, p. 1. Similar sentiments were expressed in public speeches, sermons, and letters of the time. See 1 C. Hyneman & D. Lutz, American Political Writing During the Founding Era 1760–1805, pp. 100, 308, 385 (1983).

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. See Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L.J. 907, 918–919 (1993). As one later commentator observed, "[L]iberty in the eighteenth century was thought of much more in relation to 'negative liberty'; that is, freedom *from*, not freedom *to*, freedom from a number of social and political evils, including arbitrary government power." J. Reid, The Concept of Liberty in the Age of the American Revolution 56 (1988). Or as one scholar put it in 1776, "[T]he common idea of liberty is merely negative, and is only the *absence of restraint*." R. Hey, Observations on the Nature of Civil Liberty and the Principles of Government § 13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals "from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth." Downer, A Discourse at the Dedication of the Tree of Liberty, in 1 Hyneman, *supra*, at 101. Each of those examples involved freedoms that existed outside of government.

B

Whether we define "liberty" as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges

and benefits that exist solely *because of* the government. They want, for example, to receive the State's *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. As Locke had explained many years earlier, "The first society was between man and wife, which gave beginning to that between parents and children." Locke § 77, at 39; see also J. Wilson, Lectures on Law, in 2 Collected Works of James Wilson 1068 (K. Hall and M. Hall eds. 2007) (concluding "that to the institution of marriage the true origin of society must be traced"). Petitioners misunderstand the institution of marriage when they say that it would "mean little" absent governmental recognition. Brief for Petitioners in No. 14–556, p. 33.

Petitioners' misconception of liberty carries over into their discussion of our precedents identifying a right to marry, not one of which has expanded the concept of "liberty" beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia, *id.*, at 2–3, 87 S.Ct. 1817.[5] They

5. The suggestion of petitioners and their *amici* that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. "America's earliest laws against interracial sex and marriage were spawned by slavery." P. Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America 19 (2009). For instance, Maryland's 1664 law prohibiting marriages between "'freeborne English women'" and "'Negro Sla[v]es'" was passed as part of the very act that authorized lifelong slavery in the colony. *Id.*, at 19–20. Virginia's antimiscegenation laws likewise were passed in a 1691 resolution entitled "An act for suppressing outlying Slaves." Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (italics deleted). "It was not until the Civil War threw the future of slavery into doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy." Pascoe, *supra*, at 27–28.

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. Brief for Scholars of History and Related Disciplines as *Amici Curiae* 1. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire "to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world." *Id.*, at 8. And it has existed in civilizations containing all manner of views on homosexuality. See Brief for Ryan T. Anderson as *Amicus Curiae* 11–12 (explaining that several famous ancient

were each sentenced to a year of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id.,* at 3, 87 S.Ct. 1817.[6] In a similar vein, *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), involved a man who was prohibited, on pain of criminal penalty, from "marry[ing] in Wisconsin or elsewhere" because of his outstanding child-support obligations, *id.,* at 387, 98 S.Ct. 673; see *id.,* at 377–378, 98 S.Ct. 673. And *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons, *id.,* at 82, 107 S.Ct. 2254. In *none* of those cases were individuals denied solely governmental recognition and benefits associated with marriage.

In a concession to petitioners' misconception of liberty, the majority characterizes petitioners' suit as a quest to "find . . . liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex." *Ante,* at 2593. But "liberty" is not lost, nor can it be found in the way petitioners seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority's "better informed understanding of how constitutional imperatives define . . . liberty," *ante,* at 2602,—better informed, we must assume, than that of the people who ratified the Fourteenth Amendment—runs headlong into the reality that our Constitution is a "collection of 'Thou shalt nots,' " *Reid v. Covert,* 354 U.S. 1, 9, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion), not "Thou shalt provides."

III

The majority's inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, "give up all the power necessary to the ends for which they unite into society, to the majority of the community," Locke § 99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, *id.,* § 22, at 13; see also Hey §§ 52, 54, at 30–32. To protect that liberty from arbitrary interference, they establish a process by which that society can adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal Constitution serving as a backstop for that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine *any* law on which all residents

Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time).

6. The prohibition extended so far as to forbid even religious ceremonies, thus raising a serious question under the First Amendment's Free Exercise Clause, as at least one *amicus* brief at the time pointed out. Brief for John J. Russell et al. as *Amici Curiae* in *Loving v. Virginia,* O.T. 1966, No. 395, pp. 12–16.

of a State would agree. See Locke § 98, at 49 (suggesting that society would cease to function if it required unanimous consent to laws). What matters is that the process established by those who created the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. Brief for Respondents in No. 14–571, pp. 1a–7a. That petitioners disagree with the result of that process does not make it any less legitimate. Their civil liberty has been vindicated.

B

Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1422–1425 (1990). When they arrived, they created their own havens for religious practice. *Ibid.* Many of these havens were initially homogenous communities with established religions. *Ibid.* By the 1780's, however, "America was in the wake of a great religious revival" marked by a move toward free exercise of religion. *Id.*, at 1437. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789, *id.*, at 1455, and, of course, the First Amendment enshrined protection for the free exercise of religion in the U.S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, *e.g.*, Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*; Conn. Gen.Stat. § 52–571b (2015).

Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will "have unavoidable and wide-ranging implications for religious liberty." Brief for General Conference of Seventh–Day Adventists et al. as *Amici Curiae* 5. In our society, marriage is not simply a governmental institution; it is a religious institution as well. *Id.*, at 7. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph, *ante*, at 2607. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Ibid.* Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.[7]

Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court's constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority's decision short-circuits that process, with potentially ruinous consequences for religious liberty.

IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples. *Ante,* at 2593 – 2594, 2599, 2606, 2608.[8] The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal" and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority's musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. Its mischaracterization of the arguments presented by the States and their *amici* can have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

* * *

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to

7. Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va.Code Ann. § 20–60 (1960).

8. The majority also suggests that marriage confers "nobility" on individuals. *Ante,* at 2594. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more "noble" than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

mention one's dignity, was something to be shielded from—not provided by—the State. Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, disregards the most plausible understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

Justice ALITO, with whom Justice SCALIA and Justice THOMAS join, dissenting.

Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage.[1] The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term "liberty" in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today's majority, it has a distinctively postmodern meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are " 'deeply rooted in this Nation's history and tradition.' " *Washington* v. *Glucksberg,* 521 U.S. 702, 720–721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States v. Windsor,* 570 U.S. ——, ——, 133 S.Ct. 2675, 2714–2715, 186 L.Ed.2d 808 (2013) (ALITO, J., dissenting). Indeed:

> "In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge v. Department of Public Health,* 440 Mass. 309, 798 N.E.2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.
>
> "What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility." *Id.,* at ——, 133 S.Ct., at 2715 (footnote omitted).

For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in

1. I use the phrase "recognize marriage" as shorthand for issuing marriage licenses and conferring those special benefits and obligations provided under state law for married persons.

the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women.[2] This development undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes of marriage in 21st-century America have changed, those States that do not want to

2. See, *e.g.*, Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, D. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Matthews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No. 1, p. 2 (Jan. 15, 2015), online at http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court's case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, Changing Patterns of Nonmartial Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at http://www.cdc.gov/nchs/data/databrief/db18.pdf.

recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in *Windsor*:

"The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.

"We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.

"At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials." 570 U.S., at ——, 133 S.Ct., at 2715–2716 (dissenting opinion) (citations and footnotes omitted).

III

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African–Americans and women. *E.g.*, *ante,* at 2598 – 2599. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. *Ante,* at 2606 – 2607. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat

those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The majority today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims.

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

Carlton JOYNER, Warden

v.

William Leroy BARNES.

Carlton Joyner, Warden

v.

Jason Wayne Hurst.

No. 14–395.

June 29, 2015.

The motions of respondents for leave to proceed *in forma pauperis* are granted. The petition for a writ of certiorari is denied.

Justice THOMAS, with whom Justice ALITO joins, dissenting from the denial of certiorari.

The U.S. Court of Appeals for the Fourth Circuit made the same error in these cases that we have repeatedly summarily reversed this Term. I see no reason why these cases, which involve capital

404 U.S. 71, 30 L.Ed.2d 225

Sally M. REED, Appellant,

v.

Cecil R. REED, Administrator, etc.

No. 70-4.

Argued Oct. 19, 1971.

Decided Nov. 22, 1971.

Proceedings on separate petitions by mother and father of decedent for administration of decedent's estate. The Idaho Supreme Court, 93 Idaho 511, 465 P.2d 635, reversed order of the District Court of the Fourth Judicial District and reinstated original order of the probate court which named the father administrator of the estate. The mother appealed. The Supreme Court, Mr. Chief Justice Burger, held that Idaho statute which provides that as between persons equally qualified to administer estates males must be preferred to females, is based solely on a discrimination prohibited by and is violative of the equal protection clause of the Fourteenth Amendment.

Reversed and remanded.

For opinion after remand see 493 P. 2d 701.

1. Constitutional Law ⇐224
Executors and Administrators ⇐17(1)

Idaho statute which provides that as between persons equally qualified to administer estates males must be preferred to females, is based solely on a discrimination prohibited by and is violative of the equal protection clause of the Fourteenth Amendment. I.C. §§ 15–312, 15–314; U.S.C.A.Const. Amend. 14; Const. Idaho art. 1, § 1.

2. Evidence ⇐43(1)

Court would take judicial notice that in the United States, presumably due to greater longevity of women, large proportion of estates, both intestate and testate, are administered by surviving widows. I.C. §§ 15–312, 15–314.

3. Constitutional Law ⇐211

The equal protection clause of the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways; the clause does, however, deny to states the power to legislate that different treatment be accorded to persons placed by statute into different classes on basis of criteria wholly unrelated to the objective of that statute. U.S.C.A.Const. Amend. 14.

4. Constitutional Law ⇐211

In order not to violate the equal protection clause, statutory classification must be reasonable, not arbitrary, and must rest on some ground of difference having fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike. U.S.C.A.Const. Amend. 14.

5. Constitutional Law ⇐224

To give mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits on application for appointment to administer an estate, violates the equal protection clause of the Fourteenth Amendment; the choice may not lawfully be mandated solely on basis of sex. I.C. §§ 15–312, 15–314; U.S.C.A.Const. Amend. 14; Const. Idaho art. 1, § 1.

*Syllabus**

A mandatory provision of the Idaho probate code that gives preference to men over women when persons of the same entitlement class apply for appointment as administrator of a decedent's estate is based solely on a discrimination prohibited by and therefore violative of the Equal Protection Clause of the Fourteenth Amendment.

93 Idaho 511, 465 P.2d 635, reversed and remanded.

Allen R. Derr, Boise, Idaho, for appellant.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Charles S. Stout, Boise, Idaho, for appellee.

Mr. Chief Justice BURGER delivered the opinion of the Court.

Richard Lynn Reed, a minor, died intestate in Ada County, Idaho, on March 29, 1967. His adoptive parents, who had separated sometime prior to his death, are the parties to this appeal. Approximately seven months after Richard's death, his mother, appellant Sally Reed, filed a petition in the Probate Court of
172 Ada County, seeking appointment as administratrix of her son's estate.[1] Prior to the date set for a hearing on the mother's petition, appellee Cecil Reed, the father of the decedent, filed a competing petition seeking to have himself appointed administrator of the son's estate. The probate court held a joint hearing on the two petitions and thereafter ordered that letters of administration be issued to appellee Cecil Reed upon his taking the oath and filing the bond required by law. The court treated §§ 15–312 and 15–314 of the Idaho Code as the controlling statutes and read those sections as compelling a preference for Cecil Reed because he was a male.

Section 15–312[2] designates the persons who are entitled to administer the estate of one who dies intestate. In making these designations, that section lists 11 classes of persons who are so entitled
173 and provides, in substance, that the order in which those classes are listed in the section shall be determinative of the relative rights of competing applicants for letters of administration. One of the 11 classes so enumerated is "[t]he father or mother" of the person dying intestate. Under this section then appellant and appellee, being members of the same entitlement class, would seem to have been equally entitled to administer their son's estate. Section 15–314 provides, however, that

> "[o]f several persons claiming and equally entitled [under § 15–312] to administer, males must be preferred to females, and relatives of the whole to those of the half blood."

In issuing its order, the probate court implicitly recognized the equality of entitlement of the two applicants under § 15–312 and noted that neither of the applicants was under any legal disability; the court ruled, however, that appellee, being a male, was to be preferred to the female appellant "by reason of Section 15–314 of the Idaho Code." In stating this conclusion, the probate judge gave no indication that he had attempted to determine the relative capabilities of the competing applicants to perform the functions incident to the administration of an estate. It seems clear the probate judge considered himself bound by statute to give preference to the male candidate over the female, each being otherwise "equally entitled."

Sally Reed appealed from the probate court order, and her appeal was treated by the District Court of the Fourth Judicial District of Idaho as a constitutional attack on § 15–314. In dealing with the attack, that court held that the challenged

1. In her petition, Sally Reed alleged that her son's estate, consisting of a few items of personal property and a small savings account, had an aggregate value of less than $1,000.

2. Section 15–312 provides as follows:
"Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:
"1. The surviving husband or wife or some competent person whom he or she may request to have appointed.
"2. The children.
"3. The father or mother.
"4. The brothers.
"5. The sisters.
"6. The grandchildren.
"7. The next of kin entitled to share in the distribution of the estate.
"8. Any of the kindred.
"9. The public administrator.
"10. The creditors of such person at the time of death.
"11. Any person legally competent.
"If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate."

section violated the Equal Protection Clause of the Fourteenth Amendment[3] and was, therefore, void; the matter was ordered "returned to the Probate Court for its determination of which of the two parties" was better qualified to administer the estate.

This order was never carried out, however, for Cecil Reed took a further appeal to the Idaho Supreme Court, which reversed the District Court and reinstated the original order naming the father administrator of the estate. In reaching this result, the Idaho Supreme Court first dealt with the governing statutory law and held that under § 15–312 "a father and mother are 'equally entitled' to letters of administration," but the preference given to males by § 15–314 is "mandatory" and leaves no room for the exercise of a probate court's discretion in the appointment of administrators. Having thus definitively and authoritatively interpreted the statutory provisions involved, the Idaho Supreme Court then proceeded to examine, and reject, Sally Reed's contention that § 15–314 violates the Equal Protection Clause by giving a mandatory preference to males over females, without regard to their individual qualifications as potential estate administrators. 93 Idaho 511, 465 P.2d 635.

[1] Sally Reed thereupon appealed for review by this Court pursuant to 28 U.S.C. § 1257(2), and we noted probable jurisdiction. 401 U.S. 934, 91 S.Ct. 917, 28 L.Ed.2d 213. Having examined the record and considered the briefs and oral arguments of the parties, we have concluded that the arbitrary preference established in favor of males by § 15–314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction.[4]

[2] Idaho does not, of course, deny letters of administration to women altogether. Indeed, under § 15–312, a woman whose spouse dies intestate has a preference over a son, father, brother, or any other male relative of the decedent. Moreover, we can judicially notice that in this country, presumably due to the greater longevity of women, a large proportion of estates, both intestate and under wills of decedents, are administered by surviving widows.

Section 15–314 is restricted in its operation to those situations where competing applications for letters of administration have been filed by both male and female members of the same entitlement class established by § 15–312. In such situations, § 15–314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

[3, 4] In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); Railway Express Agency v. New York, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949); McDonald v. Board of Election Commissioners, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). The Equal Protection Clause of that amendment

3. The court also held that the statute violated Art. I, § 1, of the Idaho Constitution.

4. We note that § 15–312, set out in n. 2, *supra*, appears to give a superior entitlement to brothers of an intestate (class 4) than is given to sisters (class 5). The parties now before the Court are not affected by the operation of § 15–312 in this respect, however, and appellant has made no challenge to that section.

We further note that on March 12, 1971, the Idaho Legislature adopted the Uniform Probate Code, effective July 1, 1972. Idaho Laws 1971, c. 111, p. 233. On that date, §§ 15–312 and 15–314 of the present code will, then, be effectively repealed, and there is in the new legislation no mandatory preference for males over females as administrators of estates.

does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15–312 and 15–314.

In upholding the latter section, the Idaho Supreme Court concluded that its objective was to eliminate one area of controversy when two or more persons, equally entitled under § 15–312, seek letters of administration and thereby present the probate court "with the issue of which one should be named." The court also concluded that where such persons are not of the same sex, the elimination of females from consideration "is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits * * * of the two or more petitioning relatives * * *." 93 Idaho, at 514, 465 P.2d, at 638.

[5] Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15–314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

We note finally that if § 15–314 is viewed merely as a modifying appendage to § 15–312 and as aimed at the same objective, its constitutionality is not thereby saved. The objective of § 15–312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. Royster Guano Co. v. Virginia, *supra*.

The judgment of the Idaho Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

404 U.S. 78, 30 L.Ed.2d 231

Elliott L. RICHARDSON, Secretary of Health, Education, and Welfare, Appellant,

v.

Raymond BELCHER.

No. 70–53.

Argued Oct. 13, 1971.

Decided Nov. 22, 1971.

Action under Social Security Act to review final decision of Secretary of Health, Education and Welfare making offset reductions for monthly benefits from state workmen's compensation. The recipient's motion for summary judg-

[8–10] It is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements. The facts and circumstances in preliminary and final hearings are susceptible of almost infinite variation, and a considerable discretion must be allowed the responsible agency in making the decision. Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible
1791 agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.

IV

[11, 12] We return to the facts of the present case. Because respondent was not afforded either a preliminary hearing or a final hearing the revocation of his probation did not meet the standards of due process prescribed in *Morrissey*, which we have here held applicable to probation revocations. Accordingly, respondent was entitled to a writ of habeas corpus. On remand, the District Court should allow the State an opportunity to conduct such a hearing. As to whether the State must provide counsel, respondent's admission to having committed another serious crime creates the very sort of situation in which counsel need not ordinarily be provided. But because of respondent's subsequent assertions regarding that admission, see *supra*, at 1758, we conclude that the failure of the Department to provide respondent with the assistance of counsel should be re-examined in light of this opinion. The general guidelines outlined above should be applied in the first instance by those charged with conducting the revocation hearing.

Affirmed in part, reversed in part, and remanded.

Mr. Justice DOUGLAS, dissenting in part.

I believe that due process requires the appointment of counsel in this case because of the claim that respondent's confession of the burglary was made under duress. See Morrissey v. Brewer, 408 U.S. 471, 498, 92 S.Ct. 2593, 2608, 33 L. Ed.2d 484 (opinion of Douglas, J.).

411 U.S. 677, 36 L.Ed.2d 583

Sharron A. FRONTIERO and Joseph Frontiero, Appellants,

v.

Elliot L. RICHARDSON, Secretary of Defense, et al.

No. 71–1694.

Argued Jan. 17, 1973.

Decided May 14, 1973.

Suit was brought by a married woman air force officer and her husband against the Secretary of Defense seeking declaratory and injunctive relief against enforcement of federal statutes governing quarters' allowance and medical benefits for members of the uniformed services. The Three-Judge United States District Court for the Middle District of Alabama, 341 F.Supp. 201, denied relief, and plaintiffs appealed.

Mr. Justice Brennan announced the judgment of the Supreme Court and delivered an opinion, in which Mr. Justice Douglas, Mr. Justice White and Mr. Justice Marshall joined, holding that classifications based upon sex are inherently suspect and must be subjected to strict judicial scrutiny, and that statutes providing, solely for administrative convenience, that spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support, violate due process clause of the Fifth Amendment insofar as they require a female member to prove dependency of her husband.

Reversed.

Mr. Justice Stewart filed a statement concurring in the judgment.

Mr. Justice Powell concurred in the judgment and filed an opinion in which the Chief Justice and Mr. Justice Blackmun joined.

Mr. Justice Rehnquist filed a dissenting statement.

1. Constitutional Law ⇐208(3)

Classifications based upon sex, like classifications based upon race, alienage or national origin, are inherently suspect and must be subjected to strict judicial scrutiny. (Per Mr. Justice Douglas, with three Justices concurring and four Justice concurring in the judgment.)

2. Constitutional Law ⇐211

Under "traditional" equal protection analysis, a legislative classification must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest. (Per Mr. Justice Douglas, with three Justices concurring and four Justices concurring in the judgment.)

3. Constitutional Law ⇐208(1)

With respect to strict judicial scrutiny of a legislative classification, "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. (Per Mr. Justice Douglas, with three Justices concurring and four Justices concurring in the judgment.)

4. Constitutional Law ⇐208(3)

Any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands dissimilar treatment for men and women who are similarly situated and therefore involves the very kind of arbitrary legislative choice forbidden by the Constitution. (Per Mr. Justice Douglas, with three Justices concurring and four Justices concurring in the judgment.)

5. Armed Services ⇐13.3(5)
Constitutional Law ⇐318(2)

Statutes providing, solely for administrative convenience, that spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support violate due process clause of the Fifth Amendment insofar as they require a female member to prove dependency of her husband. (Per Mr. Justice Douglas, with three Justices concurring and four Justices concurring in the judgment). U.S.C.A.Const. Amend. 5; 10 U.S.C.A. §§ 1072, 1076; 37 U.S.C.A. §§ 401, 403.

*Syllabus**

A married woman Air Force officer (hereafter appellant) sought increased benefits for her husband as a "dependent" under 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 1072, 1076. Those statutes provide, solely for administrative con-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

venience, that spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support. When her application was denied for failure to satisfy the statutory dependency standard, appellant and her husband brought this suit in District Court, contending that the statutes deprived servicewomen of due process. From that Court's adverse ruling, they took a direct appeal. *Held:* The judgment is reversed. Pp. 1768–1772, 1772–1773, 341 F.Supp. 201, reversed.

1678 Joseph J. Levin, Jr., Montgomery, Ala., for appellants.

Ruth B. Ginsburg, New York City, for American Civil Liberties Union, amicus curiae, by special leave of Court.

Samuel Huntington, Washington, D. C., for appellees.

Mr. Justice BRENNAN announced the judgment of the Court in an opinion in which Mr. Justice DOUGLAS, Mr. Justice WHITE, and Mr. Justice MARSHALL join.

The question before us concerns the right of a female member of the uniformed services [1] to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 1072, 1076, on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. 37 U.S.C. § 401(1); 10 U.S.C. § 1072(2)(A). A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his support. 37 U.S.C. § 401; 1679 10 U.S.C. § 1072(2)(C).[2] Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment. A three-judge District Court for the Middle District of Alabama, one judge dissenting, rejected this contention and sustained the constitutionality of the provisions of the statutes making this distinction. 341 F.Supp. 201 (1972). We noted probable jurisdiction. 409 U. S. 840, 93 S.Ct. 64, 34 L.Ed.2d 78 (1972). We reverse.

I

In an effort to attract career personnel through reenlistment, Congress established, in 37 U.S.C. § 401 *et seq.*, and 10 U.S.C. § 1071 *et seq.*, a scheme for the provision of fringe benefits to members of the uniformed services on a competitive basis with business and industry.[3] Thus, under 37 U.S.C. § 403,

1. The "uniformed services" include the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, and Public Health Service. 37 U.S.C. § 101(3); 10 U.S.C. § 1072(1).

2. Title 37 U.S.C. § 401 provides in pertinent part:

"In this chapter, 'dependent,' with respect to a member of a uniformed service, means—

"(1) his spouse;

. . . . . .

"However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support . . . . ."

10 U.S.C. § 1072(2) provides in pertinent part:

"'Dependent,' with respect to a member . . . of a uniformed service, means—

"(A) the wife;

. . . . . .

"(C) the husband, if he is in fact dependent on the member . . . for over one-half of his support. . . ."

3. See 102 Cong.Rec. 3849–3850 (Cong. Kilday), 8043 (Sen. Saltonstall); 95 Cong.Rec. 7662 (Cong. Kilday), 7664 (Cong. Short), 7666 (Cong. Havenner), 7667 (Cong. Bates), 7671 (Cong. Price). See also 10 U.S.C. § 1071.

a member of the uniformed services
680 with dependents is entitled to an increased "basic allowance for quarters" and, under 10 U.S.C. § 1076, a member's dependents are provided comprehensive medical and dental care.

Appellant Sharron Frontiero, a lieutenant in the United States Air Force, sought increased quarters allowances, and housing and medical benefits for her husband, appellant Joseph Frontiero, on the ground that he was her "dependent." Although such benefits would automatically have been granted with respect to the wife of a male member of the uniformed services, appellant's application was denied because she failed to demonstrate that her husband was dependent on her for more than one-half of his support.[4] Appellants then commenced this suit, contending that, by making this distinction, the statutes unreasonably discriminate on the basis of sex in violation of the Due Process Clause of the Fifth Amendment.[5] In essence, appellants asserted that the discriminatory impact of the statutes is twofold: first, as a procedural matter, a female member is required to demonstrate her spouse's dependency, while no such burden is imposed upon male members; and, second, as a substantive matter, a male member who does not provide more than one-half of his wife's support receives benefits, while a similarly situated female member is denied such benefits. Appellants therefore sought a permanent injunction against 681
the continued enforcement of these statutes and an order directing the appellees to provide Lieutenant Frontiero with the same housing and medical benefits that a similarly situated male member would receive.

Although the legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded male and female members,[6] a majority of the three-judge District Court surmised that Congress might reasonably have concluded that, since the husband in our society is generally the "breadwinner" in the family—and the wife typically the "dependent" partner—"it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presump-

4. Appellant Joseph Frontiero is a full-time student at Huntingdon College in Montgomery, Alabama. According to the agreed stipulation of facts, his living expenses, including his share of the household expenses, total approximately $354 per month. Since he receives $205 per month in veterans' benefits, it is clear that he is not dependent upon appellant Sharron Frontiero for more than one-half of his support.

5. "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" Schneider v. Rusk, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218 (1964); see Shapiro v. Thompson, 394 U.S. 618, 641–642, 89 S.Ct. 1322, 1335, 22 L.Ed.2d 600 (1969); Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

6. The housing provisions, set forth in 37 U.S.C. § 401 et seq., were enacted as part of the Career Compensation Act of 1949, which established a uniform pattern of military pay and allowances, consolidating and revising the piecemeal legislation that had been developed over the previous 40 years. See H.R.Rep. No. 779, 81st Cong., 1st Sess.; S.Rep. No. 733, 81st Cong., 1st Sess. The Act apparently retained in substance the dependency definitions of § 4 of the Pay Readjustment Act of 1942 (56 Stat. 361), as amended by § 6 of the Act of September 7, 1944 (58 Stat. 730), which required a female member of the service to demonstrate her spouse's dependency. It appears that this provision was itself derived from unspecified earlier enactments. See S.Rep. No. 917, 78th Cong., 2d Sess., 4.

The medical benefits legislation, 10 U.S.C. § 1071 et seq., was enacted as the Dependents' Medical Care Act of 1956. As such, it was designed to revise and make uniform the existing law relating to medical services for military personnel. It, too, appears to have carried forward, without explanation, the dependency provisions found in other military pay and allowance legislation. See H.R.Rep. No. 1805, 84th Cong., 2d Sess.; S.Rep. No. 1878, 84th Cong., 2d Sess.

tion of dependency to such members." 341 F.Supp., at 207. Indeed, given the fact that approximately 99% of all members of the uniformed services are male, the District Court speculated that such differential treatment might conceivably lead to a "considerable saving of administrative expense and manpower." *Ibid.*

II

[1] At the outset, appellants contend that classifications based upon sex, like classifications based upon race,[7] alienage,[8] and national origin,[9] are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

In *Reed*, the Court considered the constitutionality of an Idaho statute providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female. Appellant, the mother of the deceased, and appellee, the father, filed competing petitions for appointment as administrator of their son's estate. Since the parties, as parents of the deceased, were members of the same entitlement class the statutory preference was invoked and the father's petition was therefore granted. Appellant claimed that this statute, by giving a mandatory preference to males over females without regard to their individual qualifications, violated the Equal Protection Clause of the Fourteenth Amendment.

[2] The Court noted that the Idaho statute "provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause." 404 U.S., at 75, 92 S.Ct., at 253. Under "traditional" equal protection analysis, a legislative classification must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest. See Jefferson v. Hackney, 406 U.S. 535, 546, 92 S.Ct. 1724, 1731, 32 L.Ed.2d 285 (1972); Richardson v. Belcher, 404 U.S. 78, 81, 92 S.Ct. 254, 257, 30 L.Ed.2d 231 (1971); Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372, 4 L.Ed.2d 1435 (1960); McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961); Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970).

In an effort to meet this standard, appellee contended that the statutory scheme was a reasonable measure designed to reduce the workload on probate courts by eliminating one class of contests. Moreover, appellee argued that the mandatory preference for male applicants was in itself reasonable since "men [are] as a rule more conversant with business affairs than . . . women."[10] Indeed, appellee maintained that "it is a matter of common knowledge, that women still are not engaged in politics, the professions, business or industry to the extent that men are."[11]

7. See Loving v. Virginia, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); McLaughlin v. Florida, 379 U.S. 184, 191–192, 85 S.Ct. 283, 287–288, 13 L.Ed.2d 222 (1964); Bolling v. Sharpe, *supra*, 347 U.S., at 499, 74 S. St., at 694.

8. See Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971).

9. See Oyama v. California, 332 U.S. 633, 644–646, 68 S.Ct. 269, 274–275, 92 L.Ed. 249 (1948); Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944); Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943).

10. Brief for Appellee in No. 70–4, O.T. 1971, Reed v. Reed, p. 12.

11. *Id.*, at 12–13.

And the Idaho Supreme Court, in upholding the constitutionality of this statute, suggested that the Idaho Legislature might reasonably have "concluded that in general men are better qualified to act as an administrator than are women." [12]

Despite these contentions, however, the Court held the statutory preference for male applicants unconstitutional. In reaching this result, the Court implicitly rejected appellee's apparently rational explanation of the statutory scheme, and concluded that, by ignoring the individual qualifications of particular applicants, the challenged statute provide "dissimilar treatment for men and women who are . . . similarly situated." 404 U.S., at 77, 92 S.Ct., at 254. The Court therefore held that, even though the State's interest in achieving administrative efficiency "is not without some legitimacy," "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the [Constitution] . . .." *Id.*, at 76, 92 S.Ct. at 254. This departure from "traditional" rational-basis analysis with respect to sex-based classifications is clearly justified.

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination.[13] Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was able to proclaim:

"Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

". . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." Bradwell v. State of Illinois, 16 Wall. 130, 141, 21 L.Ed.2d 442 (1873) (Bradley, J., concurring).

As a result of notions such as these, our statute books gradually became laden with gross, sterotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally L. Kanowitz, Women and the Law: The Unfinished Revolution 5–6 (1969); G. Myrdal, An American Dilemma 1073 (20th Anniversary ed. 1962). And although blacks were guaranteed the right to vote in 1870, women were denied even that right —which is itself "preservative of other

12. Reed v. Reed, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970).

13. Indeed, the position of women in this country at its inception is reflected in the view expressed by Thomas Jefferson that women should be neither seen nor heard in society's decisionmaking councils. See M. Gruberg, Women in American Politics 4 (1968). See also 2 A. de Tocqueville, Democracy in America (Reeves trans. 1948).

basic civil and political rights" [14]—until adoption of the Nineteenth Amendment half a century later.

It is true, of course, that the position of women in America has improved [686] markedly in recent decades.[15] Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic,[16] women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.[17] See generally K. Amundsen, The Silenced Majority: Women and American Democracy (1971); The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970).

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175, 92 S.Ct. 1400, 1407, 31 L.Ed.2d 768 (1972). And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.[18] As a result, statutory distinctions between the sexes often have [687] the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, *sex*, or national origin." [19] Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act "shall discriminate . . . between employees on the basis of sex." [20] And § 1 of the

14. Reynolds v. Sims, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964); see Dunn v. Blumstein, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed. 2d 274 (1972); Kramer v. Union Free School District, 395 U.S. 621, 626, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583 (1969); Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220 (1886).

15. See generally The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970); L. Kanowitz, Women and the Law: The Unfinished Revolution (1969); A. Montagu, Man's Most Dangerous Myth (4th ed. 1964); The President's Commission on the Status of Women, American Women (1963).

16. See, *e. g.*, Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv.L.Rev. 1499, 1507 (1971).

17. It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government. See Joint Reply Brief of Appellants and American Civil Liberties Union (Amicus Curiae) 9.

18. See, *e. g.*, Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1065, 1173–1174 (1969).

19. 42 U.S.C. § 2000e–2(a), (b), (c) (emphasis added). See generally, Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 Geo.Wash.L.Rev. 824 (1972); Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109 (1971).

20. 29 U.S.C. § 206(d) (emphasis added). See generally Murphy, Female Wage

Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[21] Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this
688 conclusion of a coequal branch of Government is not without significance to the question presently under consideration. Cf. Oregon v. Mitchell, 400 U.S. 112, 240, 248–249, 91 S.Ct. 260, 322, 327, 27 L.Ed.2d 272 (1970) (opinion of Brennan, White, and Marshall, JJ.); Katzenbach v. Morgan, 384 U.S. 641, 648–649, 86 S.Ct. 1717, 1722, 16 L.Ed.2d 828 (1966).

With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.

III

The sole basis of the classification established in the challenged statutes is the sex of the individuals involved. Thus, under 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 2072, 2076, a female member of the uniformed services seeking to obtain housing and medical benefits for her spouse must prove his dependency in fact, whereas no such burden is imposed upon male members. In addition, the statutes operate so as to deny benefits to a female member, such as appellant Sharron Frontiero, who provides less than one-half of her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half of his spouse's support. Thus, to this extent at least, it may fairly be said that these statutes command "dissimilar treatment for men and women who are . . . similarly situated." Reed v. Reed, 404 U.S., at 77, 92 S.Ct., at 254.

Moreover, the Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere "administrative convenience." In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are de- 689
pendent upon their wives. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact.[22]

The Government offers no concrete evidence, however, tending to support its view that such differential treatment in

Discrimination: A Study of the Equal Pay Act 1963–1970, 39 U.Cin.L.Rev. 615 (1970).

21. H.R.J.Res. No. 208, 92d Cong., 2d Sess. (1972). In conformity with these principles, Congress in recent years has amended various statutory schemes similar to those presently under consideration so as to eliminate the differential treatment of men and women. See 5 U.S.C. § 2108, as amended, 85 Stat. 644; 5 U.S.C. § 7152, as amended, 85 Stat. 644; 5 U.S.C. § 8341, as amended, 84 Stat. 1961; 38 U.S.C. § 102(b), as amended, 86 Stat. 1092.

22. It should be noted that these statutes are not in any sense designed to rectify the effects of past discrimination against women. See Gruenwald v. Gardner, 390 F.2d 591 (CA2), cert. denied, 393 U.S. 982, 89 S.Ct. 456, 21 L.Ed.2d 445 (1968); cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed. 2d 1189 (1968); South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). On the contrary, these statutes seize upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages. Cf. Gaston County v. United States, 395 U.S. 285, 296–297, 89 S.Ct. 1720, 1725–1726, 23 L.Ed.2d 309 (1969).

fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to *all* male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits.[23] And in light of
690 the fact that the dependency determination with respect to the husbands of female members is presently made solely on the basis of affidavits rather than through the more costly hearing process,[24] the Government's explanation of the statutory scheme is, to say the least, questionable.

[3–5] In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." Stanley v. Illinois, 405 U.S. 645, 656, 92 S.Ct. 1208, 1215, 31 L.Ed.2d 551 (1972). And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. See Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). On the contrary, any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution] . . .." Reed v. Reed, 404 U.S., at 77, 76, 92 S.Ct., at 254. We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged 691
statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.[25]

Reversed.

Mr. Justice STEWART concurs in the judgment, agreeing that the statutes be-

23. In 1971, 43% of all women over the age of 16 were in the labor force, and 18% of all women worked full time 12 months per year. See U. S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment & Education 1 (W.B.Pub. No. 72–191, Mar. 1972). Moreover, 41.5% of all married women are employed. See U. S. Bureau of Labor Statistics, Dept. of Labor, Work Experience of the Population in 1971, p. 4 (Summary Special Labor Force Report, Aug. 1972). It is also noteworthy that, while the median income of a male member of the armed forces is approximately $3,686, see The Report of the President's Commission on an All-Volunteer Armed Force 51, 181 (1970), the median income for all women over the age of 14, including those who are not employed, is approximately $2,237. See Statistical Abstract of the United States Table No. 535 (1972), Source: U. S. Bureau of the Census, Current Population Reports, Series P–60, No. 80. Applying the statutory definition of "dependency" to these statistics, it appears that in the "median" family, the wife of a male member must have personal expenses of approximately $4,474, or about 75% of the total family income, in order to qualify as a "dependent."

24. Tr. of Oral Arg. 27–28.

25. As noted earlier, the basic purpose of these statutes was to provide fringe benefits to members of the uniformed services in order to establish a compensation pattern which would attract career personnel through re-enlistment. See n. 3, *supra*, and accompanying text. Our conclusion in no wise invalidates the statutory schemes except insofar as they require a female member to prove the dependency of her spouse. See Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968); Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (CA10 1972). See also 1 U.S.C. § 1.

fore us work an invidious discrimination in violation of the Constitution. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L. Ed.2d 225.

Mr. Justice REHNQUIST dissents for the reasons stated by Judge Rives in his opinion for the District Court, Frontiero v. Laird, 341 F.Supp. 201 (1972).

Mr. Justice POWELL, with whom THE CHIEF JUSTICE and Mr. Justice BLACKMUN join, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of Mr. Justice BRENNAN, which would hold that all classifications based upon sex, "like classifications based upon race, alienage, and national origin," are "inherently suspect and must therefore be subjected to close judicial scrutiny." *Ante*, at 1768. It is unnecessary for the Court in this case to
692 characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale.

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democractic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

411 U.S. 726, 36 L.Ed.2d 620

FEDERAL MARITIME COMMISSION, Petitioner,

v.

SEATRAIN LINES, INC., et al.

No. 71-1647.

Argued March 21, 1973.

Decided May 14, 1973.

The Federal Maritime Commission approved without a hearing an agreement covering sale of an entire fleet by one common carrier by water to another. A petition for review was filed. The Court of Appeals for the District of Columbia Circuit, 148 U.S.App.D.C. 424, 460 F.2d 932, vacated decisions of the Commission approving the agreement and denying application to reopen. The Supreme Court granted certiorari. The Supreme Court, Mr. Justice Marshall, held that in enacting the shipping law,

device may be also be marketed. Because the § 510(k) process seeks merely to establish whether a pre–1976 device and a post–1976 device are equivalent, and places no "requirements" on a device, the Lohrs' defective design claim is not pre-empted.

I also agree that the Lohrs' claims are not pre-empted by § 360k to the extent that they seek damages for Medtronic's alleged violation of federal requirements. Where a state cause of action seeks to enforce an FDCA requirement, that claim does not impose a requirement that is "different from, or in addition to," requirements under federal law. To be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ. Section 360k does not preclude States from imposing different or additional *remedies,* but only different or additional *requirements.*

I disagree, however, with the Court's conclusion that the Lohrs' claims survive pre-emption insofar as they would compel Medtronic to comply with requirements different from those imposed by the FDCA. Because I do not subscribe to the Court's reading into § 360k the additional requisite of "specificity," my determination of what claims are pre-empted is broader. Some, if not all, of the Lohrs' common-law claims regarding the manufacturing and labeling of Medtronic's device would compel Medtronic to comply with requirements different from, or in addition to, those required by the FDA. The FDA's Good Manufacturing Practice (GMP) regulations impose comprehensive requirements relating to every aspect of the device-manufacturing process, [514] including a manufacturer's organization and personnel, buildings, equipment, component controls, production and process controls, packaging and labeling controls, holding, distribution, installation, device evaluation, and recordkeeping. See 21 CFR §§ 820.20–820.198 (1995). The Lohrs' common-law claims regarding manufacture would, if successful, impose state requirements "different from, or in addition to," the GMP requirements, and are therefore pre-empted. In similar fashion, the Lohrs' failure to warn claim is pre-empted by the extensive labeling requirements imposed by the FDA. See, *e.g.,* 21 CFR § 801.109 (1995) (requiring labels to include such information as indications, effects, routes, methods, frequency and duration of administration, relevant hazards, contraindications, side effects, and precautions). These extensive federal manufacturing and labeling requirements are certainly applicable to the device manufactured by Medtronic. Section 360k(a) requires no more specificity than that for pre-emption of state common-law claims.

To summarize, I conclude that § 360k(a)'s term "requirement" encompasses state common-law claims. Because the statutory language does not indicate that a "requirement" must be "specific," either to pre-empt or be pre-empted, I conclude that a state common-law claim is pre-empted if it would impose "any requirement" "which is different from, or in addition to," any requirement applicable to the device under the FDCA. I would affirm the judgment of the Court of Appeals that the Lohrs' design claim is not pre-empted by the MDA, and that the manufacture and failure to warn claims are pre-empted; I would reverse the judgment of the Court of Appeals that the MDA pre-empts a common-law claim alleging violation of federal requirements.

518 U.S. 515, 135 L.Ed.2d 735

[515] **UNITED ST TES, Petitioner,**

v.

IR INI et al.

IR INI , et al., Petitioners,

v.

UNITED ST TES.

Nos. 4–1 41, 4–2107.

Argued Jan. 17, 1996.

Decided June 26, 1996.

United States sued Commonwealth of Virginia alleging equal protection violation in

maintaining military college exclusively for males. The United States District Court for the Western District of Virginia, 766 F.Supp. 1407, entered judgment for Commonwealth. Appeal was taken. The Fourth Circuit Court of Appeals, 976 F.2d 890, vacated and remanded. On remand, the Commonwealth moved for approval of a proposed remedial plan, and the District Court, Jackson L. Kiser, Chief Judge, 852 F.Supp. 471, approved proposal. Appeal was taken. The Court of Appeals, Niemeyer, Circuit Judge, 44 F.3d 1229, affirmed. United States sought certiorari. After granting certiorari, the Supreme Court, Justice Ginsburg, held that: (1) Commonwealth failed to show exceedingly persuasive justification for excluding women from citizen-soldier program offered at Virginia military college in violation of equal protection; (2) remedial plan offered by Commonwealth to create separate program for women at another college did not afford both genders benefits comparable in substance to survive equal protection evaluation; and (3) use of substantive comparability inquiry to review remedial plan was plain error.

Initial judgment of Court of Appeals affirmed; final judgment of Court of Appeals reversed and remanded.

Chief Justice Rehnquist filed opinion concurring in judgment.

Justice Scalia filed dissenting opinion.

Justice Thomas took no part in consideration or decision of case.

1. Constitutional Law ⇨224 1

Under equal protection analysis, parties who seek to defend gender-based government action must demonstrate exceedingly persuasive justification for that action. U.S.C.A. Const.Amend. 14.

2. Constitutional Law ⇨224 1

Focusing on differential treatment or denial of opportunity for which relief is sought, court reviewing official classification based on gender under equal protection analysis must determine whether proffered justification is exceedingly persuasive. U.S.C.A. Const. Amend. 14.

3. Constitutional Law ⇨224 1

Burden of justification for official classification based on gender under equal protection analysis is demanding and it rests entirely on the state. U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇨224 1

In justifying official classification based on gender under equal protection analysis, state must show at least that challenged classification serves important governmental objectives and that discriminatory means employed are substantially related to achievement of those objectives. U.S.C.A. Const.Amend. 14.

5. Constitutional Law ⇨224 1

Justification for official classification based on gender under equal protection clause must be genuine, not hypothesized or invented post hoc in response to litigation; it must not rely on overbroad generalizations about different talents, capacities, or preferences of males and females. U.S.C.A. Const. Amend. 14.

6. Constitutional Law ⇨224 1

Heightened review standard for official classification based on gender under equal protection clause does not make sex a proscribed classification. U.S.C.A. Const. Amend. 14.

7. Constitutional Law ⇨224 1

Sex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, to advance full development of talent and capacities of nation's people; but such classifications may not be used to create or perpetuate legal, social, and economic inferiority of women.

. Colleges and Universities ⚿ .10

Constitutional Law ⚿224 2

Commonwealth of Virginia failed to show exceedingly persuasive justification for excluding women from citizen-soldier program offered at Virginia military college such that Virginia's refusal to admit women to program violated equal protection; despite Virginia's contentions that option of single-sex education contributed to diversity in educational approaches, Virginia did not show that school was established, or had been maintained, with view to diversifying, by its categorical exclusion of women, educational opportunities within state. U.S.C.A. Const. Amend. 14.

. Constitutional Law ⚿224 2

Under equal protection analysis, benign justifications proffered in defense of categorical exclusions based on gender will not be accepted automatically; tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded. U.S.C.A. Const.Amend. 14.

10. Colleges and Universities ⚿ .10

Despite Commonwealth of Virginia's contentions that adversative method of training at citizen-soldier program offered at Virginia military college provided educational benefits that could not be made available, unmodified, to women and that alterations to accommodate women would necessarily be radical and so drastic, as to transform or destroy program, notion that women would downgrade adversative system was not proved, women's successful entry into federal military academies and their participation in nation's military forces indicated that contentions may not have been solidly grounded and state could not constitutionally deny to women who had will and capacity, the training and attendant opportunities that military college afforded. U.S.C.A. Const.Amend. 14.

11. Constitutional Law ⚿224 1

Under equal protection analysis, state actors controlling gates to opportunity may not exclude qualified individuals based on fixed notions concerning roles and abilities of males and females. U.S.C.A. Const.Amend. 14.

12. ederal Civil Procedure ⚿25 2

Remedial decree must closely fit constitutional violation; it must be shaped to place persons unconstitutionally denied opportunity or advantage in position they would have occupied in absence of discrimination.

13. Constitutional Law ⚿211 1

Proper remedy for an unconstitutional exclusion from opportunity or advantage based on discrimination aims to eliminate, so far as possible, discriminatory effects of the past and to bar like discrimination in the future.

14. Colleges and Universities ⚿ .10

Constitutional Law ⚿224 2

Remedial plan offered by Commonwealth of Virginia for equal protection violations related to exclusion of women from citizen-soldier program offered at Virginia military college to create separate program for women at another college did not afford both genders benefits comparable in substance so as to survive equal protection evaluation; separate college afforded women no opportunity to experience the rigorous military training for which male school was famed, female school's student body, faculty, course offerings, finances and facilities hardly matched male school and graduates from female school could not anticipate benefits associated with male school's 157–year history, prestige, and its influential alumni network. U.S.C.A. Const.Amend. 14.

15. Constitutional Law ⚿224 2

Use of "substantive comparability" inquiry to review remedial plan offered by Commonwealth of Virginia for equal protection violations related to exclusion of women from citizen-soldier program offered at Virginia military college was plain error; rather than deferential analysis, all gender based classifications warranted heightened scrutiny. U.S.C.A. Const.Amend. 14.

Syllabus *

Virginia Military Institute (VMI) is the sole single-sex school among Virginia's public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. Using an "adversative method" of training not available elsewhere in Virginia, VMI endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. Reflecting the high value alumni place on their VMI training, VMI has the largest per-student endowment of all public undergraduate institutions in the Nation. The United States sued Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Fourteenth Amendment's Equal Protection Clause. The District Court ruled in VMI's favor. The Fourth Circuit reversed and ordered Virginia to remedy the constitutional violation. In response, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL), located at Mary Baldwin College, a private liberal arts school for women. The District Court found that Virginia's proposal satisfied the Constitution's equal protection requirement, and the Fourth Circuit affirmed. The appeals court deferentially reviewed Virginia's plan and determined that provision of single-gender educational options was a legitimate objective. Maintenance of single-sex programs, the court concluded, was essential to that objective. The court recognized, however, that its analysis risked bypassing equal protection scrutiny, so it fashioned an additional test, asking whether VMI and VWIL students would receive "substantively comparable" benefits. Although the Court of Appeals acknowledged that the VWIL degree lacked the historical benefit and prestige of a VMI degree, the court nevertheless found the educational opportunities at the two schools sufficiently comparable.

Held:

1. Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. *E.g., Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090. Neither[516] federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. To meet the burden of justification, a State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " *Ibid.,* quoting *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See, *e.g., Weinberger v. Wiesenfeld,* 420 U.S. 636, 643, 648, 95 S.Ct. 1225, 1230–1231, 1233, 43 L.Ed.2d 514. The heightened review standard applicable to sex-based classifications does not make sex a proscribed classification, but it does mean that categorization by sex may not be used to create or perpetuate the legal, social, and economic inferiority of women. Pp. 2274–2276.

2. Virginia's categorical exclusion of women from the educational opportunities VMI provides denies equal protection to women. Pp. 2276–2282.

(a) Virginia contends that single-sex education yields important educational benefits and that provision of an option for such education fosters diversity in educational approaches. Benign justifications proffered in defense of categorical exclusions, however, must describe actual state purposes, not rationalizations for actions in fact differently grounded. Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportuni-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

ties within the Commonwealth. A purpose genuinely to advance an array of educational options is not served by VMI's historic and constant plan to afford a unique educational benefit only to males. However well this plan serves Virginia's sons, it makes no provision whatever for her daughters. Pp. 2276–2279.

(b) Virginia also argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women, and that alterations to accommodate women would necessarily be so drastic as to destroy VMI's program. It is uncontested that women's admission to VMI would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that neither the goal of producing citizen-soldiers, VMI's *raison d'être,* nor VMI's implementing methodology is inherently unsuitable to women. The District Court made "findings" on "gender-based developmental differences" that restate the opinions of Virginia's expert witnesses about typically male or typically female "tendencies." Courts, however, must take "a hard [517] look" at generalizations or tendencies of the kind Virginia pressed, for state actors controlling gates to opportunity have no warrant to exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women,* 458 U.S., at 725, 102 S.Ct., at 3336–3337. The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies]", see *id.,* at 730, 102 S.Ct., at 3339, once routinely used to deny rights or opportunities. Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for VMI's future may not be solidly grounded. The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, does not rank as "exceedingly persuasive." Pp. 2279–2282.

3. The remedy proffered by Virginia—maintain VMI as a male-only college and create VWIL as a separate program for women—does not cure the constitutional violation. Pp. 2282–2287.

(a) A remedial decree must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination. See *Milliken v. Bradley,* 433 U.S. 267, 280, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745. The constitutional violation in this case is the categorical exclusion of women, in disregard of their individual merit, from an extraordinary educational opportunity afforded men. Virginia chose to leave untouched VMI's exclusionary policy, and proposed for women only a separate program, different in kind from VMI and unequal in tangible and intangible facilities. VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, VWIL students will not know the feeling of tremendous accomplishment commonly experienced by VMI's successful cadets. Virginia maintains that methodological differences are justified by the important differences between men and women in learning and developmental needs, but generalizations about "the way women are," estimates of what is appropriate for *most women,* no longer justify denying opportunity to women whose talent and capacity place them outside the average description. In myriad respects other than military training, VWIL does not qualify as VMI's equal. The VWIL program is a pale shadow of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI. Cf. *Sweatt v. Painter,* 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114. Pp. 2282–2286.

[518](b) The Fourth Circuit failed to inquire whether the proposed remedy placed women denied the VMI advantage in the position they would have occupied in the

absence of discrimination, *Milliken,* 433 U.S., at 280, 97 S.Ct., at 2757, and considered instead whether the Commonwealth could provide, with fidelity to equal protection, separate and unequal educational programs for men and women. In declaring the substantially different and significantly unequal VWIL program satisfactory, the appeals court displaced the exacting standard developed by this Court with a deferential standard, and added an inquiry of its own invention, the "substantive comparability" test. The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to such a deferential analysis, for "all gender-based classifications today" warrant "heightened scrutiny." See *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 136, 114 S.Ct. 1419, 1425, 128 L.Ed.2d 89. Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection. Pp. 2286–2287.

976 F.2d 890 (C.A.4 1992), affirmed; 44 F.3d 1229 (C.A.4 1995), reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. REHNQUIST, C.J., filed an opinion concurring in the judgment, *post,* p. 2287. SCALIA, J., filed a dissenting opinion, *post,* p. 2291. THOMAS, J., took no part in the consideration or decision of the case.

Paul Bender, Washington, DC, for U.S.

Theodore B. Olson, Washington, DC, for Virginia, et al.

For U.S. Supreme Court briefs, see:

1995 WL 703403 (Pet.Brief)

1995 WL 681099 (Pet.Brief)

1995 WL 745010 (Resp.Brief)

1995 WL 745011 (Resp.Brief)

1996 WL 32776 (Reply.Brief)

1996 WL 2023 (Reply.Brief)

[519] Justice GINSBURG delivered the opinion of the Court.

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.

[520] I

Founded in 1839, VMI is today the sole single-sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an "adversative method" modeled on English public schools and once characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course.

VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals. VMI's endowment reflects the loyalty of its graduates; VMI has the largest per-student endowment of all public undergraduate institutions in the Nation.

Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.

II

A

From its establishment in 1839 as one of the Nation's first state military colleges, see

1839 Va. Acts, ch. 20, VMI has remained financially supported by Virginia and "subject to [521]the control of the [Virginia] General Assembly," Va.Code Ann. § 23–92 (1993). First southern college to teach engineering and industrial chemistry, see H. Wise, Drawing Out the Man: The VMI Story 13 (1978) (The VMI Story), VMI once provided teachers for the Commonwealth's schools, see 1842 Va. Acts, ch. 24, § 2 (requiring every cadet to teach in one of the Commonwealth's schools for a 2–year period).[1] Civil War strife threatened the school's vitality, but a resourceful superintendent regained legislative support by highlighting "VMI's great potential[,] through its technical know-how," to advance Virginia's postwar recovery. The VMI Story 47.

VMI today enrolls about 1,300 men as cadets.[2] Its academic offerings in the liberal arts, sciences, and engineering are also available at other public colleges and universities in Virginia. But VMI's mission is special. It is the mission of the school

> " 'to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in [522]time of national peril.' " 766 F.Supp. 1407, 1425 (W.D.Va.1991) (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

In contrast to the federal service academies, institutions maintained "to prepare cadets for career service in the armed forces," VMI's program "is directed at preparation for both military and civilian life"; "[o]nly about 15% of VMI cadets enter career military service." 766 F.Supp., at 1432.

VMI produces its "citizen-soldiers" through "an adversative, or doubting, model of education" which features "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." *Id.,* at 1421. As one Commandant of Cadets described it, the adversative method " 'dissects the young student,' " and makes him aware of his " 'limits and capabilities,' " so that he knows " 'how far he can go with his anger, ... how much he can take under stress, ... exactly what he can do when he is physically exhausted.' " *Id.,* at 1421–1422 (quoting Col. N. Bissell).

VMI cadets live in spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. *Id.,* at 1424, 1432. Entering students are incessantly exposed to the rat line, "an extreme form of the adversative model," comparable in intensity to Marine Corps boot camp. *Id.,* at 1422. Tormenting and punishing, the rat line bonds new cadets to their fellow sufferers and, when they have completed the 7–month experience, to their former tormentors. *Ibid.*

VMI's "adversative model" is further characterized by a hierarchical "class system" of privileges and responsibilities, a "dyke system" for assigning a senior class mentor to each entering class "rat," and a stringently enforced "honor code," which prescribes that a cadet " 'does not lie, cheat, steal nor tolerate those who do.' " *Id.,* at 1422–1423.

[523]VMI attracts some applicants because of its reputation as an extraordinarily challenging military school, and "because its

1. During the Civil War, school teaching became a field dominated by women. See A. Scott, The Southern Lady: From Pedestal to Politics, 1830–1930, p. 82 (1970).

2. Historically, most of Virginia's public colleges and universities were single sex; by the mid–1970's, however, all except VMI had become coeducational. 766 F.Supp. 1407, 1418–1419 (W.D.Va.1991). For example, Virginia's legislature incorporated Farmville Female Seminary Association in 1839, the year VMI opened. 1839 Va. Acts, ch. 167. Originally providing instruction in "English, Latin, Greek, French, and piano" in a "home atmosphere," R. Sprague, Longwood College: A History 7–8, 15 (1989) (Longwood College), Farmville Female Seminary became a public institution in 1884 with a mission to train "white female teachers for public schools," 1884 Va. Acts, ch. 311. The school became Longwood College in 1949, Longwood College 136, and introduced coeducation in 1976, *id.,* at 133.

alumni are exceptionally close to the school." *Id.,* at 1421. "[W]omen have no opportunity anywhere to gain the benefits of [the system of education at VMI]." *Ibid.*

B

In 1990, prompted by a complaint filed with the Attorney General by a female high-school student seeking admission to VMI, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment. *Id.,* at 1408.[3] Trial of the action consumed six days and involved an array of expert witnesses on each side. *Ibid.*

In the two years preceding the lawsuit, the District Court noted, VMI had received inquiries from 347 women, but had responded to none of them. *Id.,* at 1436. "[S]ome women, at least," the court said, "would want to attend the school if they had the opportunity." *Id.,* at 1414. The court further recognized that, with recruitment, VMI could "achieve at least 10% female enrollment"—"a sufficient 'critical mass' to provide the female cadets with a positive educational experience." *Id.,* at 1437–1438. And it was also established that "some women are capable of all of the individual activities required of VMI cadets." *Id.,* at 1412. In addition, experts agreed that if VMI admitted women, "the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army." *Id.,* at 1441.

The District Court ruled in favor of VMI, however, and rejected the equal protection challenge pressed by the United States. That court correctly recognized that *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), was [524]the closest guide. 766 F.Supp., at 1410. There, this Court underscored that a party seeking to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification. *Mississippi Univ. for Women,* 458 U.S., at 724, 102 S.Ct., at 3336 (internal quotation marks omitted). To succeed, the defender of the challenged action must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Ibid.* (internal quotation marks omitted).

The District Court reasoned that education in "a single-gender environment, be it male or female," yields substantial benefits. 766 F.Supp., at 1415. VMI's school for men brought diversity to an otherwise coeducational Virginia system, and that diversity was "enhanced by VMI's unique method of instruction." *Ibid.* If single-gender education for males ranks as an important governmental objective, it becomes obvious, the District Court concluded, that the *only* means of achieving the objective "is to exclude women from the all-male institution—VMI." *Ibid.*

"Women are [indeed] denied a unique educational opportunity that is available only at VMI," the District Court acknowledged. *Id.,* at 1432. But "[VMI's] single-sex status would be lost, and some aspects of the [school's] distinctive method would be altered," if women were admitted, *id.,* at 1413: "Allowance for personal privacy would have to be made," *id.,* at 1412; "[p]hysical education requirements would have to be altered, at least for the women," *id.,* at 1413; the adversative environment could not survive unmodified, *id.,* at 1412–1413. Thus, "sufficient constitutional justification" had been shown, the District Court held, "for continuing [VMI's] single-sex policy." *Id.,* at 1413.

The Court of Appeals for the Fourth Circuit disagreed and vacated the District Court's judgment. The appellate court held: "The Commonwealth of Virginia has not . . . advanced any state policy by which it can justify its determination, [525]under an announced policy of diversity, to afford VMI's unique type of program to men and not to women." 976 F.2d 890, 892 (1992).

3. The District Court allowed the VMI Foundation and the VMI Alumni Association to intervene as defendants. 766 F.Supp., at 1408.

The appeals court greeted with skepticism Virginia's assertion that it offers single-sex education at VMI as a facet of the Commonwealth's overarching and undisputed policy to advance "autonomy and diversity." The court underscored Virginia's nondiscrimination commitment: " '[I]t is extremely important that [colleges and universities] deal with faculty, staff, and students *without regard to sex, race, or ethnic origin.*' " *Id.,* at 899 (quoting 1990 Report of the Virginia Commission on the University of the 21st Century). "That statement," the Court of Appeals said, "is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions." 976 F.2d, at 899. Furthermore, the appeals court observed, in urging "diversity" to justify an all-male VMI, the Commonwealth had supplied "no explanation for the movement away from [single-sex education] in Virginia by public colleges and universities." *Ibid.* In short, the court concluded, "[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender." *Ibid.*

The parties agreed that "*some* women can meet the physical standards now imposed on men," *id.,* at 896, and the court was satisfied that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women," *id.,* at 899. The Court of Appeals, however, accepted the District Court's finding that "at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation." *Id.,* at 896–897. Remanding the case, the appeals court assigned to Virginia, in the first instance, responsibility for selecting a remedial course. The court suggested these options for the Commonwealth: Admit women to VMI; establish parallel institutions [526] or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution. *Id.,* at 900. In May 1993, this Court denied certiorari. See 508 U.S. 946, 113 S.Ct. 2431, 124 L.Ed.2d 651; see also *ibid.* (opinion of SCALIA, J., noting the interlocutory posture of the litigation).

C

In response to the Fourth Circuit's ruling, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL). The 4–year, state-sponsored undergraduate program would be located at Mary Baldwin College, a private liberal arts school for women, and would be open, initially, to about 25 to 30 students. Although VWIL would share VMI's mission—to produce "citizen-soldiers"—the VWIL program would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of education, and financial resources. See 852 F.Supp. 471, 476–477 (W.D.Va.1994).

The average combined SAT score of entrants at Mary Baldwin is about 100 points lower than the score for VMI freshmen. See *id.,* at 501. Mary Baldwin's faculty holds "significantly fewer Ph.D.'s than the faculty at VMI," *id.,* at 502, and receives significantly lower salaries, see Tr. 158 (testimony of James Lott, Dean of Mary Baldwin College), reprinted in 2 App. in Nos. 94–1667 and 94–1717(CA4) (hereinafter Tr.). While VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin, at the time of trial, offered only bachelor of arts degrees. See 852 F.Supp., at 503. A VWIL student seeking to earn an engineering degree could gain one, without public support, by attending Washington University in St. Louis, Missouri, for two years, paying the required private tuition. See *ibid.*

Experts in educating women at the college level composed the Task Force charged with designing the VWIL program; Task Force members were drawn from Mary Baldwin's own faculty and staff. *Id.,* at 476. Training its attention on methods of instruction appropriate for "most women," the [527] Task Force determined that a military model would be "wholly inappropriate" for VWIL. *Ibid.;* see 44 F.3d 1229, 1233 (C.A.4 1995).

VWIL students would participate in ROTC programs and a newly established, "largely ceremonial" Virginia Corps of Cadets, *id.,* at 1234, but the VWIL House would not have a military format, 852 F.Supp., at 477, and

VWIL would not require its students to eat meals together or to wear uniforms during the schoolday, *id.,* at 495. In lieu of VMI's adversative method, the VWIL Task Force favored "a cooperative method which reinforces self-esteem." *Id.,* at 476. In addition to the standard bachelor of arts program offered at Mary Baldwin, VWIL students would take courses in leadership, complete an off-campus leadership externship, participate in community service projects, and assist in arranging a speaker series. See 44 F.3d, at 1234.

Virginia represented that it will provide equal financial support for in-state VWIL students and VMI cadets, 852 F.Supp., at 483, and the VMI Foundation agreed to supply a $5.4625 million endowment for the VWIL program, *id.,* at 499. Mary Baldwin's own endowment is about $19 million; VMI's is $131 million. *Id.,* at 503. Mary Baldwin will add $35 million to its endowment based on future commitments; VMI will add $220 million. *Ibid.* The VMI Alumni Association has developed a network of employers interested in hiring VMI graduates. The Association has agreed to open its network to VWIL graduates, *id.,* at 499, but those graduates will not have the advantage afforded by a VMI degree.

D

Virginia returned to the District Court seeking approval of its proposed remedial plan, and the court decided the plan met the requirements of the Equal Protection Clause. *Id.,* at 473. The District Court again acknowledged evidentiary support for these determinations: "[T]he VMI methodology could be used to educate women and, in fact, some [528]women . . . may prefer the VMI methodology to the VWIL methodology." *Id.,* at 481. But the "controlling legal principles," the District Court decided, "do not require the Commonwealth to provide a mirror image VMI for women." *Ibid.* The court anticipated that the two schools would "achieve substantially similar outcomes." *Ibid.* It concluded: "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination." *Id.,* at 484.

A divided Court of Appeals affirmed the District Court's judgment. 44 F.3d 1229 (C.A.4 1995). This time, the appellate court determined to give "greater scrutiny to the selection of means than to the [Commonwealth's] proffered objective." *Id.,* at 1236. The official objective or purpose, the court said, should be reviewed deferentially. *Ibid.* Respect for the "legislative will," the court reasoned, meant that the judiciary should take a "cautious approach," inquiring into the "legitima[cy]" of the governmental objective and refusing approval for any purpose revealed to be "pernicious." *Ibid.*

"[P]roviding the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education," the appeals court observed, *id.,* at 1238; that objective, the court added, is "not pernicious," *id.,* at 1239. Moreover, the court continued, the adversative method vital to a VMI education "has never been tolerated in a sexually heterogeneous environment." *Ibid.* The method itself "was not designed to exclude women," the court noted, but women could not be accommodated in the VMI program, the court believed, for female participation in VMI's adversative training "would destroy . . . any sense of decency that still permeates the relationship between the sexes." *Ibid.*

Having determined, deferentially, the legitimacy of Virginia's purpose, the court considered the question of means. [529]Exclusion of "men at Mary Baldwin College and women at VMI," the court said, was essential to Virginia's purpose, for without such exclusion, the Commonwealth could not "accomplish [its] objective of providing single-gender education." *Ibid.*

The court recognized that, as it analyzed the case, means merged into end, and the merger risked "bypass[ing] any equal protection scrutiny." *Id.,* at 1237. The court therefore added another inquiry, a decisive test it called "substantive comparability." *Ibid.* The key question, the court said, was whether men at VMI and women at VWIL would obtain "substantively comparable benefits at their institution or through other

means offered by the [S]tate." *Ibid.* Although the appeals court recognized that the VWIL degree "lacks the historical benefit and prestige" of a VMI degree, it nevertheless found the educational opportunities at the two schools "sufficiently comparable." *Id.,* at 1241.

Senior Circuit Judge Phillips dissented. The court, in his judgment, had not held Virginia to the burden of showing an " 'exceedingly persuasive [justification]' " for the Commonwealth's action. *Id.,* at 1247 (quoting *Mississippi Univ. for Women,* 458 U.S., at 724, 102 S.Ct., at 3336). In Judge Phillips' view, the court had accepted "rationalizations compelled by the exigencies of this litigation," and had not confronted the Commonwealth's "actual overriding purpose." 44 F.3d, at 1247. That purpose, Judge Phillips said, was clear from the historical record; it was "not to create a new type of educational opportunity for women, ... nor to further diversify the Commonwealth's higher education system[,] ... but [was] simply ... to allow VMI to continue to exclude women in order to preserve its historic character and mission." *Ibid.*

Judge Phillips suggested that the Commonwealth would satisfy the Constitution's equal protection requirement if it "simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration[530] and support services, and faculty and library resources." *Id.,* at 1250. But he thought it evident that the proposed VWIL program, in comparison to VMI, fell "far short ... from providing substantially equal tangible and intangible educational benefits to men and women." *Ibid.*

The Fourth Circuit denied rehearing en banc. 52 F.3d 90 (1995). Circuit Judge Motz, joined by Circuit Judges Hall, Murnaghan, and Michael, filed a dissenting opinion.[4] Judge Motz agreed with Judge Phillips that Virginia had not shown an " 'exceedingly persuasive justification' " for the disparate opportunities the Commonwealth supported. *Id.,* at 92 (quoting *Mississippi Univ. for Women,* 458 U.S., at 724, 102 S.Ct., at 3336). She asked: "[H]ow can a degree from a yet to be implemented supplemental program at Mary Baldwin be held 'substantively comparable' to a degree from a venerable Virginia military institution that was established more than 150 years ago?" 52 F.3d, at 93. "Women need not be guaranteed equal 'results,' " Judge Motz said, "but the Equal Protection Clause does require equal opportunity ... [and] that opportunity is being denied here." *Ibid.*

4. Six judges voted to rehear the case en banc, four voted against rehearing, and three were recused. The Fourth Circuit's local Rule permits rehearing en banc only on the vote of a majority of the Circuit's judges in regular active service (currently 13) without regard to recusals. See 52 F.3d, at 91, and n. 1.

III

The cross-petitions in this suit present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI—extraordinary opportunities for military training and civilian leadership development—deny to women "capable of all of the individual activities required of VMI cadets," 766 F.Supp., at 1412, the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation, *id.,* at 1413—as Virginia's sole single-sex public institution of higher education[531]—offends the Constitution's equal protection principle, what is the remedial requirement?

IV

1 We note, once again, the core instruction of this Court's pathmarking decisions in *J.E.B. v. Alabama ex rel. T. B.,* 511 U.S. 127, 136–137, and n. 6, 114 S.Ct. 1419, 1425–1426, and n. 6, 128 L.Ed.2d 89 (1994), and *Mississippi Univ. for Women,* 458 U.S., at 724, 102 S.Ct., at 3336 (internal quotation marks omitted): Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortu-

nate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684, 93 S.Ct. 1764, 1769, 36 L.Ed.2d 583 (1973). Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; [5] not until 1920 did women gain a constitutional right to the franchise. *Id.*, at 685, 93 S.Ct., at 1769–1770. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination. See, *e.g.*, *Goesaert v. Cleary*, 335 U.S. 464, 467, 69 S.Ct. 198, 200, 93 L.Ed. 163 (1948) (rejecting challenge of female tavern owner and her daughter to Michigan law denying bartender licenses to females—except for wives and daughters of male tavern owners; Court would not "give ear" to the contention that "an unchivalrous desire of male [532] bartenders to ... monopolize the calling" prompted the legislation).

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. *Reed v. Reed*, 404 U.S. 71, 73, 92 S.Ct. 251, 252–253, 30 L.Ed.2d 225 (holding unconstitutional Idaho Code prescription that, among " 'several persons claiming and equally entitled to administer [a decedent's estate], males must be preferred to females' "). Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. See, *e.g.*, *Kirchberg v. Feenstra*, 450 U.S. 455, 462–463, 101 S.Ct. 1195, 1199–1200, 67 L.Ed.2d 428 (1981) (affirming invalidity of Louisiana law that made husband "head and master" of property jointly owned with his wife, giving him unilateral right to dispose of such property without his wife's consent); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975) (invalidating Utah requirement that parents support boys until age 21, girls only until age 18).

2–5 Without equating gender classifications, for all purposes, to classifications based on race or national origin,[6] the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). See *J.E.B.*, 511 U.S., at 152, 114 S.Ct., at 1433 (KENNEDY, J., concurring in judgment) (case law evolving since 1971 "reveal[s] a strong presumption that gender classifications are invalid"). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential [533] treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. See *Mississippi Univ. for Women*, 458 U.S., at 724, 102 S.Ct., at 3336. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " *Ibid.* (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980)). The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See

5. As Thomas Jefferson stated the view prevailing when the Constitution was new:
"Were our State a pure democracy ... there would yet be excluded from their deliberations ... [w]omen, who, to prevent depravation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men." Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), in 10 Writings of Thomas Jefferson 45–46, n. 1 (P. Ford ed. 1899).

6. The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin, but last Term observed that strict scrutiny of such classifications is not inevitably "fatal in fact." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237, 115 S.Ct. 2097, 2117, 132 L.Ed.2d 158 (1995) (internal quotation marks omitted).

Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648, 95 S.Ct. 1225, 1230–1231, 1233, 43 L.Ed.2d 514 (1975); *Califano v. Goldfarb,* 430 U.S. 199, 223–224, 97 S.Ct. 1021, 1035–1036, 51 L.Ed.2d 270 (1977) (STEVENS, J., concurring in judgment).

6 The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Ballard v. United States,* 329 U.S. 187, 193, 67 S.Ct. 261, 264, 91 L.Ed. 181 (1946).

7 "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," *Califano v. Webster,* 430 U.S. 313, 320, 97 S.Ct. 1192, 1196, 51 L.Ed.2d 360 (1977) *(per curiam),* to "promot[e] equal employment opportunity," see *California Fed. Sav. & Loan Assn. v. Guerra,* 479 U.S. 272, 289, 107 S.Ct. 683, 693–694, 93 L.Ed.2d 613 (1987), to advance full development of the talent and capacities of our Nation's people.[534][7] But such classifications may not be used, as they once were, see *Goesaert,* 335 U.S., at 467, 69 S.Ct., at 200, to create or perpetuate the legal, social, and economic inferiority of women.

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. We therefore affirm the Fourth Circuit's initial judgment, which held that Virginia had violated the Fourteenth Amendment's Equal Protection Clause. Because the remedy proffered by Virginia—the Mary Baldwin VWIL program—does not cure the constitutional violation, *i.e.,* it does not provide equal opportunity, we reverse the Fourth Circuit's final judgment in this case.

V

The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination "to afford VMI's unique type of program to men and not to women." 976 F.2d, at 892. Virginia challenges that "liability" ruling and asserts two justifications in defense of VMI's exclusion of [535]women. First, the Commonwealth contends, "single-sex education provides important educational benefits," Brief for Cross–Petitioners 20, and the option of single-sex education contributes to "diversity in educational approaches," *id.,* at 25. Second, the Commonwealth argues, "the unique VMI method of character development and leadership training," the school's adversative approach, would have to be modified were VMI to admit women. *Id.,* at 33–36 (internal quotation marks omitted). We consider these two justifications in turn.

A

, Single-sex education affords pedagogical benefits to at least some students,

7. Several *amici* have urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity. Indeed, it is the mission of some single-sex schools "to dissipate, rather than perpetuate, traditional gender classifications." See Brief for Twenty-six Private Women's Colleges as *Amici Curiae* 5. We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as "unique," see 766 F.Supp., at 1413, 1432, 976 F.2d, at 892, an opportunity available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college. Cf. *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 720, n. 1, 102 S.Ct. 3331, 3334, n. 1, 73 L.Ed.2d 1090 (1982) ("Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females.").

Virginia emphasizes, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions[536] in fact differently grounded. See *Wiesenfeld*, 420 U.S., at 648, and n. 16, 95 S.Ct., at 1233, and n. 16 ("mere recitation of a benign [or] compensatory purpose" does not block "inquiry into the actual purposes" of government-maintained gender-based classifications); *Goldfarb*, 430 U.S., at 212–213, 97 S.Ct., at 1030 (rejecting government-proffered purposes after "inquiry into the actual purposes" (internal quotation marks omitted)).

Mississippi Univ. for Women is immediately in point. There the State asserted, in justification of its exclusion of men from a nursing school, that it was engaging in "educational affirmative action" by "compensat[ing] for discrimination against women." 458 U.S., at 727, 102 S.Ct., at 3337. Undertaking a "searching analysis," *id.*, at 728, 102 S.Ct., at 3338, the Court found no close resemblance between "the alleged objective" and "the actual purpose underlying the discriminatory classification," *id.*, at 730, 102 S.Ct., at 3339. Pursuing a similar inquiry here, we reach the same conclusion.

Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. In 1839, when the Commonwealth established VMI, a range of educational opportunities for men and women was scarcely contemplated. Higher education at the time was considered dangerous for women; reflecting[537] widely held views about women's proper place, the Nation's first universities and colleges—for example, Harvard in Massachusetts, William and Mary in Virginia—admitted only men. See E. Farello, A History of the Education of Women in the United States 163 (1970). VMI was not at all novel in this respect: In admitting no women, VMI followed the lead of the Commonwealth's flagship school, the University of Virginia, founded in 1819.

"[N]o struggle for the admission of women to a state university," a historian has recounted, "was longer drawn out, or developed more bitterness, than that at the University of Virginia." 2 T. Woody, A History of Women's Education in the United States 254 (1929) (History of Women's Education). In

8. On this point, the dissent sees fire where there is no flame. See *post*, at 2305–2306, 2306–2307. "Both men and women can benefit from a single-sex education," the District Court recognized, although "the beneficial effects" of such education, the court added, apparently "are stronger among women than among men." 766 F.Supp., at 1414. The United States does not challenge that recognition. Cf. C. Jencks & D. Riesman, The Academic Revolution 297–298 (1968):

> "The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges.... The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority—assumptions for which women must eventually pay."

9. Dr. Edward H. Clarke of Harvard Medical School, whose influential book, Sex in Education, went through 17 editions, was perhaps the most well-known speaker from the medical community opposing higher education for women. He maintained that the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs. See E. Clarke, Sex in Education 38–39, 62–63 (1873); *id.*, at 127 ("identical education of the two sexes is a crime before God and humanity, that physiology protests against, and that experience weeps over"); see also H. Maudsley, Sex in Mind and in Education 17 (1874) ("It is not that girls have not ambition, nor that they fail generally to run the intellectual race [in coeducational settings], but it is asserted that they do it at a cost to their strength and health which entails life-long suffering, and even incapacitates them for the adequate performance of the natural functions of their sex."); C. Meigs, Females and Their Diseases 350 (1848) (after five or six weeks of "mental and educational discipline," a healthy woman would "lose ... the habit of menstruation" and suffer numerous ills as a result of depriving her body for the sake of her mind).

1879, the State Senate resolved to look into the possibility of higher education for women, recognizing that Virginia " 'has never, at any period of her history,' " provided for the higher education of her daughters, though she " 'has liberally provided for the higher education of her sons.' " *Ibid.* (quoting 10 Educ. J. Va. 212 (1879)). Despite this recognition, no new opportunities were instantly open to women.[10]

Virginia eventually provided for several women's seminaries and colleges. Farmville Female Seminary became a public institution in 1884. See *supra*, at 2270, n. 2. Two women's schools, Mary Washington College and James Madison University, were founded in 1908; another, Radford University, was founded in 1910. 766 F.Supp., at 1418–1419. By the mid–1970's, all four schools had become coeducational. *Ibid.*

Debate concerning women's admission as undergraduates at the main university continued well past the century's midpoint. Familiar arguments were rehearsed. If women [538] were admitted, it was feared, they "would encroach on the rights of men; there would be new problems of government, perhaps scandals; the old honor system would have to be changed; standards would be lowered to those of other coeducational schools; and the glorious reputation of the university, as a school for men, would be trailed in the dust." 2 History of Women's Education 255.

Ultimately, in 1970, "the most prestigious institution of higher education in Virginia," the University of Virginia, introduced coeducation and, in 1972, began to admit women on an equal basis with men. See *Kirstein v. Rector and Visitors of Univ. of Virginia*, 309 F.Supp. 184, 186 (E.D.Va.1970). A three-judge Federal District Court confirmed: "Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the [S]tate." *Id.*, at 187.

Virginia describes the current absence of public single-sex higher education for women as "an historical anomaly." Brief for Cross–Petitioners 30. But the historical record indicates action more deliberate than anomalous: First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation. The state legislature, prior to the advent of this controversy, had repealed "[a]ll Virginia statutes requiring individual institutions to admit only men or women." 766 F.Supp., at 1419. And in 1990, an official commission, "legislatively established to chart the future goals of higher education in Virginia," reaffirmed the policy " 'of affording broad access' " while maintaining " 'autonomy and diversity.' " 976 F.2d, at 898–899 (quoting Report of the Virginia Commission on the University of the 21st Century). Significantly, the commission reported:

> " 'Because colleges and universities provide opportunities for students to develop values and learn from role [539] models, it is extremely important that they deal with faculty, staff, and students without regard to sex, race, or ethnic origin.' " *Id.*, at 899 (emphasis supplied by Court of Appeals deleted).

This statement, the Court of Appeals observed, "is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions." *Ibid.*

Our 1982 decision in *Mississippi Univ. for Women* prompted VMI to reexamine its male-only admission policy. See 766 F.Supp., at 1427–1428. Virginia relies on that reexamination as a legitimate basis for maintaining VMI's single-sex character. See Reply Brief for Cross–Petitioners 6. A Mission Study Committee, appointed by the VMI Board of Visitors, studied the problem from October 1983 until May 1986, and in that month counseled against "change of VMI status as a single-sex college." See 766 F.Supp., at 1429 (internal quotation marks

10. Virginia's Superintendent of Public Instruction dismissed the coeducational idea as " 'repugnant to the prejudices of the people' " and proposed a female college similar in quality to Girton, Smith, or Vassar. 2 History of Women's Education 254 (quoting Dept. of Interior, 1 Report of Commissioner of Education, H.R. Doc. No. 5, 58th Cong., 2d Sess., 438 (1904)).

omitted). Whatever internal purpose the Mission Study Committee served—and however well meaning the framers of the report—we can hardly extract from that effort any Commonwealth policy evenhandedly to advance diverse educational options. As the District Court observed, the Committee's analysis "primarily focuse[d] on anticipated difficulties in attracting females to VMI," and the report, overall, supplied "very little indication of how th[e] conclusion was reached." *Ibid.*

In sum, we find no persuasive evidence in this record that VMI's male-only admission policy "is in furtherance of a state policy of 'diversity.' " See 976 F.2d, at 899. No such policy, the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education. See *ibid.* That court also questioned "how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." *Ibid.* A purpose genuinely to advance an array of educational 540 options, as the Court of Appeals recognized, is not served by VMI's historic and constant plan—a plan to "affor[d] a unique educational benefit only to males." *Ibid.* However "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection.

B

10 Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be "radical," so "drastic," Virginia asserts, as to transform, indeed "destroy," VMI's program. See Brief for Cross–Petitioners 34–36. Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminat[e] the very aspects of [the] program that distinguish [VMI] from ... other institutions of higher education in Virginia." *Id.,* at 34.

The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect "at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach." 976 F.2d, at 896–897. And it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. See Brief for Cross–Respondent 11, 29–30. It is also undisputed, however, that "the VMI methodology could be used to educate women." 852 F.Supp., at 481. The District Court even allowed that some women may prefer it to the methodology a women's college might pursue. See *ibid.* "[S]ome women, at least, would want to attend [VMI] if they had the opportunity," the District Court recognized, 766 F.Supp., at 1414, and "some women," the expert testimony established, "are 541 capable of all of the individual activities required of VMI cadets," *id.,* at 1412. The parties, furthermore, agree that "*some* women can meet the physical standards [VMI] now impose[s] on men." 976 F.2d, at 896. In sum, as the Court of Appeals stated, "neither the goal of producing citizen soldiers," VMI's *raison d'être,* "nor VMI's implementing methodology is inherently unsuitable to women." *Id.,* at 899.

In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, the District Court made "findings" on "gender-based developmental differences." 766 F.Supp., at 1434–1435. These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." *Id.,* at 1434. For example, "[m]ales tend to need an atmosphere of adversativeness," while "[f]emales tend to thrive in a cooperative atmosphere." *Ibid.* "I'm not saying that some women don't do well under [the] adversative model," VMI's expert on educational institutions testified, "undoubtedly there are some [women] who do"; but educational experiences must be designed "around the rule," this expert maintained, and not "around the exception." *Ibid.* (internal quotation marks omitted).

11 The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court's turning point decision in *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), we have cautioned reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia, and relied upon by the District Court. See O'Connor, Portia's Progress, 66 N.Y.U.L.Rev. 1546, 1551 (1991). State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women*, 458 U.S., at 725, 102 S.Ct., at 3336; see *J.E.B.*, 511 U.S., at 139, n. 11, 114 S.Ct., at 1427, n. 11 (equal protection principles, as applied to gender classifications, mean [542]state actors may not rely on "overbroad" generalizations to make "judgments about people that are likely to . . . perpetuate historical patterns of discrimination").

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. As Fourth Circuit Judge Motz observed, however, in her dissent from the Court of Appeals' denial of rehearing en banc, it is also probable that "many men would not want to be educated in such an environment." 52 F.3d, at 93. (On that point, even our dissenting colleague might agree.) Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women—or men—should be forced to attend VMI"; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords. *Ibid.*

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school,[11] is a judgment hardly proved,[12] a prediction [543]hardly different from other "self-fulfilling prophec[ies]," see *Mississippi Univ. for Women*, 458 U.S., at 730, 102 S.Ct., at 3339, once routinely used to deny rights or opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. For example, in 1876, the Court of Common Pleas of Hennepin County, Minnesota, explained why women were thought ineligible for the practice of law. Women train and educate the young, the court said, which

> "forbids that they shall bestow that time (early and late) and labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot therefore be said that the opposition of courts to the admission of females to practice . . . is to any extent the outgrowth of . . . 'old fogyism[.]' . . . [I]t arises rather from a comprehension of the magnitude of the responsibilities connected with the suc-

11. See *post*, at 2291, 2306–2307, 2309. Forecasts of the same kind were made regarding admission of women to the federal military academies. See, *e.g.*, Hearings on H.R. 9832 et al. before Subcommittee No. 2 of the House Committee on Armed Services, 93d Cong., 2d Sess., 137 (1975) (statement of Lt. Gen. A.P. Clark, Superintendent of U.S. Air Force Academy) ("It is my considered judgment that the introduction of female cadets will inevitably erode this vital atmosphere."); *id.*, at 165 (statement of Hon. H.H. Callaway, Secretary of the Army) ("Admitting women to West Point would irrevocably change the Academy. . . . The Spartan atmosphere—which is so important to producing the final product—would surely be diluted, and would in all probability disappear.").

12. See 766 F.Supp., at 1413 (describing testimony of expert witness David Riesman: "[I]f VMI were to admit women, it would eventually find it necessary to drop the adversative system altogether, and adopt a system that provides more nurturing and support for the students."). Such judgments have attended, and impeded, women's progress toward full citizenship stature throughout our Nation's history. Speaking in 1879 in support of higher education for females, for example, Virginia State Senator C.T. Smith of Nelson recounted that legislation proposed to protect the property rights of women had encountered resistance. 10 Educ. J. Va. 213 (1879). A Senator opposing the measures objected that "there [was] no formal call for the [legislation]," and "depicted in burning eloquence the terrible consequences such laws would produce." *Ibid.* The legislation passed, and a year or so later, its sponsor, C.T. Smith, reported that "not one of [the forecast "terrible consequences"] has or ever will happen, even unto the sounding of Gabriel's trumpet." *Ibid.* See also *supra*, at 2278.

cessful practice of law, and a desire to *grade up* the profession." In re Application of Martha Angle Dorsett to Be Admitted to Practice as Attorney and Counselor at Law (Minn. C.P. Hennepin Cty., 1876), in The Syllabi, Oct. 21, 1876, pp. 5, 6 (emphasis added).

A like fear, according to a 1925 report, accounted for Columbia Law School's resistance to women's admission, although

"[t]he faculty ... never maintained that women could not master legal learning.... No, its argument has been ... more practical. If women were admitted to 544 the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!" The Nation, Feb. 18, 1925, p. 173.

Medical faculties similarly resisted men and women as partners in the study of medicine. See R. Morantz–Sanchez, Sympathy and Science: Women Physicians in American Medicine 51–54, 250 (1985); see also M. Walsh, "Doctors Wanted: No Women Need Apply" 121–122 (1977) (quoting E. Clarke, Medical Education of Women, 4 Boston Med. & Surg. J. 345, 346 (1869) (" 'God forbid that I should ever see men and women aiding each other to display with the scalpel the secrets of the reproductive system .... ' ")); cf. *supra*, at 2277, n. 9. More recently, women seeking careers in policing encountered resistance based on fears that their presence would "undermine male solidarity," see F. Heidensohn, Women in Control? 201 (1992); deprive male partners of adequate assistance, see *id.*, at 184–185; and lead to sexual misconduct, see C. Milton et al., Women in Policing 32–33 (1974). Field studies did not confirm these fears. See Heidensohn, *supra*, at 92–93; P. Bloch & D. Anderson, Policewomen on Patrol: Final Report (1974).

Women's successful entry into the federal military academies,[13] and their participation in the Nation's military forces,[14] indicate that Virginia's fears for the future of VMI 545 may not be solidly grounded.[15] The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard.

Virginia and VMI trained their argument on "means" rather than "end," and thus misperceived our precedent. Single-sex education at VMI serves an "important governmental objective," they maintained, and exclusion of women is not only "substantially related," it is essential to that objective. By this notably circular argument, the "straightforward" test *Mississippi Univ. for Women* described, see 458 U.S., at 724–725, 102 S.Ct., at 3336–3337, was bent and bowed.

The Commonwealth's misunderstanding and, in turn, the District Court's, is apparent from VMI's mission: to produce "citizen-soldiers," individuals

" 'imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready

13. Women cadets have graduated at the top of their class at every federal military academy. See Brief for Lieutenant Colonel Rhonda Cornum et al. as *Amici Curiae* 11, n. 25; cf. Defense Advisory Committee on Women in the Services, Report on the Integration and Performance of Women at West Point 64 (1992).

14. Brief for Lieutenant Colonel Rhonda Cornum, *supra*, at 5–9 (reporting the vital contributions and courageous performance of women in the military); see Mintz, President Nominates 1st Woman to Rank of Three–Star General, Washington Post, Mar. 27, 1996, p. A19, col. 1 (announcing President's nomination of Marine Corps Major General Carol Mutter to rank of Lieutenant General; Mutter will head corps manpower and planning); M. Tousignant, A New Era for the Old Guard, Washington Post, Mar. 23, 1996, p. C1, col. 2 (reporting admission of Sergeant Heather Johnsen to elite Infantry unit that keeps round-the-clock vigil at Tomb of the Unknowns in Arlington National Cemetery).

15. Inclusion of women in settings where, traditionally, they were not wanted inevitably entails a period of adjustment. As one West Point cadet squad leader recounted: "[T]he classes of '78 and '79 see the women as women, but the classes of '80 and '81 see them as classmates." U.S. Military Academy, A. Vitters, Report of Admission of Women (Project Athena II) 84 (1978) (internal quotation marks omitted).

. . . to defend their country in time of national peril.'" 766 F.Supp., at 1425 (quoting Mission Study Committee of the VMI Board of Visitors, Report, May 16, 1986).

Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men. Just as surely, the Commonwealth's 546great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier "citizen-soldier" corps.[16] Virginia, in sum, "has fallen far short of establishing the 'exceedingly persuasive justification,'" *Mississippi Univ. for Women,* 458 U.S., at 731, 102 S.Ct., at 3340, that must be the solid base for any gender-defined classification.

VI

In the second phase of the litigation, Virginia presented its remedial plan—maintain VMI as a male-only college and create VWIL as a separate program for women. The plan met District Court approval. The Fourth Circuit, in turn, deferentially reviewed the Commonwealth's proposal and decided that the two single-sex programs directly served Virginia's reasserted purposes: single-gender education, and "achieving the results of an adversative method in a military environment." See 44 F.3d, at 1236, 1239. Inspecting the VMI and VWIL educational programs to determine whether they "afford[ed] to both genders benefits comparable in substance, [if] not in form and detail," *id.,* at 1240, the Court of Appeals concluded that Virginia had arranged for men and women opportunities "sufficiently comparable" to survive equal protection evaluation, *id.,* at 1240–1241. The United States challenges this "remedial" ruling as pervasively misguided.

547A

12, 13 A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]." See *Milliken v. Bradley,* 433 U.S. 267, 280, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977) (internal quotation marks omitted). The constitutional violation in this suit is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion, we have explained, aims to "eliminate [so far as possible] the discriminatory effects of the past" and to "bar like discrimination in the future." *Louisiana v. United States,* 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965).

14 Virginia chose not to eliminate, but to leave untouched, VMI's exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities.[17] Having violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal "directly address[ed] and relate[d]

16. VMI has successfully managed another notable change. The school admitted its first African–American cadets in 1968. See The VMI Story 347–349 (students no longer sing "Dixie," salute the Confederate flag or the tomb of General Robert E. Lee at ceremonies and sports events). As the District Court noted, VMI established a program on "retention of black cadets" designed to offer academic and social-cultural support to "minority members of a dominantly white and tradition-oriented student body." 766 F.Supp., at 1436–1437. The school maintains a "special recruitment program for blacks" which, the District Court found, "has had little, if any, effect on VMI's method of accomplishing its mission." *Id.,* at 1437.

17. As earlier observed, see *supra,* at 2273–2274, Judge Phillips, in dissent, measured Virginia's plan against a paradigm arrangement, one that "could survive equal protection scrutiny": single-sex schools with "substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, . . . faculty[,] and library resources." 44 F.3d 1229, 1250 (C.A.4 1995). Cf. *Bray v. Lee,* 337 F.Supp. 934 (Mass.1972) (holding inconsistent with the Equal Protection Clause admission of males to Boston's Boys Latin School with a test score of 120 or higher (up to a top score of 200) while requiring a score, on the same test, of at least 133 for admission of females to Girls Latin School, but not ordering coeducation). Measuring VMI/VWIL against the paradigm, Judge Phillips said, "reveals how far short the [Virginia] plan falls from providing substantially equal tangible and intangible educational benefits to men and women." 44 F.3d, at 1250.

to" the violation, see *Milliken,* 433 U.S., at 282, 97 S.Ct., at 2758, *i.e.,* the equal protection denied to women ready, willing, and able to benefit from educational [548] opportunities of the kind VMI offers. Virginia described VWIL as a "parallel program," and asserted that VWIL shares VMI's mission of producing "citizen-soldiers" and VMI's goals of providing "education, military training, mental and physical discipline, character ... and leadership development." Brief for Respondents 24 (internal quotation marks omitted). If the VWIL program could not "eliminate the discriminatory effects of the past," could it at least "bar like discrimination in the future"? See *Louisiana,* 380 U.S., at 154, 85 S.Ct., at 822. A comparison of the programs said to be "parallel" informs our answer. In exposing the character of, and differences in, the VMI and VWIL programs, we recapitulate facts earlier presented. See *supra,* at 2269–2271, 2272–2273.

VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. See 766 F.Supp., at 1413–1414 ("No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI."); *id.,* at 1421 (VMI "is known to be the most challenging military school in the United States"). Instead, the VWIL program "deemphasize[s]" military education, 44 F.3d, at 1234, and uses a "cooperative method" of education "which reinforces self-esteem," 852 F.Supp., at 476.

VWIL students participate in ROTC and a "largely ceremonial" Virginia Corps of Cadets, see 44 F.3d, at 1234, but Virginia deliberately did not make VWIL a military institute. The VWIL House is not a military-style residence and VWIL students need not live together throughout the 4–year program, eat meals together, or wear uniforms during the schoolday. See 852 F.Supp., at 477, 495. VWIL students thus do not experience the "barracks" life "crucial to the VMI experience," the spartan living arrangements designed to foster an "egalitarian ethic." See 766 F.Supp., at 1423–1424. "[T]he most important aspects of the VMI educational experience occur in the barracks," the District Court [549] found, *id.,* at 1423, yet Virginia deemed that core experience nonessential, indeed inappropriate, for training its female citizen-soldiers.

VWIL students receive their "leadership training" in seminars, externships, and speaker series, see 852 F.Supp., at 477, episodes and encounters lacking the "[p]hysical rigor, mental stress, ... minute regulation of behavior, and indoctrination in desirable values" made hallmarks of VMI's citizen-soldier training, see 766 F.Supp., at 1421.[1] Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, see *id.,* at 1422, VWIL students will not know the "feeling of tremendous accomplishment" commonly experienced by VMI's successful cadets, *id.,* at 1426.

Virginia maintains that these methodological differences are "justified pedagogically," based on "important differences between men and women in learning and developmental needs," "psychological and sociological differences" Virginia describes as "real" and "not stereotypes." Brief for Respondents 28 (internal quotation marks omitted). The Task Force charged with developing the leadership program for women, drawn from the staff and faculty at Mary Baldwin College, "determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training *most women.*" 852 F.Supp., at 476 (emphasis added). See also 44 F.3d, at 1233–1234 (noting Task Force conclusion that, while "some women would be suited to and interested in [a VMI-style experience]," VMI's adversative method "would not be effective for *women as a group*" (emphasis added)). The Commonwealth [550] embraced the Task Force view, as did expert witnesses who testified for Virginia. See 852 F.Supp., at 480–481.

18. Both programs include an honor system. Students at VMI are expelled forthwith for honor code violations, see 766 F.Supp., at 1423; the system for VWIL students, see 852 F.Supp., at 496–497, is less severe, see Tr. 414–415 (testimony of Mary Baldwin College President Cynthia Tyson).

As earlier stated, see *supra,* at 2280, generalizations about "the way women are," estimates of what is appropriate for *most women,* no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI's method of education suits *most men.* It is also revealing that Virginia accounted for its failure to make the VWIL experience "the entirely militaristic experience of VMI" on the ground that VWIL "is planned for women who do not necessarily expect to pursue military careers." 852 F.Supp., at 478. By that reasoning, VMI's "entirely militaristic" program would be inappropriate for men in general or *as a group,* for "[o]nly about 15% of VMI cadets enter career military service." See 766 F.Supp., at 1432.

In contrast to the generalizations about women on which Virginia rests, we note again these dispositive realities: VMI's "implementing methodology" is not "inherently unsuitable to women," 976 F.2d, at 899; "some women . . . do well under [the] adversative model," 766 F.Supp., at 1434 (internal quotation marks omitted); "some women, at least, would want to attend [VMI] if they had the opportunity," *id.,* at 1414; "some women are capable of all of the individual activities required of VMI cadets," *id.,* at 1412, and "can meet the physical standards [VMI] now impose[s] on men," 976 F.2d, at 896. It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted,[1] a remedy that will end their [551]exclusion from a state-supplied educational opportunity for which they are fit, a decree that will "bar like discrimination in the future." *Louisiana,* 380 U.S., at 154, 85 S.Ct., at 822.

B

In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157–year history, the school's prestige, and its influential alumni network.

Mary Baldwin College, whose degree VWIL students will gain, enrolls first-year women with an average combined SAT score about 100 points lower than the average score for VMI freshmen. 852 F.Supp., at 501. The Mary Baldwin faculty holds "significantly fewer Ph.D.'s," *id.,* at 502, and receives substantially lower salaries, see Tr. 158 (testimony of James Lott, Dean of Mary Baldwin College), than the faculty at VMI.

Mary Baldwin does not offer a VWIL student the range of curricular choices available to a VMI cadet. VMI awards baccalaureate degrees in liberal arts, biology, chemistry, civil engineering, electrical and computer engineering, and mechanical engineering. See 852 F.Supp., at 503; Virginia Military Institute: More than an Education 11 (Govt. exh. 75, [552]lodged with Clerk of this Court). VWIL students attend a school that "does not have a math and science focus," 852 F.Supp., at 503; they cannot take at Mary Baldwin any courses in engineering or the advanced math and physics courses VMI offers, see *id.,* at 477.

For physical training, Mary Baldwin has "two multi-purpose fields" and "[o]ne gymnasium." *Id.,* at 503. VMI has "an NCAA competition level indoor track and field facility; a number of multi-purpose fields; baseball, soccer and lacrosse fields; an obstacle course; large boxing, wrestling and martial arts facilities; an 11–laps–to–the–mile indoor

19. Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs. See Brief for Petitioner 27–29; cf. note following 10 U.S.C. § 4342 (academic and other standards for women admitted to the Military, Naval, and Air Force Academies "shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals"). Experience shows such adjustments are manageable. See U.S. Military Academy, A. Vitters, N. Kinzer, & J. Adams, Report of Admission of Women (Project Athena I–IV) (1977–1980) (4–year longitudinal study of the admission of women to West Point); Defense Advisory Committee on Women in the Services, Report on the Integration and Performance of Women at West Point 17–18 (1992).

running course; an indoor pool; indoor and outdoor rifle ranges; and a football stadium that also contains a practice field and outdoor track." *Ibid.*

Although Virginia has represented that it will provide equal financial support for in-state VWIL students and VMI cadets, *id.,* at 483, and the VMI Foundation has agreed to endow VWIL with $5.4625 million, *id.,* at 499, the difference between the two schools' financial reserves is pronounced. Mary Baldwin's endowment, currently about $19 million, will gain an additional $35 million based on future commitments; VMI's current endowment, $131 million—the largest public college per-student endowment in the Nation—will gain $220 million. *Id.,* at 503.

The VWIL student does not graduate with the advantage of a VMI degree. Her diploma does not unite her with the legions of VMI "graduates [who] have distinguished themselves" in military and civilian life. See 976 F.2d, at 892–893. "[VMI] alumni are exceptionally close to the school," and that closeness accounts, in part, for VMI's success in attracting applicants. See 766 F.Supp., at 1421. A VWIL graduate cannot assume that the "network of business owners, corporations, VMI graduates and non-graduate employers . . . interested in hiring VMI graduates," 852 F.Supp., at 499, will be equally responsive to her search for employment, [553]see 44 F.3d, at 1250 (Phillips, J., dissenting) ("the powerful political and economic ties of the VMI alumni network cannot be expected to open" for graduates of the fledgling VWIL program).

Virginia, in sum, while maintaining VMI for men only, has failed to provide any "comparable single-gender women's institution." *Id.,* at 1241. Instead, the Commonwealth has created a VWIL program fairly appraised as a "pale shadow" of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. See *id.,* at 1250 (Phillips, J., dissenting).

Virginia's VWIL solution is reminiscent of the remedy Texas proposed 50 years ago, in response to a state trial court's 1946 ruling that, given the equal protection guarantee, African–Americans could not be denied a legal education at a state facility. See *Sweatt v. Painter,* 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950). Reluctant to admit African–Americans to its flagship University of Texas Law School, the State set up a separate school for Heman Sweatt and other black law students. *Id.,* at 632, 70 S.Ct., at 849. As originally opened, the new school had no independent faculty or library, and it lacked accreditation. *Id.,* at 633, 70 S.Ct., at 849–850. Nevertheless, the state trial and appellate courts were satisfied that the new school offered Sweatt opportunities for the study of law "substantially equivalent to those offered by the State to white students at the University of Texas." *Id.,* at 632, 70 S.Ct., at 849 (internal quotation marks omitted).

Before this Court considered the case, the new school had gained "a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who ha[d] become a member of the Texas Bar." *Id.,* at 633, 70 S.Ct., at 850. This Court contrasted resources at the new school with those at the school from which Sweatt had been excluded. The University of Texas Law School had a full-time faculty of 16, a student body of 850, a library containing over [554]65,000 volumes, scholarship funds, a law review, and moot court facilities. *Id.,* at 632–633, 70 S.Ct., at 849–850.

More important than the tangible features, the Court emphasized, are "those qualities which are incapable of objective measurement but which make for greatness" in a school, including "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." *Id.,* at 634, 70 S.Ct., at 850. Facing the marked differences reported in the *Sweatt* opinion, the Court unanimously ruled that Texas had not shown "substantial equality in the [separate] educational opportunities" the State offered. *Id.,* at 633, 70 S.Ct., at 850. Accordingly, the Court held, the Equal Protection Clause required Texas to admit African–Americans to the University of Texas Law School. *Id.,* at

636, 70 S.Ct., at 851. In line with *Sweatt*, we rule here that Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI.

C

15 When Virginia tendered its VWIL plan, the Fourth Circuit did not inquire whether the proposed remedy, approved by the District Court, placed women denied the VMI advantage in "the position they would have occupied in the absence of [discrimination]." *Milliken*, 433 U.S., at 280, 97 S.Ct., at 2757 (internal quotation marks omitted). Instead, the Court of Appeals considered whether the Commonwealth could provide, with fidelity to the equal protection principle, separate and unequal educational programs for men and women.

The Fourth Circuit acknowledged that "the VWIL degree from Mary Baldwin College lacks the historical benefit and prestige of a degree from VMI." 44 F.3d, at 1241. The Court of Appeals further observed that VMI is "an ongoing and successful institution with a long history," and there remains no "comparable single-gender women's institution." *Ibid.* Nevertheless, the appeals court declared the substantially different and significantly unequal VWIL program satisfactory.[555] The court reached that result by revising the applicable standard of review. The Fourth Circuit displaced the standard developed in our precedent, see *supra*, at 2275–2276, and substituted a standard of its own invention.

We have earlier described the deferential review in which the Court of Appeals engaged, see *supra*, at 2273–2274, a brand of review inconsistent with the more exacting standard our precedent requires, see *supra*, at 2275–2276. Quoting in part from *Mississippi Univ. for Women*, the Court of Appeals candidly described its own analysis as one capable of checking a legislative purpose ranked as "pernicious," but generally according "deference to [the] legislative will." 44 F.3d, at 1235, 1236. Recognizing that it had extracted from our decisions a test yielding "little or no scrutiny of the effect of a classification directed at [single-gender education]," the Court of Appeals devised another test, a "substantive comparability" inquiry, *id.*, at 1237, and proceeded to find that new test satisfied, *id.*, at 1241.

The Fourth Circuit plainly erred in exposing Virginia's VWIL plan to a deferential analysis, for "all gender-based classifications today" warrant "heightened scrutiny." See *J.E.B.*, 511 U.S., at 136, 114 S.Ct., at 1425. Valuable as VWIL may prove for students who seek the program offered, Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade. See *supra*, at 2282–2286.[20] In

20. Virginia's prime concern, it appears, is that "plac[ing] men and women into the adversative relationship inherent in the VMI program ... would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes." 44 F.3d, at 1239; see *supra*, at 2279–2281. It is an ancient and familiar fear. Compare *In re Lavinia Goodell*, 39 Wis. 232, 246 (1875) (denying female applicant's motion for admission to the bar of its court, Wisconsin Supreme Court explained: "Discussions are habitually necessary in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety."), with Levine, Closing Comments, 6 Law & Inequality 41 (1988) (presentation at Eighth Circuit Judicial Conference, Colorado Springs, Colo., July 17, 1987) (footnotes omitted):

"Plato questioned whether women should be afforded equal opportunity to become guardians, those elite Rulers of Platonic society. Ironically, in that most undemocratic system of government, the Republic, women's native ability to serve as guardians was not seriously questioned. The concern was over the wrestling and exercise class in which all candidates for guardianship had to participate, for rigorous physical and mental training were prerequisites to attain the exalted status of guardian. And in accord with Greek custom, those exercise classes were conducted in the nude. Plato concluded that their virtue would clothe the women's nakedness and that Platonic society would not thereby be deprived of the talent of qualified citizens for reasons of mere gender."

For Plato's full text on the equality of women, see 2 The Dialogues of Plato 302–312 (B. Jowett transl., 4th ed.1953). Virginia, not bound to ancient Greek custom in its "rigorous physical and mental training" programs, could more readily make the accommodations necessary to draw on "the talent of [all] qualified citizens." Cf. *supra*, at 2284, n. 19.

sum, Virginia's |556remedy does not match the constitutional violation; the Commonwealth has shown no "exceedingly persuasive justification" for withholding from women qualified for the experience premier training of the kind VMI affords.

VII

A generation ago, "the authorities controlling Virginia higher education," despite long established tradition, agreed "to innovate and favorably entertain[ed] the [then] relatively new idea that there must be no discrimination by sex in offering educational opportunity." *Kirstein*, 309 F.Supp., at 186. Commencing in 1970, Virginia opened to women "educational opportunities at the Charlottesville campus that [were] not afforded in other [state-operated] institutions." *Id.*, at 187; see *supra*, at 2278. A federal court approved the Commonwealth's innovation, emphasizing that the University of Virginia "offer[ed] courses of instruction . . . not available elsewhere." 309 F.Supp., at 187. The court further noted: "[T]here exists at Charlottesville a 'prestige' factor |557[not paralleled in] other Virginia educational institutions." *Ibid.*

VMI, too, offers an educational opportunity no other Virginia institution provides, and the school's "prestige"—associated with its success in developing "citizen-soldiers"—is unequaled. Virginia has closed this facility to its daughters and, instead, has devised for them a "parallel program," with a faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization. Cf. *Sweatt*, 339 U.S., at 633, 70 S.Ct., at 849–850. VMI, beyond question, "possesses to a far greater degree" than the VWIL program "those qualities which are incapable of objective measurement but which make for greatness in a . . . school," including "position and influence of the alumni, standing in the community, traditions and prestige." *Id.*, at 634, 70 S.Ct., at 850. Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection.

A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded.[21] VMI's story continued as our comprehension of "We the People" expanded. See *supra*, at 2275, n. 6. |558There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the "more perfect Union."

* * *

For the reasons stated, the initial judgment of the Court of Appeals, 976 F.2d 890 (C.A.4 1992), is affirmed, the final judgment of the Court of Appeals, 44 F.3d 1229 (C.A.4 1995), is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS took no part in the consideration or decision of these cases.

Chief Justice REHNQUIST, concurring in the judgment.

The Court holds first that Virginia violates the Equal Protection Clause by maintaining the Virginia Military Institute's (VMI's) all-male admissions policy, and second that establishing the Virginia Women's Institute for Leadership (VWIL) program does not remedy that violation. While I agree with these conclusions, I disagree with the Court's analysis and so I write separately.

21. R. Morris, The Forging of the Union, 1781–1789, p. 193 (1987); see *id.*, at 191, setting out letter to a friend from Massachusetts patriot (later second President) John Adams, on the subject of qualifications for voting in his home State: "[I]t is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level." Letter from John Adams to James Sullivan (May 26, 1776), in 9 Works of John Adams 378 (C. Adams ed. 1854).

I

Two decades ago in *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 456–457, 50 L.Ed.2d 397 (1976), we announced that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." We have adhered to that standard of scrutiny ever since. See *Califano v. Goldfarb,* 430 U.S. 199, 210–211, 97 S.Ct. 1021, 1028–1029, 51 L.Ed.2d 270 (1977); *Califano v. Webster,* 430 U.S. 313, 316–317, 97 S.Ct. 1192, 1194, 51 L.Ed.2d 360 (1977); *Orr v. Orr,* 440 U.S. 268, 279, 99 S.Ct. 1102, 1111–1112, 59 L.Ed.2d 306 (1979); *Caban v. Mohammed,* 441 U.S. 380, 388, 99 S.Ct. 1760, 1765–1766, 60 L.Ed.2d 297 (1979); *Davis v. Passman,* 442 U.S. 228, 234–235, 235, n. 9, 99 S.Ct. 2264, 2271, 2271, n. 9, 60 L.Ed.2d 846 (1979); *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979); [559]*Califano v. Westcott,* 443 U.S. 76, 85, 99 S.Ct. 2655, 2661, 61 L.Ed.2d 382 (1979); *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980); *Kirchberg v. Feenstra,* 450 U.S. 455, 459–460, 101 S.Ct. 1195, 1198–1199, 67 L.Ed.2d 428 (1981); *Michael M. v. Superior Court, Sonoma Cty.,* 450 U.S. 464, 469, 101 S.Ct. 1200, 1204, 67 L.Ed.2d 437 (1981); *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982); *Heckler v. Mathews,* 465 U.S. 728, 744, 104 S.Ct. 1387, 1397–1398, 79 L.Ed.2d 646 (1984); *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 137, n. 6, 114 S.Ct. 1419, 1425, n. 6, 128 L.Ed.2d 89 (1994). While the majority adheres to this test today, *ante,* at 2271, 2275, it also says that the Commonwealth must demonstrate an " 'exceedingly persuasive justification' " to support a gender-based classification. See *ante,* at 2271, 2273, 2274, 2275, 2276, 2281, 2282, 2287. It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test.

While terms like "important governmental objective" and "substantially related" are hardly models of precision, they have more content and specificity than does the phrase "exceedingly persuasive justification." That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself. See, *e.g., Feeney, supra,* at 273, 99 S.Ct., at 2293 ("[T]hese precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment require an exceedingly persuasive justification"). To avoid introducing potential confusion, I would have adhered more closely to our traditional, "firmly established," *Hogan, supra,* at 723, 102 S.Ct., at 3335; *Heckler, supra,* at 744, 104 S.Ct., at 1397–1398, standard that a gender-based classification "must bear a close and substantial relationship to important governmental objectives." *Feeney, supra,* at 273, 99 S.Ct., at 2293.

Our cases dealing with gender discrimination also require that the proffered purpose for the challenged law be the actual purpose. See *ante,* at 2275–2276, 2276–2277. It is on this ground that the Court rejects the first of two justifications Virginia offers for VMI's single-sex admissions policy, namely, the goal of diversity among its public educational institutions. While I ultimately agree that the Commonwealth[560] has not carried the day with this justification, I disagree with the Court's method of analyzing the issue.

VMI was founded in 1839, and, as the Court notes, *ante,* at 2277–2278, admission was limited to men because under the then-prevailing view men, not women, were destined for higher education. However misguided this point of view may be by present-day standards, it surely was not unconstitutional in 1839. The adoption of the Fourteenth Amendment, with its Equal Protection Clause, was nearly 30 years in the future. The interpretation of the Equal Protection Clause to require heightened scrutiny for gender discrimination was yet another century away.

Long after the adoption of the Fourteenth Amendment, and well into this century, legal distinctions between men and women were thought to raise no question under the Equal Protection Clause. The Court refers to our decision in *Goesaert v. Cleary,* 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948). Likewise representing that now abandoned view was

Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), where the Court upheld a Florida system of jury selection in which men were automatically placed on jury lists, but women were placed there only if they expressed an affirmative desire to serve. The Court noted that despite advances in women's opportunities, the "woman is still regarded as the center of home and family life." *Id.,* at 62, 82 S.Ct., at 162.

Then, in 1971, we decided *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225, which the Court correctly refers to as a seminal case. But its facts have nothing to do with admissions to any sort of educational institution. An Idaho statute governing the administration of estates and probate preferred men to women if the other statutory qualifications were equal. The statute's purpose, according to the Idaho Supreme Court, was to avoid hearings to determine who was better qualified as between a man and a woman both applying for letters of administration. This Court held that such a rule violated the Fourteenth Amendment because "a mandatory preference to members of either [561] sex over members of the other, merely to accomplish the elimination of hearings," was an "arbitrary legislative choice forbidden by the Equal Protection Clause." *Id.,* at 76, 92 S.Ct., at 254. The brief opinion in *Reed* made no mention of either *Goesaert* or *Hoyt.*

Even at the time of our decision in *Reed v. Reed,* therefore, Virginia and VMI were scarcely on notice that its holding would be extended across the constitutional board. They were entitled to believe that "one swallow doesn't make a summer" and await further developments. Those developments were 11 years in coming. In *Mississippi Univ. for Women v. Hogan, supra,* a case actually involving a single-sex admissions policy in higher education, the Court held that the exclusion of men from a nursing program violated the Equal Protection Clause. This holding did place Virginia on notice that VMI's men-only admissions policy was open to serious question.

The VMI Board of Visitors, in response, appointed a Mission Study Committee to examine "the legality and wisdom of VMI's single-sex policy in light of" *Hogan.* 766 F.Supp. 1407, 1427 (W.D.Va.1991). But the committee ended up cryptically recommending against changing VMI's status as a single-sex college. After three years of study, the committee found " 'no information' " that would warrant a change in VMI's status. *Id.,* at 1429. Even the District Court, ultimately sympathetic to VMI's position, found that "[t]he Report provided very little indication of how [its] conclusion was reached" and that "[t]he one and one-half pages in the committee's final report devoted to analyzing the information it obtained primarily focuses on anticipated difficulties in attracting females to VMI." *Ibid.* The reasons given in the report for not changing the policy were the changes that admission of women to VMI would require, and the likely effect of those changes on the institution. That VMI would have to change is simply not helpful in addressing the constitutionality of the status after *Hogan.*

[562] Before this Court, Virginia has sought to justify VMI's single-sex admissions policy primarily on the basis that diversity in education is desirable, and that while most of the public institutions of higher learning in the Commonwealth are coeducational, there should also be room for single-sex institutions. I agree with the Court that there is scant evidence in the record that this was the real reason that Virginia decided to maintain VMI as men only.* But, unlike the majority,

* The dissent equates our conclusion that VMI's "asserted interest in promoting diversity" is not " 'genuine,' " with a "charge" that the diversity rationale is "a pretext for discriminating against women." *Post,* at 2298. Of course, those are not the same thing. I do not read the Court as saying that the diversity rationale is a pretext for discrimination, and I would not endorse such a proposition. We may find that diversity was not the Commonwealth's real reason without suggesting, or having to show, that the real reason was "antifeminism," *post,* at 2298. Our cases simply require that the proffered purpose for the challenged gender classification be the actual purpose, although not necessarily recorded. See *ante,* at 2275, 2277. The dissent also says that the interest in diversity is so transparent that having to articulate it is "absurd on its face." *Post,* at 2303. Apparently, that rationale was not obvious to the Mission Study Committee which

I would consider only evidence that postdates our decision in *Hogan*, and would draw no negative inferences from the Commonwealth's actions before that time. I think that after *Hogan*, the Commonwealth was entitled to reconsider its policy with respect to VMI, and not to have earlier justifications, or lack thereof, held against it.

Even if diversity in educational opportunity were the Commonwealth's actual objective, the Commonwealth's position would still be problematic. The difficulty with its position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women. When *Hogan* placed Virginia on notice that 563 VMI's admissions policy possibly was unconstitutional, VMI could have dealt with the problem by admitting women; but its governing body felt strongly that the admission of women would have seriously harmed the institution's educational approach. Was there something else the Commonwealth could have done to avoid an equal protection violation? Since the Commonwealth did nothing, we do not have to definitively answer that question.

I do not think, however, that the Commonwealth's options were as limited as the majority may imply. The Court cites, without expressly approving it, a statement from the opinion of the dissenting judge in the Court of Appeals, to the effect that the Commonwealth could have "simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extracurricular programs, funding, physical plant, administration and support services, and faculty and library resources." *Ante*, at 2273–2274 (internal quotation marks omitted). If this statement is thought to exclude other possibilities, it is too stringent a requirement. VMI had been in operation for over a century and a half, and had an established, successful, and devoted group of alumni. No legislative wand could instantly call into existence a similar institution for women; and it would be a tremendous loss to scrap VMI's history and tradition. In the words of Grover Cleveland's second inaugural address, the Commonwealth faced a condition, not a theory. And it was a condition that had been brought about, not through defiance of decisions construing gender bias under the Equal Protection Clause, but, until the decision in *Hogan*, a condition that had not appeared to offend the Constitution. Had Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation. I do not believe the Commonwealth was faced with the stark choice of either admitting women to VMI, on the 564 one hand, or abandoning VMI and starting from scratch for both men and women, on the other.

But, as I have noted, neither the governing board of VMI nor the Commonwealth took any action after 1982. If diversity in the form of single-sex, as well as coeducational, institutions of higher learning were to be available to Virginians, that diversity had to be available to women as well as to men.

The dissent criticizes me for "disregarding the four all-women's private colleges in Virginia (generously assisted by public funds)." *Post*, at 2305. The private women's colleges are treated by the Commonwealth *exactly* as all other private schools are treated, which includes the provision of tuition-assistance grants to Virginia residents. Virginia gives no special support to the women's single-sex education. But obviously, the same is not true for men's education. Had the Commonwealth provided the kind of support for the private women's schools that it provides for VMI, this may have been a very different case. For in so doing, the Commonwealth would have demonstrated that its interest in providing a single-sex education for men was to some measure matched by an interest in providing the same opportunity for women.

Virginia offers a second justification for the single-sex admissions policy: maintenance of the adversative method. I agree with the Court that this justification does not serve an important governmental objective. A State does not have substantial interest in the adversative methodology unless it is pedagogically beneficial. While considerable evidence shows that a single-sex education is

failed to list it among its reasons for maintaining VMI's all-men admission policy.

pedagogically beneficial for some students, see 766 F.Supp., at 1414, and hence a State may have a valid interest in promoting that methodology, there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies.

|565II

The Court defines the constitutional violation in these cases as "the categorical exclusion of women from an extraordinary educational opportunity afforded to men." *Ante,* at 2282. By defining the violation in this way, and by emphasizing that a remedy for a constitutional violation must place the victims of discrimination in " 'the position they would have occupied in the absence of [discrimination],' " *ibid.,* the Court necessarily implies that the only adequate remedy would be the admission of women to the all-male institution. As the foregoing discussion suggests, I would not define the violation in this way; it is not the "exclusion of women" that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any—much less a comparable—institution for women.

Accordingly, the remedy should not necessarily require either the admission of women to VMI or the creation of a VMI clone for women. An adequate remedy in my opinion might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution. To demonstrate such, the Commonwealth does not need to create two institutions with the same number of faculty Ph.D.'s, similar SAT scores, or comparable athletic fields. See *ante,* at 2284–2285. Nor would it necessarily require that the women's institution offer the same curriculum as the men's; one could be strong in computer science, the other could be strong in liberal arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber.

If a State decides to create single-sex programs, the State would, I expect, consider the public's interest and demand in designing curricula. And rightfully so. But the State should avoid assuming demand based on stereotypes; it must not assume *a priori,* without evidence, that there would be |566no interest in a women's school of civil engineering, or in a men's school of nursing.

In the end, the women's institution Virginia proposes, VWIL, fails as a remedy, because it is distinctly inferior to the existing men's institution and will continue to be for the foreseeable future. VWIL simply is not, in any sense, the institution that VMI is. In particular, VWIL is a program appended to a private college, not a self-standing institution; and VWIL is substantially underfunded as compared to VMI. I therefore ultimately agree with the Court that Virginia has not provided an adequate remedy.

Justice SCALIA, dissenting.

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. As to facts: It explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: It drastically revises our established standards for reviewing sex-based classifications. And as to history: It counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.

Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not |567consider them debatable. The

virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy—so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent.

I

I shall devote most of my analysis to evaluating the Court's opinion on the basis of our current equal protection jurisprudence, which regards this Court as free to evaluate everything under the sun by applying one of three tests: "rational basis" scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case. Strict scrutiny, we have said, is reserved for state "classifications based on race or national origin and classifications affecting fundamental rights," *Clark v. Jeter,* 486 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988) (citation omitted). It is my position that the term "fundamental rights" should be limited to "interest[s] traditionally protected by our society," *Michael H.* |568 *v. Gerald D.,* 491 U.S. 110, 122, 109 S.Ct. 2333, 2341, 105 L.Ed.2d 91 (1989) (plurality opinion of SCALIA, J.); but the Court has not accepted that view, so that strict scrutiny will be applied to the deprivation of whatever sort of right we consider "fundamental." We have no established criterion for "intermediate scrutiny" either, but essentially apply it when it seems like a good idea to load the dice. So far it has been applied to content-neutral restrictions that place an incidental burden on speech, to disabilities attendant to illegitimacy, and to discrimination on the basis of sex. See, *e.g., Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 662, 114 S.Ct. 2445, 2469, 129 L.Ed.2d 497 (1994); *Mills v. Habluetzel,* 456 U.S. 91, 98–99, 102 S.Ct. 1549, 1554–1555, 71 L.Ed.2d 770 (1982); *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 456–457, 50 L.Ed.2d 397 (1976).

I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that "equal protection" our society has always accorded in the past. But in my view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." *Rutan v. Republican Party of Ill.,* 497 U.S. 62, 95, 110 S.Ct. 2729, 2748, 111 L.Ed.2d 52 (1990) (SCALIA, J., |569 dissenting). The same applies, *mutatis mutandis,* to a practice assert-

ed to be in violation of the post-Civil War Fourteenth Amendment. See, *e.g., Burnham v. Superior Court of Cal., County of Marin,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (plurality opinion of SCALIA, J.) (Due Process Clause); *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 156–163, 114 S.Ct. 1419, 1436–1439, 128 L.Ed.2d 89 (1994) (SCALIA, J., dissenting) (Equal Protection Clause); *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 979–984, 1000–1001, 112 S.Ct. 2791, 2873–2876, 120 L.Ed.2d 674 (1992) (SCALIA, J., dissenting) (various alleged "penumbras").

The all-male constitution of VMI comes squarely within such a governing tradition. Founded by the Commonwealth of Virginia in 1839 and continuously maintained by it since, VMI has always admitted only men. And in that regard it has not been unusual. For almost all of VMI's more than a century and a half of existence, its single-sex status reflected the uniform practice for government-supported military colleges. Another famous Southern institution, The Citadel, has existed as a state-funded school of South Carolina since 1842. And all the federal military colleges—West Point, the Naval Academy at Annapolis, and even the Air Force Academy, which was not established until 1954—admitted only males for most of their history. Their admission of women in 1976 (upon which the Court today relies, see *ante,* at 2281, nn. 13, 15) came not by court decree, but because the people, through their elected representatives, decreed a change. See, *e.g.,* § 803(a), 89 Stat. 537, note following 10 U.S.C. § 4342. In other words, the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.

And the same applies, more broadly, to single-sex education in general, which, as I shall discuss, is threatened by [570]today's decision with the cutoff of all state and federal support. Government-run *non*military educational institutions for the two sexes have until very recently also been part of our national tradition. "[It is] [c]oeducation, historically, [that] is a novel educational theory. From grade school through high school, college, and graduate and professional training, much of the Nation's population during much of our history has been educated in sexually segregated classrooms." *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 736, 102 S.Ct. 3331, 3342, 73 L.Ed.2d 1090 (1982) (Powell, J., dissenting); see *id.,* at 736–739, 102 S.Ct., at 3342–3344. These traditions may of course be changed by the democratic decisions of the people, as they largely have been.

Today, however, change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court. Even while bemoaning the sorry, bygone days of "fixed notions" concerning women's education, see *ante,* at 2277–2278, and n. 10, 2277–2278, 2280–2282, the Court favors current notions so fixedly that it is willing to write them into the Constitution of the United States by application of custom-built "tests." This is not the interpretation of a Constitution, but the creation of one.

II

To reject the Court's disposition today, however, it is not necessary to accept my view that the Court's made-up tests cannot displace longstanding national traditions as the primary determinant of what the Constitution means. It is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades. It is well settled, as Justice O'CONNOR stated some time ago for a unanimous Court, that we evaluate a statutory classification based on sex under a standard that lies "[b]etween th[e] extremes of rational basis review and strict scrutiny." *Clark v. Jeter,* 486 U.S., at 461, 108 S.Ct., at 1914. We have denominated this standard "intermediate scrutiny" and under it have inquired whether the statutory classification is "sub[571]stantially related to an important governmental objective." *Ibid.* See, *e.g., Heckler v. Mathews,* 465 U.S. 728, 744, 104

S.Ct. 1387, 1397–1398, 79 L.Ed.2d 646 (1984); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980); *Craig v. Boren*, 429 U.S., at 197, 97 S.Ct., at 456–457.

Before I proceed to apply this standard to VMI, I must comment upon the manner in which the Court *avoids* doing so. Notwithstanding our above-described precedents and their " 'firmly established principles,' " *Heckler, supra*, at 744, 104 S.Ct., at 1397 (quoting *Hogan, supra*, at 723, 102 S.Ct., at 3335–3336), the United States urged us to hold in this litigation "that strict scrutiny is the correct constitutional standard for evaluating classifications that deny opportunities to individuals based on their sex." Brief for United States in No. 94–2107, p. 16. (This was in flat contradiction of the Government's position below, which was, in its own words, to "stat[e] *unequivocally* that the appropriate standard in this case is 'intermediate scrutiny.' " 2 Record, Doc. No. 88, p. 3 (emphasis added).) The Court, while making no reference to the Government's argument, effectively accepts it.

Although the Court in two places recites the test as stated in *Hogan*, see *ante*, at 2271, 2275, which asks whether the State has demonstrated "that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," 458 U.S., at 724, 102 S.Ct., at 3336 (internal quotation marks omitted), the Court never answers the question presented in anything resembling that form. When it engages in analysis, the Court instead prefers the phrase "exceedingly persuasive justification" from *Hogan*. The Court's nine invocations of that phrase, see *ante*, at 2271, 2274, 2275, 2276, 2281, 2282, 2287, and even its fanciful description of that imponderable as "the core instruction" of the Court's decisions in *J.E.B. v. Alabama ex rel. T. B., supra*, and *Hogan, supra*, see *ante*, at 2274, would be unobjectionable if the Court acknowledged that *whether* a "justification" is "exceedingly persuasive" must be assessed by asking [572]"[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives." Instead, however, the Court proceeds to interpret "exceedingly persuasive justification" in a fashion that contradicts the reasoning of *Hogan* and our other precedents.

That is essential to the Court's result, which can only be achieved by establishing that intermediate scrutiny is not survived if there are *some* women interested in attending VMI, capable of undertaking its activities, and able to meet its physical demands. Thus, the Court summarizes its holding as follows:

> "In contrast to the generalizations about women on which Virginia rests, we note again these *dispositive* realities: VMI's implementing methodology is not *inherently* unsuitable to women; *some* women do well under the adversative model; *some* women, at least, would want to attend VMI if they had the opportunity; *some* women are capable of all of the individual activities required of VMI cadets and can meet the physical standards VMI now imposes on men." *Ante*, at 2284 (internal quotation marks, citations, and punctuation omitted; emphasis added).

Similarly, the Court states that "[t]he Commonwealth's justification for excluding all women from 'citizen-soldier' training for which some are qualified . . . cannot rank as 'exceedingly persuasive'. . . ." *Ante*, at 2281.[1]

[573]Only the amorphous "exceedingly persuasive justification" phrase, and not the

1. Accord, *ante*, at 2279 ("In sum . . ., neither the goal of producing citizen-soldiers, VMI's *raison d'être*, nor VMI's implementing methodology is *inherently unsuitable* to women" (internal quotation marks omitted; emphasis added)); *ante*, at 2280 ("[T]he question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords"); *ante*, at 2283 (the "violation" is that "equal protection [has been] denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers"); *ante*, at 2284 ("As earlier stated, see *supra*, at 2280, generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description").

standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a "substantial relation" between the classification and the state interests that it serves. Thus, in *Califano v. Webster,* 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977) *(per curiam),* we upheld a congressional statute that provided higher Social Security benefits for women than for men. We reasoned that "women . . . as such have been unfairly hindered from earning as much as men," but we did not require proof that each woman so benefited had suffered discrimination or that each disadvantaged man had not; it was sufficient that even under the former congressional scheme "women *on the average* received lower retirement benefits than men." *Id.,* at 318, and n. 5, 97 S.Ct., at 1195, and n. 5 (emphasis added). The reasoning in our other intermediate-scrutiny cases has similarly required only a substantial relation between end and means, not a perfect fit. In *Rostker v. Goldberg,* 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981), we held that selective-service registration could constitutionally exclude women, because even "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." *Id.,* at 81, 101 S.Ct., at 2660. In *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 579, 582–583, 110 S.Ct. 2997, 3016–3017, 3018–3019, 111 L.Ed.2d 445 (1990), overruled on other grounds, *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 2112–2113, 132 L.Ed.2d 158 (1995), we held that a classification need not be accurate "in every case" to survive intermediate scrutiny so long as, "in the aggregate," it advances the underlying [574]objective. There is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance.

Not content to execute a *de facto* abandonment of the intermediate scrutiny that has been our standard for sex-based classifications for some two decades, the Court purports to reserve the question whether, even in principle, a higher standard (*i.e.,* strict scrutiny) should apply. "The Court has," it says, "*thus far* reserved most stringent judicial scrutiny for classifications based on race or national origin . . .," *ante,* at 2275, n. 6 (emphasis added); and it describes our earlier cases as having done no more than decline to "equat[e] gender classifications, *for all purposes,* to classifications based on race or national origin," *ante,* at 2275 (emphasis added). The wonderful thing about these statements is that they are not actually false—just as it would not be actually false to say that "our cases have thus far reserved the 'beyond a reasonable doubt' standard of proof for criminal cases," or that "we have not equated tort actions, for all purposes, to criminal prosecutions." But the statements are misleading, insofar as they suggest that we have not already categorically *held* strict scrutiny to be inapplicable to sex-based classifications. See, *e.g., Heckler v. Mathews,* 465 U.S. 728, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984) (*upholding* state action after applying *only* intermediate scrutiny); *Michael M. v. Superior Court of Sonoma Cty.,* 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981) (plurality and both concurring opinions) (same); *Califano v. Webster, supra, (per curiam)* (same). And the statements are irresponsible, insofar as they are calculated to destabilize current law. Our task is to clarify the law—not to muddy the waters, and not to exact overcompliance by intimidation. The States and the Federal Government are entitled to know *before they act* the standard to which they will be held, rather than be compelled to guess about the outcome of Supreme Court peek-a-boo.

The Court's intimations are particularly out of place because it is perfectly clear that, if the question of the applicable[575] standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to

strict scrutiny, but for reducing it to rational-basis review. The latter certainly has a firmer foundation in our past jurisprudence: Whereas no majority of the Court has ever applied strict scrutiny in a case involving sex-based classifications, we routinely applied rational-basis review until the 1970's, see, *e.g., Hoyt v. Florida,* 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961); *Goesaert v. Cleary,* 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948). And of course normal, rational-basis review of sex-based classifications would be much more in accord with the genesis of heightened standards of judicial review, the famous footnote in *United States v. Carolene Products Co.,* 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), which said (intimatingly) that we did not have to inquire in the case at hand

> "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.,* at 152–153, n. 4, 58 S.Ct., at 783, n. 4.

It is hard to consider women a "discrete and insular minorit[y]" unable to employ the "political processes ordinarily to be relied upon," when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns. See, *e.g., ante,* at 2277–2278, 2280–2282 (and accompanying notes). Moreover, a long list of legislation proves the proposition false. See, *e.g.,* Equal Pay Act of 1963, 29 U.S.C. § 206(d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; Women's Business Ownership Act of 1988, Pub.L. 100–533, 102 Stat. 2689; [576] Violence Against Women Act of 1994, Pub.L. 103–322, Title IV, 108 Stat. 1902.

III

With this explanation of how the Court has succeeded in making its analysis seem orthodox—and indeed, if intimations are to be believed, even overly generous to VMI—I now proceed to describe how the analysis should have been conducted. The question to be answered, I repeat, is whether the exclusion of women from VMI is "substantially related to an important governmental objective."

A

It is beyond question that Virginia has an important state interest in providing effective college education for its citizens. That single-sex instruction is an approach substantially related to that interest should be evident enough from the long and continuing history in this country of men's and women's colleges. But beyond that, as the Court of Appeals here stated: "That single-gender education at the college level is beneficial to both sexes is a *fact established in this case.*" 44 F.3d 1229, 1238 (C.A.4 1995) (emphasis added).

The evidence establishing that fact was overwhelming—indeed, "virtually uncontradicted" in the words of the court that received the evidence, 766 F.Supp. 1407, 1415 (W.D.Va.1991). As an initial matter, Virginia demonstrated at trial that "[a] substantial body of contemporary scholarship and research supports the proposition that, although males and females have significant areas of developmental overlap, they also have differing developmental needs that are deep-seated." *Id.,* at 1434. While no one questioned that for many students a coeducational environment was nonetheless not inappropriate, that could not obscure the demonstrated benefits of single-sex colleges. For example, the District Court stated as follows:

> "One empirical study in evidence, not questioned by any expert, demonstrates that single-sex colleges provide [577] better educational experiences than coeducational institutions. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business

and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chances that those who attend will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees." *Id.,* at 1412.

See also *id.,* at 1434–1435 (factual findings). "[I]n the light of this very substantial authority favoring single-sex education," the District Court concluded that "the VMI Board's decision to maintain an all-male institution is fully justified even without taking into consideration the other unique features of VMI's teaching and training." *Id.,* at 1412. This finding alone, which even this Court cannot dispute, see *ante,* at 2276, should be sufficient to demonstrate the constitutionality of VMI's all-male composition.

But besides its single-sex constitution, VMI is different from other colleges in another way. It employs a "distinctive educational method," sometimes referred to as the "adversative, or doubting, model of education." 766 F.Supp., at 1413, 1421. "Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience." *Id.,* at 1421. No one contends that this method is appropriate for all individuals; education is not a "one size fits all" business. Just as a State may wish to support junior colleges, vocational institutes, or a law school that emphasizes case [578]practice instead of classroom study, so too a State's decision to maintain within its system one school that provides the adversative method is "substantially related" to its goal of good education. Moreover, it was uncontested that "if the state were to establish a women's VMI-type [*i.e.,* adversative] program, the program would attract an insufficient number of participants to make the program work," 44 F.3d, at 1241; and it was found by the District Court that if Virginia were to include women in VMI, the school "would eventually find it necessary to drop the adversative system altogether," 766 F.Supp., at 1413. Thus, Virginia's options were an adversative method that excludes women or no adversative method at all.

There can be no serious dispute that, as the District Court found, single-sex education and a distinctive educational method "represent legitimate contributions to diversity in the Virginia higher education system." *Ibid.* As a theoretical matter, Virginia's educational interest would have been *best* served (insofar as the two factors we have mentioned are concerned) by six different types of public colleges—an all-men's, an all-women's, and a coeducational college run in the "adversative method," and an all-men's, an all-women's, and a coeducational college run in the "traditional method." But as a practical matter, of course, Virginia's financial resources, like any State's, are not limitless, and the Commonwealth must select among the available options. Virginia thus has decided to fund, in addition to some 14 coeducational 4–year colleges, one college that is run as an all-male school on the adversative model: the Virginia Military Institute.

Virginia did not make this determination regarding the make-up of its public college system on the unrealistic assumption that no other colleges exist. Substantial evidence in the District Court demonstrated that the Commonwealth has long proceeded on the principle that " '[h]igher education resources should be viewed as a whole—public and private' "[579]—because such an approach enhances diversity and because " 'it is academic and economic waste to permit unwarranted duplication.' " *Id.,* at 1420–1421 (quoting 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia). It is thus significant that, whereas there are "four all-female private [colleges] in Virginia," there is only "one private all-male college," which "indicates that the private sector is providing for th[e] [former] form of education to a much greater extent that it provides for all-male education." 766 F.Supp., at 1420–1421. In these circumstances, Virginia's election to fund one public all-male institution and one on the adversative model—and to concentrate its resources in a single entity that serves both these interests in diversity—is substantially related to the Commonwealth's important educational interests.

B

The Court today has no adequate response to this clear demonstration of the conclusion produced by application of intermediate scrutiny. Rather, it relies on a series of contentions that are irrelevant or erroneous as a matter of law, foreclosed by the record in this litigation, or both.

1. I have already pointed out the Court's most fundamental error, which is its reasoning that VMI's all-male composition is unconstitutional because "some women are capable of all of the individual activities required of VMI cadets," 766 F.Supp., at 1412, and would prefer military training on the adversative model. See *supra*, at 2293–2295. This unacknowledged adoption of what amounts to (at least) strict scrutiny is without antecedent in our sex-discrimination cases and by itself discredits the Court's decision.

2. The Court suggests that Virginia's claimed purpose in maintaining VMI as an all-male institution—its asserted interest in promoting diversity of educational options—is not "genuin[e]," but is a pretext for discriminating against women. *Ante*, at 2279; see *ante*, at 2276–2279. To support this [580] charge, the Court would have to impute that base motive to VMI's Mission Study Committee, which conducted a 3–year study from 1983 to 1986 and recommended to VMI's Board of Visitors that the school remain all male. The committee, a majority of whose members consisted of non-VMI graduates, "read materials on education and on women in the military," "made site visits to single-sex and newly coeducational institutions" including West Point and the Naval Academy, and "considered the reasons that other institutions had changed from single-sex to coeducational status"; its work was praised as "thorough" in the accreditation review of VMI conducted by the Southern Association of Colleges and Schools. See 766 F.Supp., at 1413, 1428; see also *id.*, at 1427–1430 (detailed findings of fact concerning the Mission Study Committee). The Court states that "[w]hatever internal purpose the Mission Study Committee served—and however well meaning the framers of the report—we can hardly extract from that effort any Commonwealth policy evenhandedly to advance diverse educational options." *Ante*, at 2279. But whether it is part of the evidence to prove that diversity *was* the Commonwealth's objective (its short report said nothing on that particular subject) is quite separate from whether it is part of the evidence to prove that anti-feminism *was not*. The relevance of the Mission Study Committee is that its very creation, its sober 3–year study, and the analysis it produced utterly refute the claim that VMI has elected to maintain its all-male student-body composition for some misogynistic reason.

The Court also supports its analysis of Virginia's "actual state purposes" in maintaining VMI's student body as all male by stating that there is no explicit statement in the record " 'in which the Commonwealth has expressed itself' " concerning those purposes. *Ante*, at 2277, 2278 (quoting 976 F.2d 890, 899 (C.A.4 1992)); see also *ante*, at 2272. That is wrong on numerous grounds. First and foremost, in its implication that such an explicit statement of "actual purposes" [581] is needed. The Court adopts, in effect, the argument of the United States that since the exclusion of women from VMI in 1839 was based on the "assumptions" of the time "that men alone were fit for military and leadership roles," and since "[b]efore this litigation was initiated, Virginia never sought to supply a valid, contemporary rationale for VMI's exclusionary policy," "[t]hat failure itself renders the VMI policy invalid." Brief for United States in No. 94–2107, at 10. This is an unheard-of doctrine. Each state decision to adopt or maintain a governmental policy need not be accompanied—in anticipation of litigation and on pain of being found to lack a relevant state interest—by a lawyer's contemporaneous recitation of the State's purposes. The Constitution is not some giant Administrative Procedure Act, which imposes upon the States the obligation to set forth a "statement of basis and purpose" for their sovereign Acts, see 5 U.S.C. § 553(c). The situation would be different if what the Court assumes to have been the 1839 policy *had* been enshrined *and remained enshrined* in legislation—a VMI charter, perhaps, pronouncing that the institution's purpose is to keep women in their place. But since the

1839 policy was no more explicitly recorded than the Court contends the present one is, the mere fact that *today's* Commonwealth continues to fund VMI "is enough to answer [the United States'] contention that the [classification] was the 'accidental by-product of a traditional way of thinking about females.' " *Michael M.*, 450 U.S., at 471, n. 6, 101 S.Ct., at 1205, n. 6 (plurality opinion) (quoting *Califano v. Webster*, 430 U.S., at 320, 97 S.Ct., at 1196) (internal quotation marks omitted).

It is, moreover, not true that Virginia's contemporary reasons for maintaining VMI are not explicitly recorded. It is hard to imagine a more authoritative source on this subject than the 1990 Report of the Virginia Commission on the University of the 21st Century (1990 Report). As the parties stipulated, that report "notes that the hallmarks of Virginia's educational policy are 'diversity and autonomy.' " Stipulations[582] of Fact 37, reprinted in Lodged Materials from the Record 64 (Lodged Materials). It said: "The formal system of higher education in Virginia includes a great array of institutions: state-supported and independent, two-year and senior, research and highly specialized, traditionally black *and single-sex*." 1990 Report, quoted in relevant part at Lodged Materials 64–65 (emphasis added).[2] The Court's only response to this is repeated reliance on the Court of Appeals' assertion that " 'the only explicit [statement] that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions' " (namely, the statement in the 1990 Report that the Commonwealth's institutions must "deal with faculty, staff, and students without regard to sex") had nothing to do with the purpose of diversity. *Ante*, at 2272, 2278 (quoting 976 F.2d, at 899). This proves, I suppose, that the Court of Appeals did not find a statement dealing with sex and diversity in the record; but the pertinent question (accepting the need for such a statement) is *whether it was there*. And the plain fact, which the Court does not deny, is that it *was*.

[583] The Court contends that "[a] purpose genuinely to advance an array of educational options ... is not served" by VMI. *Ante*, at 2279. It relies on the fact that all of Virginia's *other* public colleges have become coeducational. *Ibid.*; see also *ante*, at 2270, n. 2. The apparent theory of this argument is that unless Virginia pursues a great deal of diversity, its pursuit of some diversity must be a sham. This fails to take account of the fact that Virginia's resources cannot support all possible permutations of schools, see *supra*, at 2297, and of the fact that Virginia coordinates its public educational offerings with the offerings of in-state private educational institutions that the Commonwealth provides money for its residents to attend and otherwise assists—which include four women's colleges.[3]

2. This statement is supported by other evidence in the record demonstrating, by reference to both public and private institutions, that Virginia actively seeks to foster its " 'rich heritage of pluralism and diversity in higher education,' " 1969 Report of the Virginia Commission on Constitutional Revision, quoted in relevant part at Lodged Materials 53; that Virginia views " '[o]ne special characteristic of the Virginia system [as being] its diversity,' " 1989 Virginia Plan for Higher Education, quoted in relevant part at Lodged Materials 64; and that in the Commonwealth's view "[h]igher education resources should be viewed as a whole—public and private"—because " 'Virginia needs the diversity inherent in a dual system of higher education,' " 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia, quoted in 766 F.Supp. 1407, 1420 (W.D.Va.1991). See also Budget Initiatives for 1990–1992 of State Council of Higher Education for Virginia, 10 (June 21, 1989) (Budget Initiatives), quoted at n. 3, *infra*. It should be noted (for this point will be crucial to my later discussion) that these official reports quoted here, in text and footnote, regard the Commonwealth's educational system—public *and private*—as a unitary one.

3. The Commonwealth provides tuition assistance, scholarship grants, guaranteed loans, and work-study funds for residents of Virginia who attend private colleges in the Commonwealth. See, *e.g.*, Va.Code Ann. §§ 23–38.11 to 23–38.19 (1993 and Supp.1995) (Tuition Assistance Grant Act); §§ 23–38.30 to 23–38.44:3 (Virginia Student Assistance Authorities); Va.Code Ann. §§ 23–38.45 to 23–38.53 (1993) (College Scholarship Assistance Act); §§ 23–38.53:1 to 23–38.53:3 (Virginia Scholars Program); §§ 23–38.70, 23–38.71 (Virginia Work–Study Program). These programs involve substantial expenditures: for example, Virginia appropriated $4,413,750 (not counting federal funds it also earmarked) for the College Scholarship Assistance Program for both 1996 and 1997, and for the Tuition Assis-

Finally, the Court unreasonably suggests that there is some pretext in Virginia's reliance upon decentralized decisionmaking[584] to achieve diversity—its granting of substantial autonomy to each institution with regard to student-body composition and other matters, see 766 F.Supp., at 1419. The Court adopts the suggestion of the Court of Appeals that it is not possible for "one institution with autonomy, but with no authority over any other state institution, [to] give effect to a state policy of diversity among institutions." *Ante,* at 2279 (internal quotation marks omitted). If it were impossible for individual human beings (or groups of human beings) to act autonomously in effective pursuit of a common goal, the game of soccer would not exist. And where the goal is diversity in a free market for services, that tends to be achieved even by autonomous actors who act out of entirely selfish interests and make no effort to cooperate. Each Virginia institution, that is to say, has a natural incentive to make itself distinctive in order to attract a particular segment of student applicants. And of course none of the institutions is *entirely* autonomous; if and when the legislature decides that a particular school is not well serving the interest of diversity—if it decides, for example, that a men's school is not much needed—funding will cease.[4]

[585]3. In addition to disparaging Virginia's claim that VMI's single-sex status serves a state interest in diversity, the Court finds fault with Virginia's failure to offer education based on the adversative training method to women. It dismisses the District Court's " 'findings' on 'gender-based developmental differences' " on the ground that "[t]hese 'findings' restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female 'tendencies.' " *Ante,* at 2279 (quoting 766 F.Supp., at 1434–1435). How remarkable to criticize the District Court on the ground that its findings rest on the evidence (*i.e.,* the testimony of Virginia's witnesses)! That is what findings are supposed to do. It is indefensible to tell the Commonwealth that "[t]he burden of justification is demanding and it rests entirely on [you]," *ante,* at 2275, and then to ignore the District Court's findings *because* they rest on the evidence put forward by the Commonwealth—particularly when, as the District Court said, "[t]he evidence in the case . . . is

tance Grant Program appropriated $21,568,000 for 1996 and $25,842,000 for 1997. See 1996 Va. Appropriations Act, ch. 912, pt. 1, § 160.

In addition, as the parties stipulated in the District Court, the Commonwealth provides other financial support and assistance to private institutions—including single-sex colleges—through low-cost building loans, state-funded services contracts, and other programs. See, *e.g.,* Va.Code Ann. §§ 23–30.39 to 23–30.58 (1993) (Educational Facilities Authority Act). The State Council of Higher Education for Virginia, in a 1989 document not created for purposes of this litigation but introduced into evidence, has described these various programs as a "means by which the Commonwealth can provide funding to its independent institutions, thereby helping to maintain a diverse system of higher education." Budget Initiatives 10.

4. The Court, unfamiliar with the Commonwealth's policy of diverse and independent institutions, and in any event careless of state and local traditions, must be forgiven by Virginians for quoting a reference to " 'the Charlottesville campus' " of the University of Virginia. See *ante,* at 2278. The University of Virginia, an institution even older than VMI, though not as old as another of the Commonwealth's universities, the College of William and Mary, occupies the portion of Charlottesville known, not as the "campus," but as "the grounds." More importantly, even if it were a "campus," there would be no need to specify "the Charlottesville campus," as one might refer to the Bloomington or Indianapolis campus of Indiana University. Unlike university systems with which the Court is perhaps more familiar, such as those in New York (*e.g.,* the State University of New York at Binghamton or Buffalo), Illinois (University of Illinois at Urbana–Champaign or at Chicago), and California (University of California, Los Angeles, or University of California, Berkeley), there is only *one* University of Virginia. It happens (because Thomas Jefferson lived near there) to be located at Charlottesville. To many Virginians it is known, simply, as "the University," which suffices to distinguish it from the Commonwealth's other institutions offering 4–year college instruction, which include Christopher Newport College, Clinch Valley College, the College of William and Mary, George Mason University, James Madison University, Longwood College, Mary Washington University, Norfolk State University, Old Dominion University, Radford University, Virginia Commonwealth University, Virginia Polytechnic Institute and State University, Virginia State University—and, of course, VMI.

virtually uncontradicted," 766 F.Supp., at 1415 (emphasis added).

Ultimately, in fact, the Court does not deny the evidence supporting these findings. See *ante,* at 2280–2282. It instead makes evident that the parties to this litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial. The Court simply dispenses with the evidence submitted at trial—it never says that a single finding of the District Court is clearly erroneous—in favor of the Justices' own view of the world, which the Court proceeds to support with (1) references to observations of someone [586]who is not a witness, nor even an educational expert, nor even a judge who reviewed the record or participated in the judgment below, but rather a judge who merely dissented from the Court of Appeals' decision not to rehear this litigation en banc, see *ante,* at 2280, (2) citations of nonevidentiary materials such as *amicus curiae* briefs filed in this Court, see *ante,* at 2281, nn. 13, 14, and (3) various historical anecdotes designed to demonstrate that Virginia's support for VMI as currently constituted reminds the Justices of the "bad old days," see *ante,* at 2280–2281.

It is not too much to say that this approach to the litigation has rendered the trial a sham. But treating the evidence as irrelevant is absolutely necessary for the Court to reach its conclusion. Not a single witness contested, for example, Virginia's "substantial body of 'exceedingly persuasive' evidence ... that some students, both male and female, benefit from attending a single-sex college" and "[that] [f]or those students, the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement." 766 F.Supp., at 1411–1412. Even the United States' expert witness "called himself a 'believer in single-sex education,' " although it was his "personal, philosophical preference," not one "born of educational-benefit considerations," "that single-sex education should be provided only by the private sector." *Id.,* at 1412.

4. The Court contends that Virginia, and the District Court, erred, and "misperceived our precedent," by "train[ing] their argument on 'means' rather than 'end,' " *ante,* at 2281. The Court focuses on "VMI's mission," which is to produce individuals "imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready ... to defend their country in time of national peril." 766 F.Supp., at 1425 (quoting Mission Study Committee of the VMI Board of [587]Visitors, Report, May 16, 1986). "Surely," the Court says, "that goal is great enough to accommodate women." *Ante,* at 2282.

This is lawmaking by indirection. What the Court describes as "VMI's mission" is no less the mission of *all* Virginia colleges. Which of them would the Old Dominion continue to fund if they did *not* aim to create individuals "imbued with love of learning, etc.," right down to being ready "to defend their country in time of national peril"? It can be summed up as "learning, leadership, and patriotism." To be sure, those general educational values are described in a particularly martial fashion in VMI's mission statement, in accordance with the military, adversative, and all-male character of the institution. But imparting those values *in that fashion—i.e.,* in a military, adversative, all-male environment—is the *distinctive* mission of VMI. And as I have discussed (and both courts below found), *that* mission is *not* "great enough to accommodate women."

The Court's analysis at least has the benefit of producing foreseeable results. Applied generally, it means that whenever a State's ultimate objective is "great enough to accommodate women" (as it always will be), then the State will be held to have violated the Equal Protection Clause if it restricts to men even one means by which it pursues that objective—no matter how few women are interested in pursuing the objective by that means, no matter how much the single-sex program will have to be changed if both sexes are admitted, and no matter how beneficial that program has theretofore been to its participants.

5. The Court argues that VMI would not have to change very much if it were to admit women. See, *e.g., ante,* at 2279–2280. The

principal response to that argument is that it is irrelevant: If VMI's single-sex status is substantially related to the government's important educational objectives, as I have demonstrated above and as the Court refuses to discuss,[588] that concludes the inquiry. There should be no debate in the federal judiciary over "how much" VMI would be required to change if it admitted women and whether that would constitute "too much" change.

But if such a debate were relevant, the Court would certainly be on the losing side. The District Court found as follows: "[T]he evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests." 766 F.Supp., at 1411. Changes that the District Court's detailed analysis found would be required include new allowances for personal privacy in the barracks, such as locked doors and coverings on windows, which would detract from VMI's approach of regulating minute details of student behavior, "contradict the principle that everyone is constantly subject to scrutiny by everyone else," and impair VMI's "total egalitarian approach" under which every student must be "treated alike"; changes in the physical training program, which would reduce "[t]he intensity and aggressiveness of the current program"; and various modifications in other respects of the adversative training program that permeates student life. See *id.,* at 1412–1413, 1435–1443. As the Court of Appeals summarized it, "the record supports the district court's findings that at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training." 976 F.2d, at 896–897.

In the face of these findings by two courts below, amply supported by the evidence, and resulting in the conclusion that VMI would be fundamentally altered if it admitted women, this Court simply pronounces that "[t]he notion that [589]admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved." *Ante,* at 2280 (footnote omitted). The point about "downgrad[ing] VMI's stature" is a straw man; no one has made any such claim. The point about "destroy[ing] the adversative system" is simply false; the District Court not only stated that "[e]vidence supports this theory," but specifically concluded that while "[w]ithout a doubt" VMI could assimilate women, "it is equally without a doubt that VMI's present methods of training and education would have to be changed" by a "move away from its adversative new cadet system." 766 F.Supp., at 1413, and n. 8, 1440. And the point about "destroy[ing] the school," depending upon what that ambiguous phrase is intended to mean, is either false or else sets a standard much higher than VMI had to meet. It sufficed to establish, as the District Court stated, that VMI would be "significantly different" upon the admission of women, 766 F.Supp., at 1412, and "would eventually find it necessary to drop the adversative system altogether," *id.,* at 1413.[5]

[590]6. Finally, the absence of a precise "all-women's analogue" to VMI is irrelevant. In *Mississippi Univ. for Women v. Hogan,*

5. The Court's do-it-yourself approach to factfinding, which throughout is contrary to our well-settled rule that we will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error," *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed. 672 (1949) (and cases cited), is exemplified by its invocation of the experience of the federal military academies to prove that not much change would occur. See *ante,* at 2280, n. 11; 2281, and n. 15; 2284, n. 19. In fact, the District Court noted that "the West Point experience" *supported* the theory that a coeducational VMI would have to "adopt a [different] system," for West Point found it necessary upon becoming coeducational to "move away" from its adversative system. 766 F.Supp., at 1413, 1440. "Without a doubt . . . VMI's present methods of training and education would have to be changed as West Point's were." *Id.,* at 1413, n. 8; accord, 976 F.2d 890, 896–897 (CA4 1992) (upholding District Court's findings that "the unique characteristics of VMI's program," including its "unique methodology," "would be destroyed by coeducation").

458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), we attached no constitutional significance to the absence of an all-male nursing school. As Virginia notes, if a program restricted to one sex is necessarily unconstitutional unless there is a parallel program restricted to the other sex, "the opinion in *Hogan* could have ended with its first footnote, which observed that 'Mississippi maintains no other single-sex public university or college.' " Brief for Cross–Petitioners in No. 94–2107, p. 38 (quoting *Mississippi Univ. for Women v. Hogan, supra,* at 720, n. 1, 102 S.Ct., at 3334, n. 1).

Although there is no precise female-only analogue to VMI, Virginia has created during this litigation the Virginia Women's Institute for Leadership (VWIL), a state-funded all-women's program run by Mary Baldwin College. I have thus far said nothing about VWIL because it is, under our established test, irrelevant, so long as *VMI*'s all-male character is "substantially related" to an important state goal. But VWIL now exists, and the Court's treatment of it shows how far reaching today's decision is.

VWIL was carefully designed by professional educators who have long experience in educating young women. The program *rejects* the proposition that there is a "difference in the respective spheres and destinies of man and woman," *Bradwell v. State,* 16 Wall. 130, 141, 21 L.Ed. 442 (1873), and is designed to "provide an all-female program that will achieve substantially similar outcomes [to VMI's] in an all-female environment," 852 F.Supp. 471, 481 (W.D.Va.1994). After holding a trial where voluminous evidence was submitted and making detailed findings of fact, the District Court concluded that "there is a legitimate pedagogical basis for the different means employed [by VMI and VWIL] to achieve the substantially 591 similar ends." *Ibid.* The Court of Appeals undertook a detailed review of the record and affirmed. 44 F.3d 1229 (C.A.4 1995).[6] But it is Mary Baldwin College, which runs VWIL, that has made the point most succinctly:

> "It would have been possible to develop the VWIL program to more closely resemble VMI, with adversative techniques associated with the rat line and barracks-like living quarters. Simply replicating an existing program would have required far less thought, research, and educational expertise. But such a facile approach would have produced a paper program with no real prospect of successful implementation." Brief for Mary Baldwin College as *Amicus Curiae* 5.

It is worth noting that none of the United States' own experts in the remedial phase of this litigation was willing to testify that VMI's adversative method was an appropriate methodology for educating women. This Court, however, does not care. Even though VWIL was carefully designed by professional educators who have tremendous experience in the area, and survived the test of adversarial litigation, the Court simply declares, with no basis in the evidence, that 592 these professionals acted on " 'overbroad' generalizations," *ante,* at 2280, 2284.

C

A few words are appropriate in response to the concurrence, which finds VMI unconstitutional on a basis that is more moderate than the Court's but only at the expense of being even more implausible. The concurrence offers three reasons: First, that there is "scant evidence in the record," *ante,* at 2289, that diversity of educational offering was the real reason for Virginia's maintaining VMI. "Scant" has the advantage of being

6. The Court is incorrect in suggesting that the Court of Appeals applied a "deferential" "brand of review inconsistent with the more exacting standard our precedent requires." *Ante,* at 2286. That court "inquir[ed] (1) whether the state's objective is 'legitimate and important,' and (2) whether 'the requisite direct, substantial relationship between objective and means is present,' " 44 F.3d, at 1235 (quoting *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 725, 102 S.Ct. 3331, 3336–3337, 73 L.Ed.2d 1090 (1982)). To be sure, such review is "deferential" to a degree that the Court's new standard is not, *for it is intermediate scrutiny.* (The Court cannot evade this point or prove the Court of Appeals too deferential by stating that that court " 'devised another test, a 'substantive comparability' inquiry,' " *ante,* at 2286 (quoting 44 F.3d, at 1237), for as that court explained, its "substantive comparability" inquiry was an "*additional* step" that it

an imprecise term. I have cited the clearest statements of diversity as a goal for higher education in the 1990 Report, the 1989 Virginia Plan for Higher Education, the Budget Initiatives prepared in 1989 by the State Council of Higher Education for Virginia, the 1974 Report of the General Assembly Commission on Higher Education to the General Assembly of Virginia, and the 1969 Report of the Virginia Commission on Constitutional Revision. See *supra,* at 2297–22998, 2298–2299, and n. 2, 2299 n. 3. There is *no* evidence to the contrary, once one rejects (as the concurrence rightly does) the relevance of VMI's founding in days when attitude towards the education of women were different. Is this conceivably not enough to foreclose rejecting as clearly erroneous the District Court's determination regarding "the Commonwealth's objective of educational diversity"? 766 F.Supp., at 1413. Especially since it is absurd on its face even to *demand* "evidence" to prove that the Commonwealth's reason for maintaining a men's military academy is that a men's military academy provides a distinctive type of educational experience (*i.e.,* fosters diversity). What other purpose *would* the Commonwealth have? One may argue, as the Court does, that this *type* of diversity is designed only to indulge hostility toward women—but that is a separate point, explicitly rejected by the concurrence, and amply refuted by the evidence I have mentioned in discussing[593] the Court's opinion.[7] What is now under discussion—the concurrence's making central to the disposition of this litigation the supposedly "scant" evidence that Virginia maintained VMI in order to offer a diverse educational experience—is rather like making crucial to the lawfulness of the United States Army record "evidence" that its purpose is to do battle. A legal culture that has forgotten the concept of *res ipsa loquitur* deserves the fate that it today decrees for VMI.

Second, the concurrence dismisses out of hand what it calls Virginia's "second justification for the single-sex admissions policy: maintenance of the adversative method." *Ante,* at 2290. The concurrence reasons that "this justification does not serve an important governmental objective" because, whatever the record may show about the pedagogical benefits of *single-sex* education, "there is no similar evidence in the record that an adversative method is pedagogically beneficial or is any more likely to produce character traits than other methodologies." *Ante,* at 2291. That is simply wrong. See, *e.g.,* 766 F.Supp., at 1426 (factual findings concerning character traits produced by VMI's adversative methodology); *id.,* at 1434 (factual findings concerning benefits for many college-age men of an adversative approach in general). In reality, the pedagogical benefits of VMI's adversative approach were not only proved, but were a *given* in this litigation. The reason the woman applicant who prompted this suit wanted to enter VMI was assuredly not that she wanted to go to an all-male school; it would cease being all-male as[594] soon as she entered. She wanted the distinctive adversative education that VMI provided, and the battle was joined (in the main) over whether VMI had a basis for excluding women from that approach. The Court's opinion recognizes this, and devotes much of its opinion to demonstrating that " 'some women ... do well under [the] adversative model' " and that "[i]t is on behalf of these women that the United States has instituted this suit." *Ante,* at 2284 (quoting 766 F.Supp., at 1434). Of course, in the last analysis it does not matter whether there are any benefits to the adversative method. The concurrence does not contest that there are benefits to *single-sex* education, and that alone suffices to make Virginia's case, since admission of a woman will even more surely put an end to VMI's single-sex education

engrafted on ''th[e] traditional test'' of intermediate scrutiny, *ibid.* (emphasis added).)

7. The concurrence states that it ''read[s] the Court'' not ''as saying that the diversity rationale is a pretext'' for discriminating against women, but as saying merely that the diversity rationale is not genuine. *Ante,* at 2289, n. The Court itself makes no such disclaimer, which would be difficult to credit inasmuch as the foundation for its conclusion that the diversity rationale is not ''genuin[e],'' *ante,* at 2279, is its antecedent discussion of Virginia's ''deliberate'' actions over the past century and a half, based on ''[f]amiliar arguments,'' that sought to enforce once ''widely held views about women's proper place,'' *ante,* at 2277–2278.

than it will to VMI's adversative methodology.

A third reason the concurrence offers in support of the judgment is that the Commonwealth and VMI were not quick enough to react to the "further developments" in this Court's evolving jurisprudence. *Ante,* at 2289. Specifically, the concurrence believes it should have been clear after *Hogan* that "[t]he difficulty with [Virginia's] position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women." *Ante,* at 2290. If only, the concurrence asserts, Virginia had "made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation." *Ante,* at 2290. That is to say, the concurrence believes that after our decision in *Hogan* (which held a program of the Mississippi University for Women to be unconstitutional—without any reliance on the fact that there was no corresponding Mississippi all-men's program), the Commonwealth should have known that what this Court expected of it was ... yes!, the creation of a state all-women's program. Any lawyer who gave that advice to the Commonwealth [595] ought to have been either disbarred or committed. (The proof of that pudding is today's 6–Justice majority opinion.) And any Virginia politician who proposed such a step when there were already four 4–year women's colleges in Virginia (assisted by state support that may well exceed, in the aggregate, what VMI costs, see n. 3, *supra*) ought to have been recalled.

In any event, "diversity in the form of single-sex, as well as coeducational, institutions of higher learning" *is* "available to women as well as to men" in Virginia. *Ante,* at 2290. The concurrence is able to assert the contrary only by disregarding the four all-women's private colleges in Virginia (generously assisted by public funds) and the Commonwealth's longstanding policy of coordinating public with private educational offerings, see *supra,* at 2297–2298, 2298–2299, and n. 2, 2299–2300, and n. 3. According to the concurrence, the *reason* Virginia's assistance to its four all-women's private colleges does not count is that "[t]he private women's colleges are treated by the State *exactly* as all other private schools are treated." *Ante,* at 2290. But if Virginia cannot get *credit* for assisting women's education if it only treats women's private schools as it does all other private schools, then why should it get *blame* for assisting men's education if it only treats VMI as it does all other public schools? This is a great puzzlement.

IV

As is frequently true, the Court's decision today will have consequences that extend far beyond the parties to the litigation. What I take to be the Court's unease with these consequences, and its resulting unwillingness to acknowledge them, cannot alter the reality.

A

Under the constitutional principles announced and applied today, single-sex public education is unconstitutional. By going through the motions of applying a balancing test—asking [596] whether the State has adduced an "exceedingly persuasive justification" for its sex-based classification—the Court creates the illusion that government officials in some future case will have a clear shot at justifying some sort of single-sex public education. Indeed, the Court seeks to create even a greater illusion than that: It purports to have said nothing of relevance to *other* public schools at all. "We address specifically and only an educational opportunity recognized ... as 'unique'." *Ante,* at 2276, n. 7.

The Supreme Court of the United States does not sit to announce "unique" dispositions. Its principal function is to establish *precedent*—that is, to set forth principles of law that every court in America must follow. As we said only this Term, we expect both ourselves and lower courts to adhere to the "*rationale* upon which the Court based the results of its earlier decisions." *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 66–67, 116 S.Ct. 1114, 1128–1129, 134 L.Ed.2d 252 (1996) (emphasis added). That is the principal reason we publish our opinions.

And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. See *supra*, at 2293–2295. Indeed, the Court indicates that if any program restricted to one sex is "uniqu[e]," it must be opened to members of the opposite sex "who have the will and capacity" to participate in it. *Ante*, at 2280. I suggest that the single-sex program that will not be capable of being characterized as "unique" is not only unique but nonexistent.

In any event, regardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead. [597]The costs of litigating the constitutionality of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high to be embraced by public officials. Any person with standing to challenge any sex-based classification can haul the State into federal court and compel it to establish by evidence (presumably in the form of expert testimony) that there is an "exceedingly persuasive justification" for the classification. Should the courts happen to interpret that vacuous phrase as establishing a standard that is not utterly impossible of achievement, there is considerable risk that whether the standard has been met will not be determined on the basis of the record evidence—indeed, that will necessarily be the approach of any court that seeks to walk the path the Court has trod today. No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program. The enemies of single-sex education have won; by persuading only seven Justices (five would have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.

This is especially regrettable because, as the District Court here determined, educational experts in recent years have increasingly come to "suppor[t] [the] view that substantial educational benefits flow from a single-gender environment, be it male or female, *that cannot be replicated in a coeducational setting.*" 766 F.Supp., at 1415 (emphasis added). "The evidence in th[is] case," for example, "is virtually uncontradicted" to that effect. *Ibid.* Until quite recently, some public officials have attempted to institute new single-sex programs, at least as experiments. In 1991, for example, the Detroit Board of Education announced a program to establish three boys-only schools for inner-city youth; it was met with a lawsuit, a preliminary injunction was swiftly entered by a District Court that purported to rely on *Hogan*, see *Garrett v. Board of Ed. of School Dist. of Detroit*, 775 F.Supp. 1004, 1006 (E.D.Mich.1991), and the [598]Detroit Board of Education voted to abandon the litigation and thus abandon the plan, see Detroit Plan to Aid Blacks with All–Boy Schools Abandoned, Los Angeles Times, Nov. 8, 1991, p. A4, col. 1. Today's opinion assures that no such experiment will be tried again.

B

There are few extant single-sex public educational programs. The potential of today's decision for widespread disruption of existing institutions lies in its application to *private* single-sex education. Government support is immensely important to private educational institutions. Mary Baldwin College—which designed and runs VWIL—notes that private institutions of higher education in the 1990–1991 school year derived approximately 19 percent of their budgets from federal, state, and local government funds, *not including financial aid to students.* See Brief for Mary Baldwin College as *Amicus Curiae* 22, n. 13 (citing U.S. Dept. of Education, National Center for Education Statistics, Digest of Education Statistics, p. 38 and Note (1993)). Charitable status under the tax laws is also highly significant for private educational institutions, and it is certainly not beyond the Court that rendered today's decision to hold

8. In this regard, I note that the Court—which I concede is under no obligation to do so—provides no example of a program that *would* pass muster under its reasoning today: not even, for example, a football or wrestling program. On the Court's theory, any woman ready, willing, and physically able to participate in such a program would, *as a constitutional matter*, be entitled to do so.

that a donation to a single-sex college should be deemed contrary to public policy and therefore not deductible if the college discriminates on the basis of sex. See Note, The Independent Sector and the Tax Laws: Defining Charity in an Ideal Democracy, 64 S. Cal. L.Rev. 461, 476 (1991). See also *Bob Jones Univ. v. United States,* 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983).

The Court adverts to private single-sex education only briefly, and only to make the assertion (mentioned above) that "[w]e address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as 'unique.'" *Ante,* at 2276, n. 7. As I have already remarked, see *supra,* at 2305–2306, that assurance assures nothing, unless it is to be taken as a promise that in the future [599] the Court will disclaim the reasoning it has used today to destroy VMI. The Government, in its briefs to this Court, at least purports to address the consequences of its attack on VMI for public support of private single-sex education. It contends that private colleges that are the direct or indirect beneficiaries of government funding are not thereby necessarily converted into state actors to which the Equal Protection Clause is then applicable. See Brief for United States in No. 94–2107, at 35–37 (discussing *Rendell–Baker v. Kohn,* 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), and *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)). That is true. It is also virtually meaningless.

The issue will be not whether government assistance turns private colleges into state actors, but whether the government *itself* would be violating the Constitution by providing state support to single-sex colleges. For example, in *Norwood v. Harrison,* 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973), we saw no room to distinguish between state operation of racially segregated schools and state support of privately run segregated schools. "Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" *Id.,* at 465, 93 S.Ct., at 2810 (quoting *Lee v. Macon County Bd. of Ed.,* 267 F.Supp. 458, 475–476 (M.D.Ala.1967)); see also *Cooper v. Aaron,* 358 U.S. 1, 19, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 5 (1958) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws"); *Grove City College v. Bell,* 465 U.S. 555, 565, 104 S.Ct. 1211, 1217, 79 L.Ed.2d 516 (1984) (case arising under Title IX of the Education Amendments of 1972 and stating that "[t]he economic effect of direct and indirect assistance often is indistinguishable"). When the Government was pressed at oral argument concerning the implications of these cases for private single-sex education if government-provided single-sex education is unconstitutional, [600] it stated that the implications will not be so disastrous, since States *can* provide funding to *racially* segregated private schools, "depend[ing] on the circumstances," Tr. of Oral Arg. 56. I cannot imagine what those "circumstances" might be, and it would be as foolish for private-school administrators to think that that assurance from the Justice Department will outlive the day it was made, as it was for VMI to think that the Justice Department's "unequivoca[l]" support for an intermediate-scrutiny standard in this litigation would survive the Government's loss in the courts below.

The only hope for state-assisted single-sex private schools is that the Court will not apply in the future the principles of law it has applied today. That is a substantial hope, I am happy and ashamed to say. After all, did not the Court today abandon the principles of law it has applied in our earlier sex-classification cases? And does not the Court positively invite private colleges to rely upon our ad-hocery by assuring them this litigation is "unique"? I would not advise the foundation of any new single-sex college (especially an all-male one) with the expectation of being allowed to receive any government support; but it is too soon to abandon in despair those single-sex colleges already in existence. It will certainly be possible for

this Court to write a future opinion that ignores the broad principles of law set forth today, and that characterizes as utterly dispositive the opinion's perceptions that VMI was a uniquely prestigious all-male institution, conceived in chauvinism, etc., etc. I will not join that opinion.

* * *

Justice Brandeis said it is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386–387, 76 L.Ed. 747 [601](1932) (dissenting opinion). But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a "'more perfect Union,'" *ante*, at 2287 (a criterion only slightly more restrictive than a "more perfect world"), can impose its own favored social and economic dispositions nationwide. As today's disposition, and others this single Term, show, this places it beyond the power of a "single courageous State," not only to introduce novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavored dispositions that are centuries old. See, *e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). The sphere of self-government reserved to the people of the Republic is progressively narrowed.

In the course of this dissent, I have referred approvingly to the opinion of my former colleague, Justice Powell, in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). Many of the points made in his dissent apply with equal force here—in particular, the criticism of judicial opinions that purport to be "narro[w]" but whose "logic" is "sweepin[g]." *Id.*, at 745, n. 18, 102 S.Ct., at 3347, n. 18. But there is one statement with which I cannot agree. Justice Powell observed that the Court's decision in *Hogan*, which struck down a single-sex program offered by the Mississippi University for Women, had thereby "[l]eft without honor ... an element of diversity that has characterized much of American education and enriched much of American life." *Id.*, at 735, 102 S.Ct., at 3342. Today's decision does not leave VMI without honor; no court opinion can do that.

In an odd sort of way, it is precisely VMI's attachment to such old-fashioned concepts as manly "honor" that has made it, and the system it represents, the target of those who today succeed in abolishing public single-sex education. The record contains a booklet that all first-year VMI students [602] (the so-called "rats") were required to keep in their possession at all times. Near the end there appears the following period piece, entitled "The Code of a Gentleman":

> "Without a strict observance of the fundamental Code of Honor, no man, no matter how 'polished,' can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defenseless and the champion of justice ... or he is not a Gentleman.
>
> "A Gentleman ...
>
> "Does not discuss his family affairs in public or with acquaintances.
>
> "Does not speak more than casually about his girl friend.
>
> "Does not go to a lady's house if he is affected by alcohol. He is temperate in the use of alcohol.
>
> "Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public.
>
> "Does not hail a lady from a club window.
>
> "A gentleman never discusses the merits or demerits of a lady.
>
> "Does not mention names exactly as he avoids the mention of what things cost.
>
> "Does not borrow money from a friend, except in dire need. Money borrowed is a debt of honor, and must be repaid as promptly as possible. Debts incurred by a deceased parent, brother, sister or grown child are assumed by honorable men as a debt of honor.

"Does not display his wealth, money or possessions.

"Does not put his manners on and off, whether in the club or in a ballroom. He treats people with courtesy, no matter what their social position may be.

[603]"Does not slap strangers on the back nor so much as lay a finger on a lady.

"Does not 'lick the boots of those above' nor 'kick the face of those below him on the social ladder.'

"Does not take advantage of another's helplessness or ignorance and assumes that no gentleman will take advantage of him.

"A Gentleman respects the reserves of others, but demands that others respect those which are his.

"A Gentleman can become what he wills to be . . . ."

I do not know whether the men of VMI lived by this code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction.

518 U.S. 604, 135 L.Ed.2d 795

[604]**COLOR DO REPUBLIC N EDER L C P I N CO ITTEE and Douglas Jones, Treasurer, Petitioners,**

v.

EDER L ELECTION CO ISSION.

No. 5–4 .

Argued April 15, 1996.

Decided June 26, 1996.

Federal Election Commission (FEC) brought action against state political party for violating spending limits under Federal Election Campaign Act (FECA). The United States District Court for the District of Colorado, Edward W. Nottingham, J., 839 F.Supp. 1448, entered summary judgment for party, and FEC appealed. The United States Court of Appeals for the Tenth Circuit reversed, 59 F.3d 1015. Certiorari was granted. The Supreme Court, Justice Breyer, held that First Amendment prohibits application of FECA's party expenditure provision to expenditure that political party has made independently, without coordination with any candidate.

Vacated and remanded.

Justice Kennedy filed an opinion concurring in the judgment and dissenting in part, which Chief Justice Rehnquist and Justice Scalia joined.

Justice Thomas filed an opinion concurring in the judgment and dissenting in part, which Chief Justice Rehnquist and Justice Scalia joined in part.

Justice Stevens filed a dissenting opinion, which Justice Ginsburg joined.

1. Constitutional Law ⇦ 0.1 1.2
Elections ⇦317.2

First Amendment prohibits application of party expenditure provision of Federal Election Campaign Act (FECA) to expenditure that political party has made independently, without coordination with any candidate. (Per Justice Breyer, with two Justices concurring, and the Chief Justice and three Justices concurring in the judgment in part.) U.S.C.A. Const.Amend. 1; Federal Election Campaign Act of 1971, § 315(d)(3), as amended, 2 U.S.C.A. § 441a(d)(3).

2. Elections ⇦311

Political party expenditures were not automatically presumed to be coordinated expenditures which could be constitutionally regulated under the Federal Election Campaign Act (FECA), rather than independent expenditures that enjoyed greater protection under the First Amendment. (Per Justice Breyer, with two Justices concurring, and the Chief Justice and three Justices concurring in the judgment in part.) U.S.C.A. Const.Amend. 1; Federal Election Cam-

the general protection against oppressive prosecutions offered by the Due Process Clause, should assuage the majority's fear, *ante*, at 2460, that the statute will have California overrun by vindictive prosecutions resting on unreliable recovered memories. See *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

The statute does not violate petitioner's rights under the Due Process Clause. We have held, in the civil context, that expired statutes of limitations do not implicate fundamental rights under the Clause. See, *e.g., Chase Securities Corp., supra*, at 314, 65 S.Ct. 1137. For reasons already explained, see *supra*, at 2471, there is no reason to reach a different conclusion here.

The Court's stretching of *Calder's* second category contradicts the historical understanding of that category, departs from established precedent, and misapprehends the purposes of the *Ex Post Facto* Clause. The Court also disregards the interests of those victims of child abuse who have found the courage to face their abusers and bring them to justice. The Court's opinion harms not only our *ex post facto* jurisprudence but also these and future victims of child abuse, and so compels my respectful dissent.

539 U.S. 558, 156 L.Ed.2d 508

John Geddes LAWRENCE and Tyron Garner, Petitioners,

v.

TEXAS.

No. 02–102.

Argued March 26, 2003.

Decided June 26, 2003.

Defendants were convicted in the County Criminal Court at Law No. 10, Harris County, Sherman A. Ross, J., of engaging in homosexual conduct. They appealed. On rehearing en banc, the Texas Court of Appeals, Hudson, J., 41 S.W.3d 349, affirmed. Certiorari was granted. The Supreme Court, Justice Kennedy, overruled its prior decision in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), and held that Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual act of sodomy in privacy of home.

Reversed and remanded.

Justice O'Connor concurred in judgment and filed opinion.

Justice Scalia dissented and filed opinion, in which Chief Justice Rehnquist and Justice Thomas joined.

Justice Thomas dissented and filed opinion.

1. Constitutional Law ⚿258(5)

Sodomy ⚿1

Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual act of sodomy in privacy of home, as impinging on their exercise of liberty interests protected by the Due Process Clause of the Fourteenth Amendment; overruling *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). U.S.C.A. Const. Amend. 14; V.T.C.A., Penal Code § 21.06(a).

2. Constitutional Law ⚿251.2

History and tradition are the starting point, but not in all cases the ending point, of substantive due process inquiry. U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⚿274(5)

Fourteenth Amendment accords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. U.S.C.A. Const.Amend. 14.

4. Courts ⚿89

Although doctrine of stare decisis is essential to the respect accorded to judgments of court and to stability of the law, it is not an inexorable command.

5. Constitutional Law ⚿274(5)

Homosexuals' right to liberty under the Due Process Clause gives them a right to engage in consensual sexual activity in home without intervention of government. U.S.C.A. Const.Amend. 14.

Syllabus *

Responding to a reported weapons disturbance in a private residence, Houston police entered petitioner Lawrence's apartment and saw him and another adult man, petitioner Garner, engaging in a private, consensual sexual act. Petitioners were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct. In affirming, the State Court of Appeals held, *inter alia*, that the statute was not unconstitutional under the Due Process Clause of the Fourteenth Amendment. The court considered *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140, controlling on that point.

Held: The Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause. Pp. 2476–2484.

(a) Resolution of this case depends on whether petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause. For this inquiry the Court deems it necessary to reconsider its *Bowers* holding. The *Bowers* Court's initial substantive statement—"The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . .," 478 U.S., at 190, 106 S.Ct. 2841—discloses the Court's failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said that marriage is just about the right to have sexual intercourse. Although the laws involved in *Bowers* and here purport to do no more than prohibit a particular sexual act, their penalties and purposes have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. They seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons. Pp. 2476–2478.

559 (b) Having misapprehended the liberty claim presented to it, the *Bowers* Court stated that proscriptions against sodomy have ancient roots. 478 U.S., at 192, 106 S.Ct. 2841. It should be noted, however, that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally, whether between men and women or men and men. Moreover, early sodomy laws seem not to

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

have been enforced against consenting adults acting in private. Instead, sodomy prosecutions often involved predatory acts against those who could not or did not consent: relations between men and minor girls or boys, between adults involving force, between adults implicating disparity in status, or between men and animals. The longstanding criminal prohibition of homosexual sodomy upon which *Bowers* placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character. Far from possessing "ancient roots," *ibid.,* American laws targeting same-sex couples did not develop until the last third of the 20th century. Even now, only nine States have singled out same-sex relations for criminal prosecution. Thus, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger there indicated. They are not without doubt and, at the very least, are overstated. The *Bowers* Court was, of course, making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral, but this Court's obligation is to define the liberty of all, not to mandate its own moral code, *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 850, 112 S.Ct. 2791, 120 L.Ed.2d 674. The Nation's laws and traditions in the past half century are most relevant here. They show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. See *County of Sacramento v. Lewis,* 523 U.S. 833, 857, 118 S.Ct. 1708, 140 L.Ed.2d 1043. Pp. 2478–2481.

(c) *Bowers'* deficiencies became even more apparent in the years following its announcement. The 25 States with laws prohibiting the conduct referenced in *Bowers* are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States, including Texas, that still proscribe sodomy (whether for same-sex or heterosexual conduct), there is a pattern of nonenforcement with respect to consenting adults acting in private. *Casey, supra,* at 851, 112 S.Ct. 2791—which confirmed that the Due Process Clause protects personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education—and *Romer v. Evans,* 517 U.S. 620, 624, 116 S.Ct. 1620, 134 L.Ed.2d 855—which struck down class-based legislation directed at homosexuals—cast *Bowers'* 560 holding into even more doubt. The stigma the Texas criminal statute imposes, moreover, is not trivial. Although the offense is but a minor misdemeanor, it remains a criminal offense with all that imports for the dignity of the persons charged, including notation of convictions on their records and on job application forms, and registration as sex offenders under state law. Where a case's foundations have sustained serious erosion, criticism from other sources is of greater significance. In the United States, criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. And, to the extent *Bowers* relied on values shared with a wider civilization, the case's reasoning and holding have been rejected by the European Court of Human Rights, and that other nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent. *Stare decisis* is not an inexorable command. *Payne v. Tennessee,* 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720. *Bowers'* holding has not induced detrimental reliance of the sort that could counsel against overturning it once there are compelling reasons to do so. *Casey, supra,* at 855–856, 112 S.Ct. 2791. *Bowers* causes uncertainty, for the precedents before and after it contradict its central holding. Pp. 2481–2483.

(d) *Bowers'* rationale does not withstand careful analysis. In his dissenting opinion in *Bowers* Justice STEVENS concluded that (1) the fact that a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice, and (2) individual decisions concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of "liberty" protected by due process. That analysis should have controlled *Bowers*, and it controls here. *Bowers* was not correct when it was decided, is not correct today, and is hereby overruled. This case does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct or prostitution. It does involve two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle. Petitioners' right to liberty under the Due Process Clause gives them the full right to engage in private conduct without government intervention. *Casey*, *supra*, at 847, 112 S.Ct. 2791. The Texas statute furthers no legitimate state interest which can justify its intrusion into the individual's personal and private life. Pp. 2483–2484.

41 S.W.3d 349, reversed and remanded.

[561] KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 2484. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and THOMAS, J., joined, *post*, p. 2488. THOMAS, J., filed a dissenting opinion, *post*, p. 2498.

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For U.S. Supreme Court Briefs, See:

2003 WL 152352 (Pet.Brief)

2003 WL 470184 (Resp.Brief)

2003 WL 1098835 (Reply.Brief)

[562] Justice KENNEDY delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

I

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, [563] resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and an-

other man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. to Pet. for Cert. 127a, 139a. The applicable state law is Tex. Penal Code Ann. § 21.06(a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows:

> "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or
>
> "(B) the penetration of the genitals or the anus of another person with an object." § 21.01(1).

The petitioners exercised their right to a trial *de novo* in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. Tex. Const., Art. 1, § 3a. Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere,* were each fined $200 and assessed court costs of $141.25. App. to Pet. for Cert. 107a–110a.

The Court of Appeals for the Texas Fourteenth District considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. After hearing the case en banc the court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. 41 S.W.3d 349 (2001). The majority opinion indicates that the Court of Appeals considered our decision in *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), to be controlling on the federal due process aspect of the case. *Bowers* then being authoritative, this was proper.

564 We granted certiorari, 537 U.S. 1044, 123 S.Ct. 661, 154 L.Ed.2d 514 (2002), to consider three questions:

> 1. Whether petitioners' criminal convictions under the Texas 'Homosexual Conduct' law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of the laws.
>
> 2. Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.
>
> 3. Whether *Bowers v. Hardwick, supra,* should be overruled. See Pet. for Cert. i.

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

II

[1] We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers.*

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); but the most pertinent beginning point is our decision in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or

aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and [565]placed emphasis on the marriage relation and the protected space of the marital bedroom. *Id.,* at 485, 85 S.Ct. 1678.

After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, *id.,* at 454, 92 S.Ct. 1029; but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights, *ibid.* It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

> "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship .... If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.,* at 453, 92 S.Ct. 1029.

The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.

[566]In *Carey v. Population Services Int'l,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both *Eisenstadt* and *Carey,* as well as the holding and rationale in *Roe,* confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick.*

The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented. 478 U.S., at 199, 106 S.Ct. 2841 (opinion of Blackmun, J., joined by Brennan, Marshall, and STEVENS, JJ.); *id.,* at 214, 106

S.Ct. 2841 (opinion of STEVENS, J., joined by Brennan and Marshall, JJ.).

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so [567] for a very long time." *Id.*, at 190, 106 S.Ct. 2841. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." *Id.*, at 192, 106 S.Ct. 2841. In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions [568] in *Bowers*. Brief for Cato Institute as *Amicus Curiae* 16–17; Brief for American Civil Liberties Union et al. as *Amici Curiae* 15–21; Brief for Professors of History et al. as *Amici Curiae* 3–10. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. See, *e.g.*, *King v. Wiseman*, 92 Eng. Rep. 774, 775 (K.B.1718) (interpreting "mankind" in Act of 1533 as including women and girls). Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. See, *e.g.*, 2 J. Bishop, Criminal Law § 1028 (1858); 2 J. Chitty, Criminal Law 47–50 (5th Am. ed. 1847); R. Desty, A Compendium of American Criminal Law 143 (1882); J. May, The Law of Crimes § 203 (2d ed. 1893). The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of

person did not emerge until the late 19th century. See, e.g., J. Katz, The Invention of Heterosexuality 10 (1995); J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America 121 (2d ed. 1997) ("The modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions"). Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of [569] homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, see 2 Chitty, *supra*, at 49, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent. See, *e.g.,* F. Wharton, Criminal Law 443 (2d ed. 1852); 1 F. Wharton, Criminal Law 512 (8th ed. 1880). The rule may explain in part the infrequency of these prosecutions. In all events that infrequency makes it difficult to say that society approved of a rigorous and systematic [570] punishment of the consensual acts committed in private and by adults. The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.

The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing "ancient roots," *Bowers,* 478 U.S., at 192, 106 S.Ct. 2841, American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880–1995 are not always clear in the details, but a significant number involved conduct in a public place. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 14–15, and n. 18.

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. See 1977 Ark. Gen. Acts no. 828; 1983 Kan. Sess. Laws p. 652; 1974 Ky.

Acts p. 847; 1977 Mo. Laws p. 687; 1973 Mont. Laws p. 1339; 1977 Nev. Stats. p. 1632; 1989 Tenn. Pub. Acts ch. 591; 1973 Tex. Gen. Laws ch. 399; see also *Post v. State,* 715 P.2d 1105 (Okla.Crim.App.1986) (sodomy law invalidated as applied to different-sex couples). Post-*Bowers* even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. See, *e.g., Jegley v. Picado,* 349 Ark. 600, 80 S.W.3d 332 (2002); *Gryczan v. State,* 283 Mont. 433, 942 P.2d 112 (1997); *Campbell v. Sundquist,* 926 S.W.2d 250 (Tenn.App.1996); *Commonwealth v. Wasson,* [571] 842 S.W.2d 487 (Ky.1992); see also 1993 Nev. Stats. p. 518 (repealing Nev.Rev.Stat. § 201.193).

In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 850, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

[2] Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao–Christian moral and ethical standards." 478 U.S., at 196, 106 S.Ct. 2841. As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, *e.g.,* Eskridge, Hardwick and Historiography, 1999 U. Ill. L.Rev. 631, 656. In all events we think that our laws and traditions in the past half century are of [572] most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *County of Sacramento v. Lewis,* 523 U.S. 833, 857, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (KENNEDY, J., concurring).

This emerging recognition should have been apparent when *Bowers* was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." ALI, Model Penal Code § 213.2, Comment 2, p. 372 (1980). It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277–280 (Tent. Draft No. 4, 1955). In 1961 Illinois changed its laws to conform to the Model Penal Code.

Other States soon followed. Brief for Cato Institute as *Amicus Curiae* 15–16.

In *Bowers* the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. 478 U.S., at 192–193, 106 S.Ct. 2841. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. *Id.*, at 197–198, n. 2, 106 S.Ct. 2841 ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo–Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws [573]punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, § 1.

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) & ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. *State v. Morales,* 869 S.W.2d 941, 943.

[3] Two principal cases decided after *Bowers* cast its holding into even more doubt. In *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed [574]that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.*, at 851, 112 S.Ct. 2791. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Ibid.*

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.

The second post-*Bowers* case of principal relevance is *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," *id.,* at 624, 116 S.Ct. 1620 (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. *Id.,* at 634, 116 S.Ct. 1620.

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude 575 the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. *Smith v. Doe,* 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003); *Connecticut Dept. of Public Safety v. Doe,* 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of at least four States were he or she to be subject to their jurisdiction. Pet. for Cert. 13, and n. 12 (citing Idaho Code §§ 18–8301 to 18–8326 (Cum.Supp.2002); La.Code Crim. Proc. Ann. §§ 15:540–15:549 576 (West 2003); Miss.Code Ann. §§ 45–33–21 to 45–33–57 (Lexis 2003); S.C.Code Ann. §§ 23–3–400 to 23–3–490 (West 2002)). This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.

The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer.* When our precedent has been thus weakened, criticism from other sources is of greater sig-

nificance. In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, *e.g.,* C. Fried, Order and Law: Arguing the Reagan Revolution—A Firsthand Account 81–84 (1991); R. Posner, Sex and Reason 341–350 (1992). The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment, see *Jegley v. Picado,* 349 Ark. 600, 80 S.W.3d 332 (2002); *Powell v. State,* 270 Ga. 327, 510 S.E.2d 18, 24 (1998); *Gryczan v. State,* 283 Mont. 433, 942 P.2d 112 (1997); *Campbell v. Sundquist,* 926 S.W.2d 250 (Tenn.App.1996); *Commonwealth v. Wasson,* 842 S.W.2d 487 (Ky.1992).

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom.* See *P.G. & J.H. v. United Kingdom,* App. No. 00044787/98, & ¶ 56 (Eur.Ct.H. R., Sept. 25, 2001); *Modinos v. Cyprus,* 259 Eur. Ct. H.R. (1993); *Norris v. Ireland,* 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary [577] Robinson et al. as *Amici Curiae* 11–12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

[4] The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. *Payne v. Tennessee,* 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision' " (quoting *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940))). In *Casey* we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. 505 U.S., at 855–856, 112 S.Ct. 2791; see also *id.,* at 844, 112 S.Ct. 2791 ("Liberty finds no refuge in a jurisprudence of doubt"). The holding in *Bowers,* however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in Bowers Justice STEVENS came to these conclusions:

> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional [578] attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons." 478 U.S., at 216, 106 S.Ct. 2841 (footnotes and citations omitted).

Justice STEVENS' analysis, in our view, should have been controlling in *Bowers* and should control here.

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

[5] The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey, supra,* at 847, 112 S.Ct. 2791. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume [579] to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice O'CONNOR, concurring in the judgment.

The Court today overrules *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). I joined *Bowers,* and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. See Tex. Penal Code Ann. § 21.06 (2003). Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); see also *Plyler v. Doe,* 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Under our rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, supra,* at 440, 105 S.Ct. 3249; see also *Department of Agriculture v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); *Romer v. Evans,* 517 U.S. 620, 632–633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *Nordlinger v. Hahn,* 505 U.S. 1, 11–12, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992).

Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since "the Constitution presumes that

even improvident decisions will eventually be rectified by the [580]democratic processes." *Cleburne v. Cleburne Living Center, supra,* at 440, 105 S.Ct. 3249; see also *Fitzgerald v. Racing Assn. of Central Iowa, ante,* 539 U.S. 103, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003); *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). We have consistently held, however, that some objectives, such as "a bare ... desire to harm a politically unpopular group," are not legitimate state interests. *Department of Agriculture v. Moreno, supra,* at 534, 93 S.Ct. 2821. See also *Cleburne v. Cleburne Living Center, supra,* at 446–447, 105 S.Ct. 3249; *Romer v. Evans, supra,* at 632, 116 S.Ct. 1620. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.

We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships. In *Department of Agriculture v. Moreno,* for example, we held that a law preventing those households containing an individual unrelated to any other member of the household from receiving food stamps violated equal protection because the purpose of the law was to " 'discriminate against hippies.' " 413 U.S., at 534, 93 S.Ct. 2821. The asserted governmental interest in preventing food stamp fraud was not deemed sufficient to satisfy rational basis review. *Id.,* at 535–538, 93 S.Ct. 2821. In *Eisenstadt v. Baird,* 405 U.S. 438, 447–455, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), we refused to sanction a law that discriminated between married and unmarried persons by prohibiting the distribution of contraceptives to single persons. Likewise, in *Cleburne v. Cleburne Living Center, supra,* we held that it was irrational for a State to require a home for the mentally disabled to obtain a special use permit when other residences—like fraternity houses and apartment buildings—did not have to obtain such a permit. And in *Romer v. Evans,* we disallowed a state statute that "impos[ed] a broad and undifferentiated disability on a single named group"—specifically, homosexuals. 517 U.S., at 632, 116 S.Ct. 1620.

[581]The statute at issue here makes sodomy a crime only if a person "engages in deviate sexual intercourse with another individual of the same sex." Tex. Penal Code Ann. § 21.06(a) (2003). Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by § 21.06.

The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction. It appears that prosecutions under Texas' sodomy law are rare. See *State v. Morales,* 869 S.W.2d 941, 943 (Tex.1994) (noting in 1994 that § 21.06 "has not been, and in all probability will not be, enforced against private consensual conduct between adults"). This case shows, however, that prosecutions under § 21.06 *do* occur. And while the penalty imposed on petitioners in this case was relatively minor, the consequences of conviction are not. It appears that petitioners' convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design. See, *e.g.,* Tex. Occ.Code Ann. § 164.051(a)(2)(B) (2003 Pamphlet) (physician); § 451.251(a)(1)

(athletic trainer); § 1053.252(2) (interior designer). Indeed, were petitioners to move to one of four States, their convictions would require them to register as sex offenders to local law enforcement. See, *e.g.,* Idaho Code § 18–8304 (Cum.Supp. 2002); La. Stat. Ann. § 15:542 (West Cum. Supp.2003); Miss.Code Ann. § 45–33–25 (West 2003); S.C.Code Ann. § 23–3–430 (West Cum.Supp.2002); cf. *ante,* at 2482.

And the effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas [582] itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing." *State v. Morales,* 826 S.W.2d 201, 203 (Tex.App.1992).

Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality. In *Bowers,* we held that a state law criminalizing sodomy as applied to homosexual couples did not violate substantive due process. We rejected the argument that no rational basis existed to justify the law, pointing to the government's interest in promoting morality. 478 U.S., at 196, 106 S.Ct. 2841. The only question in front of the Court in *Bowers* was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy. *Id.,* at 188, n. 2. *Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished.

This case raises a different issue than *Bowers:* whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. See, *e.g., Department of Agriculture v. Moreno,* 413 U.S., at 534, 93 S.Ct. 2821; *Romer v. Evans,* 517 U.S., at 634–635, 116 S.Ct. 1620. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

[583] Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." *Id.,* at 633, 116 S.Ct. 1620. Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating "a classification of persons undertaken for its own sake." *Id.,* at 635, 116 S.Ct. 1620. And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.,* at 634, 116 S.Ct. 1620.

Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas'

sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id.,* at 641, 116 S.Ct. 1620 (SCALIA, J., dissenting) (internal quotation marks omitted). When a State makes homosexual conduct criminal, and not "deviate sexual intercourse" committed by persons of different sexes, "that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Ante,* at 2482.

Indeed, Texas law confirms that the sodomy statute is directed toward homosexuals as a class. In Texas, calling a person a homosexual is slander *per se* because the word "homosexual"[584] "impute[s] the commission of a crime." *Plumley v. Landmark Chevrolet, Inc.,* 122 F.3d 308, 310 (C.A.5 1997) (applying Texas law); see also *Head v. Newton,* 596 S.W.2d 209, 210 (Tex. App.1980). The State has admitted that because of the sodomy law, *being* homosexual carries the presumption of being a criminal. See *State v. Morales,* 826 S.W.2d, at 202–203 ("[T]he statute brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law"). Texas' sodomy law therefore results in discrimination against homosexuals as a class in an array of areas outside the criminal law. See *ibid.* In *Romer v. Evans,* we refused to sanction a law that singled out homosexuals "for disfavored legal status." 517 U.S., at 633, 116 S.Ct. 1620. The same is true here. The Equal Protection Clause " 'neither knows nor tolerates classes among citizens.' " *Id.,* at 623, 116 S.Ct. 1620 (quoting *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting)).

A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to "a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass ... cannot be reconciled with" the Equal Protection Clause. *Plyler v. Doe,* 457 U.S., at 239, 102 S.Ct. 2382 (Powell, J., concurring).

Whether a sodomy law that is neutral both in effect and application, see *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), would violate the substantive component of the Due Process Clause is an issue that need not be decided today. I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a [585]law would not long stand in our democratic society. In the words of Justice Jackson:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 112–113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (concurring opinion).

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legiti-

mate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court's judgment that Texas' sodomy law banning "deviate sexual intercourse" between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.

[586] Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 844, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). That was the Court's sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The Court's response today, to those who have engaged in a 17–year crusade to overrule *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), is very different. The need for stability and certainty presents no barrier.

Most of the rest of today's opinion has no relevance to its actual holding—that the Texas statute "furthers no legitimate state interest which can justify" its application to petitioners under rational-basis review. *Ante,* at 2484 (overruling *Bowers* to the extent it sustained Georgia's antisodomy statute under the rational-basis test). Though there is discussion of "fundamental proposition[s]," *ante,* at 2477, and "fundamental decisions," *ibid.*, nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a "fundamental right." Thus, while overruling the *outcome* of *Bowers,* the Court leaves strangely untouched its central legal conclusion: "[R]espondent would have us announce ... a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." 478 U.S., at 191, 106 S.Ct. 2841. Instead the Court simply describes petitioners' conduct as "an exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case. *Ante,* at 2476.

I

I begin with the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick.*[587] I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. Today's opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention—the paean to *stare decisis* coauthored by three Members of today's majority in *Planned Parenthood v. Casey.* There, when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to *reaffirm* it:

> "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* [,] ... its decision has a dimension that the resolution of the normal case does not carry.... [T]o overrule under fire in the absence of the most compelling reason ... would subvert the Court's legitimacy beyond any serious

question." 505 U.S., at 866–867, 112 S.Ct. 2791.

Today, however, the widespread opposition to *Bowers*, a decision resolving an issue as "intensely divisive" as the issue in *Roe*, is offered as a reason in favor of *overruling* it. See *ante*, at 2482–2483. Gone, too, is any "enquiry" (of the sort conducted in *Casey*) into whether the decision sought to be overruled has "proven 'unworkable,'" *Casey, supra*, at 855, 112 S.Ct. 2791.

Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) *if:* (1) its foundations have been "ero[ded]" by subsequent decisions, *ante*, at 2482; (2) it has been subject to "substantial and continuing" criticism, *ibid.*; and (3) it has not induced "individual or societal reliance" that counsels against overturning, *ante*, at 2483. The problem is that *Roe* itself—which today's majority surely has no disposition to overrule—satisfies these conditions to at least the same degree as *Bowers*.

588 (1) A preliminary digressive observation with regard to the first factor: The Court's claim that *Planned Parenthood v. Casey, supra*, "casts some doubt" upon the holding in *Bowers* (or any other case, for that matter) does not withstand analysis. *Ante*, at 2480. As far as its holding is concerned, *Casey* provided a *less* expansive right to abortion than did *Roe, which was already on the books when* Bowers *was decided.* And if the Court is referring not to the holding of *Casey*, but to the dictum of its famed sweet-mystery-of-life passage, *ante*, at 2481 (" 'At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life' "): That "casts some doubt" upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one's "right to define" certain concepts; and if the passage calls into question the government's power to regulate *actions based on* one's self-defined "concept of existence, etc.," it is the passage that ate the rule of law.

I do not quarrel with the Court's claim that *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), "eroded" the "foundations" of *Bowers*' rational-basis holding. See *Romer, supra*, at 640–643, 116 S.Ct. 1620 (SCALIA, J., dissenting). But *Roe* and *Casey* have been equally "eroded" by *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), which held that *only* fundamental rights which are " 'deeply rooted in this Nation's history and tradition' " qualify for anything other than rational-basis scrutiny under the doctrine of "substantive due process." *Roe* and *Casey*, of course, subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort *was* rooted in this Nation's tradition.

(2) *Bowers*, the Court says, has been subject to "substantial and continuing [criticism], disapproving of its reasoning in all respects, not just as to its historical assumptions." *Ante*, at 2483. Exactly what those nonhistorical criticisms are, and whether the Court even agrees with them, are left 589 unsaid, although the Court does cite two books. See *ibid.* (citing C. Fried, Order and Law: Arguing the Reagan Revolution—A Firsthand Account 81–84 (1991); R. Posner, Sex and Reason 341–350 (1992)).[1] Of course, *Roe* too (and by extension *Casey*) had been (and still is) subject to unrelenting criticism, including criticism from the two commentators cited by the Court today. See Fried, *supra*, at 75 ("Roe was a prime example of twisted judging"); Posner, *supra*, at 337 ("[The Court's] opinion in *Roe* (3)27 fails to measure up to professional expectations re-

1. This last-cited critic of *Bowers* actually writes: *"[Bowers]* is correct nevertheless that the right to engage in homosexual acts is not deeply rooted in America's history and tradition." Posner, Sex and Reason, at 343.

garding judicial opinions"); Posner, Judicial Opinion Writing, 62 U. Chi. L.Rev. 1421, 1434 (1995) (describing the opinion in *Roe* as an "embarrassing performanc[e]").

(3) That leaves, to distinguish the rock-solid, unamendable disposition of *Roe* from the readily overrulable *Bowers*, only the third factor. "[T]here has been," the Court says, "no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding . . . ." *Ante*, at 2483. It seems to me that the "societal reliance" on the principles confirmed in *Bowers* and discarded today has been overwhelming. Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation. See, *e.g.*, *Williams v. Pryor*, 240 F.3d 944, 949 (C.A.11 2001) (citing *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality . . . indisputably is a legitimate government interest under rational basis scrutiny"); *Milner v. Apfel*, 148 F.3d 812, 814 (C.A.7 1998) (citing *Bowers* for the proposition that "[l]egislatures are permitted to legislate with regard to morality . . . rather than confined 590 to preventing demonstrable harms"); *Holmes v. California Army National Guard*, 124 F.3d 1126, 1136 (C.A.9 1997) (relying on *Bowers* in upholding the federal statute and regulations banning from military service those who engage in homosexual conduct); *Owens v. State*, 352 Md. 663, 683, 724 A.2d 43, 53 (1999) (relying on *Bowers* in holding that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage"); *Sherman v. Henry*, 928 S.W.2d 464, 469–473 (Tex.1996) (relying on *Bowers* in rejecting a claimed constitutional right to commit adultery). We ourselves relied extensively on *Bowers* when we concluded, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), that Indiana's public indecency statute furthered "a substantial government interest in protecting order and morality," *ibid.* (plurality opinion); see also *id.*, at 575, 111 S.Ct. 2456 (SCALIA, J., concurring in judgment). State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. See *ante*, at 2480 (noting "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*" (emphasis added)). The impossibility of distinguishing homosexuality from other traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge. "The law," it said, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U.S., at 196, 106 S.Ct. 2841.[2]

2. While the Court does not overrule *Bowers'* holding that homosexual sodomy is not a "fundamental right," it is worth noting that the "societal reliance" upon that aspect of the decision has been substantial as well. See 10 U.S.C. § 654(b)(1) ("A member of the armed forces shall be separated from the armed forces . . . if . . . the member has engaged in . . . a homosexual act or acts"); *Marcum v. McWhorter*, 308 F.3d 635, 640–642 (C.A.6 2002) (relying on *Bowers* in rejecting a claimed fundamental right to commit adultery); *Mullins v. Oregon*, 57 F.3d 789, 793–794 (C.A.9 1995) (relying on *Bowers* in rejecting a grandparent's claimed "fundamental liberty interes[t]" in the adoption of her grandchildren); *Doe v. Wigginton*, 21 F.3d 733, 739–740 (C.A.6 1994) (relying on *Bowers* in rejecting a prisoner's claimed "fundamental right" to on-demand HIV testing); *Schowengerdt v. United States*, 944 F.2d 483, 490 (C.A.9 1991) (relying on *Bowers* in upholding a bisexual's discharge from the armed services); *Charles v. Baesler*, 910 F.2d 1349,

[591]What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails. Not so the overruling of *Roe,* which would simply have restored the regime that existed for centuries before 1973, in which the permissibility of, and restrictions upon, abortion were determined legislatively State by State. *Casey,* however, chose to base its *stare decisis* determination on a different "sort" of reliance. "[P]eople," it said, "have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." 505 U.S., at 856, 112 S.Ct. 2791. This falsely assumes that the consequence of overruling *Roe* would have been to make abortion unlawful. It would not; it would merely have *permitted* [592]the States to do so. Many States would unquestionably have declined to prohibit abortion, and others would not have prohibited it within six months (after which the most significant reliance interests would have expired). Even for persons in States other than these, the choice would not have been between abortion and childbirth, but between abortion nearby and abortion in a neighboring State.

To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey.* It has thereby exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is.

II

Having decided that it need not adhere to *stare decisis,* the Court still must establish that *Bowers* was wrongly decided and that the Texas statute, as applied to petitioners, is unconstitutional.

Texas Penal Code Ann. § 21.06(a) (2003) undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to "liberty" under the Due Process Clause, though today's opinion repeatedly makes that claim. *Ante,* at 2478 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice"); *ante,* at 2481 (" 'These matters . . . are central to the liberty protected by the Fourteenth Amendment' "); *ante,* at 2484 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government"). The Fourteenth Amendment *expressly allows* States to deprive their citizens of "liberty," *so long as "due process of law" is provided:*

> "No state shall . . . deprive any person of life, liberty, or property, *without due process of law.*" Amdt. 14 (emphasis added).

[593]Our opinions applying the doctrine known as "substantive due process" hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg,* 521 U.S., at 721, 117 S.Ct. 2258. We have held repeatedly, in cases the Court today does

1353 (C.A.6 1990) (relying on *Bowers* in rejecting fire department captain's claimed "fundamental" interest in a promotion); *Henne v. Wright,* 904 F.2d 1208, 1214–1215 (C.A.8 1990) (relying on *Bowers* in rejecting a claim that state law restricting surnames that could be given to children at birth implicates a "fundamental right"); *Walls v. Petersburg,* 895 F.2d 188, 193 (C.A.4 1990) (relying on *Bowers* in rejecting substantive-due-process challenge to a police department questionnaire that asked prospective employees about homosexual activity); *High Tech Gays v. Defense Industrial Security Clearance Office,* 895 F.2d 563, 570–571 (C.A.9 1990) (relying on *Bowers'* holding that homosexual activity is not a fundamental right in rejecting—on the basis of the rational-basis standard—an equal-protection challenge to the Defense Department's policy of conducting expanded investigations into backgrounds of gay and lesbian applicants for secret and top-secret security clearances).

not overrule, that *only* fundamental rights qualify for this so-called "heightened scrutiny" protection—that is, rights which are " 'deeply rooted in this Nation's history and tradition,' " *ibid.* See *Reno v. Flores,* 507 U.S. 292, 303, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (fundamental liberty interests must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (internal quotation marks and citations omitted)); *United States v. Salerno,* 481 U.S. 739, 751, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (same). See also *Michael H. v. Gerald D.,* 491 U.S. 110, 122, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) ("[W]e have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society"); *Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion); *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (Fourteenth Amendment protects "those privileges *long recognized at common law* as essential to the orderly pursuit of happiness by free men" (emphasis added)).[3] All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.

[594] *Bowers* held, first, that criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny because they do not implicate a "fundamental right" under the Due Process Clause, 478 U.S., at 191–194, 106 S.Ct. 2841. Noting that "[p]roscriptions against that conduct have ancient roots," *id.,* at 192, 106 S.Ct. 2841, that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights," *ibid.,* and that many States had retained their bans on sodomy, *id.,* at 193, *Bowers* concluded that a right to engage in homosexual sodomy was not " 'deeply rooted in this Nation's history and tradition,' " *id.,* at 192, 106 S.Ct. 2841.

The Court today does not overrule this holding. Not once does it describe homosexual sodomy as a "fundamental right" or a "fundamental liberty interest," nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is " 'deeply rooted in this Nation's history and tradition,' " the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers*' holding to the contrary, see *id.,* at 196, 106 S.Ct. 2841. "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Ante,* at 2484.

I shall address that rational-basis holding presently. First, however, I address some aspersions that the Court casts upon *Bowers'* conclusion that homosexual sodomy is not a "fundamental right"—even though, as I have said, the Court does not have the boldness to reverse that conclusion.

III

The Court's description of "the state of the law" at the time of *Bowers* only confirms that *Bowers* was right. *Ante,* at 2477. The Court points to *Griswold v. Connecticut,* 381 U.S. 479, 481–482, 85

3. The Court is quite right that " '[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry,' " *ante,* at 2480. An asserted "fundamental liberty interest" must not only be " 'deeply rooted in this Nation's history and tradition,' " *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258 (1997), but it must *also* be " 'implicit in the concept of ordered liberty,' " so that " 'neither liberty nor justice would exist if [it] were sacrificed,' " *ibid.* Moreover, liberty interests unsupported by history and tradition, though not deserving of "heightened scrutiny," are *still* protected from state laws that are not rationally related to any legitimate state interest. *Id.,* at 722, 117 S.Ct. 2258. As I proceed to discuss, it is this latter principle that the Court applies in the present case.

S.Ct. 1678, 14 L.Ed.2d 510 (1965). But that case *expressly disclaimed* any reliance on the doctrine of "substantive due [595]process," and grounded the so-called "right to privacy" in penumbras of constitutional provisions *other than* the Due Process Clause. *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), likewise had nothing to do with "substantive due process"; it invalidated a Massachusetts law prohibiting the distribution of contraceptives to unmarried persons solely on the basis of the Equal Protection Clause. Of course *Eisenstadt* contains well-known dictum relating to the "right to privacy," but this referred to the right recognized in *Griswold*—a right penumbral to the *specific* guarantees in the Bill of Rights, and not a "substantive due process" right.

Roe v. Wade recognized that the right to abort an unborn child was a "fundamental right" protected by the Due Process Clause. 410 U.S., at 155, 93 S.Ct. 705. The *Roe* Court, however, made no attempt to establish that this right was " 'deeply rooted in this Nation's history and tradition' "; instead, it based its conclusion that "the Fourteenth Amendment's concept of personal liberty ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" on its own normative judgment that antiabortion laws were undesirable. See *id.,* at 153, 93 S.Ct. 705. We have since rejected *Roe's* holding that regulations of abortion must be narrowly tailored to serve a compelling state interest, see *Planned Parenthood v. Casey,* 505 U.S., at 876, 112 S.Ct. 2791 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *id.,* at 951–953, 112 S.Ct. 2791 (REHNQUIST, C. J., concurring in judgment in part and dissenting in part)—and thus, by logical implication, *Roe's* holding that the right to abort an unborn child is a "fundamental right." See 505 U.S., at 843–912, 112 S.Ct. 2791 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.) (not once describing abortion as a "fundamental right" or a "fundamental liberty interest").

After discussing the history of antisodomy laws, *ante,* at 2478–2480, the Court proclaims that, "it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter," *ante,* [596]at 2478. This observation in no way casts into doubt the "definitive [historical] conclusio[n]," *ibid.,* on which *Bowers* relied: that our Nation has a longstanding history of laws prohibiting *sodomy in general*—regardless of whether it was performed by same-sex or opposite-sex couples:

> "It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. *Sodomy* was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had *criminal sodomy laws.* In fact, until 1961, all 50 States outlawed *sodomy,* and today, 24 States and the District of Columbia continue to provide criminal penalties for *sodomy* performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." 478 U.S., at 192–194, 106 S.Ct. 2841 (citations and footnotes omitted; emphasis added).

It is (as *Bowers* recognized) entirely irrelevant whether the laws in our long national tradition criminalizing homosexual sodomy were "directed at homosexual conduct as a distinct matter." *Ante,* at 2478. Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it *was* criminal-

ized—which suffices to establish that homosexual sodomy is not a right "deeply rooted in our Nation's history and tradition." The Court today agrees that homosexual sodomy was criminalized and thus does not dispute the facts on which Bowers *actually* relied.

[597] Next the Court makes the claim, again unsupported by any citations, that "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private." *Ante,* at 2479. The key qualifier here is "acting in private"—since the Court admits that sodomy laws *were* enforced against consenting adults (although the Court contends that prosecutions were "infrequen[t]," *ibid.*). I do not know what "acting in private" means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by "acting in private" is "on private premises, with the doors closed and windows covered," it is entirely unsurprising that evidence of enforcement would be hard to come by. (Imagine the circumstances that would enable a search warrant to be obtained for a residence on the ground that there was probable cause to believe that consensual sodomy was then and there occurring.) Surely that lack of evidence would not sustain the proposition that consensual sodomy on private premises with the doors closed and windows covered was regarded as a "fundamental right," even though all other consensual sodomy was criminalized. There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880–1995. See W. Eskridge, Gaylaw: Challenging the Apartheid of the Closet 375 (1999) (hereinafter Gaylaw). There are also records of 20 sodomy prosecutions and 4 executions during the colonial period. J. Katz, Gay/Lesbian Almanac 29, 58, 663 (1983). *Bowers*' conclusion that homosexual sodomy is not a fundamental right "deeply rooted in this Nation's history and tradition" is utterly unassailable.

Realizing that fact, the Court instead says: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show *an emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex.*" *Ante,* at 2480 (emphasis [598] added). Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States continue to prosecute all sorts of crimes by adults "in matters pertaining to sex": prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced "in the past half century," in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. Gaylaw 375. In relying, for evidence of an "emerging recognition," upon the American Law Institute's 1955 recommendation not to criminalize " 'consensual sexual relations conducted in private,' " *ante,* at 2480, the Court ignores the fact that this recommendation was "a point of resistance in most of the states that considered adopting the Model Penal Code." Gaylaw 159.

In any event, an "emerging awareness" is by definition not "deeply rooted in this Nation's history and tradition[s]," as we have said "fundamental right" status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on "values we share with a wider civilization," *ante,* at 2483, but rather rejected the claimed right to sodomy on the ground that such a right was not " 'deeply rooted in *this Nation's* history and tradition,' " 478 U.S., at 193–194, 106 S.Ct. 2841 (emphasis added). *Bowers*' rational-basis holding is likewise devoid of any reliance on the views of a

"wider civilization," see *id.*, at 196, 106 S.Ct. 2841. The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans." *Foster v. Florida*, 537 U.S. 990, n., 123 S.Ct. 470, 154 L.Ed.2d 359 (2002) (THOMAS, J., concurring in denial of certiorari).

[599] IV

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," *Bowers, supra*, at 196, 106 S.Ct. 2841—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual," *ante*, at 2484 (emphasis added). The Court embraces instead Justice STEVENS' declaration in his *Bowers* dissent, that " 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,' " *ante*, at 2483. This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.

V

Finally, I turn to petitioners' equal-protection challenge, which no Member of the Court save Justice O'CONNOR, *ante*, at 2484 (opinion concurring in judgment), embraces: On its face § 21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. To be sure, § 21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual [600] acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.

The objection is made, however, that the antimiscegenation laws invalidated in *Loving v. Virginia*, 388 U.S. 1, 8, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), similarly were applicable to whites and blacks alike, and only distinguished between the races insofar as the *partner* was concerned. In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was "designed to maintain White Supremacy." *Id.*, at 6, 11, 87 S.Ct. 1817. A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. See *Washington v. Davis*, 426 U.S. 229, 241–242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). No purpose to discriminate against men or women as a class can be gleaned from the Texas law, so rational-basis review applies. That review is readily satisfied here by the same rational basis that satisfied it in *Bowers*—society's belief that certain forms of sexual behavior are "immoral and unacceptable," 478 U.S., at 196, 106 S.Ct. 2841. This is the same justification that supports many

other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.

Justice O'CONNOR argues that the discrimination in this law which must be justified is not its discrimination with regard to the sex of the partner but its discrimination with regard to the sexual proclivity of the principal actor.

> "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct.[601] It is instead directed toward gay persons as a class." *Ante,* at 2486–2487.

Of course the same could be said of any law. A law against public nudity targets "the conduct that is closely correlated with being a nudist," and hence "is targeted at more than conduct"; it is "directed toward nudists as a class." But be that as it may. Even if the Texas law *does* deny equal protection to "homosexuals as a class," that denial *still* does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality.

Justice O'CONNOR simply decrees application of "a more searching form of rational basis review" to the Texas statute. *Ante,* at 2485. The cases she cites do not recognize such a standard, and reach their conclusions only after finding, as required by conventional rational-basis analysis, that no conceivable legitimate state interest supports the classification at issue. See *Romer v. Evans,* 517 U.S., at 635, 116 S.Ct. 1620; *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 448–450, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Department of Agriculture v. Moreno,* 413 U.S. 528, 534–538, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). Nor does Justice O'CONNOR explain precisely what her "more searching form" of rational-basis review consists of. It must at least mean, however, that laws exhibiting "a desire to harm a politically unpopular group," *ante,* at 2485, are invalid *even though* there may be a conceivable rational basis to support them.

This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O'CONNOR seeks to preserve them by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. *Ante,* at 2488. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples. Texas's interest in § 21.06 could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society." In the jurisprudence Justice O'CONNOR has[602] seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).

* * *

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. See *Romer, supra,* at 653, 116 S.Ct. 1620.

One of the most revealing statements in today's opinion is the Court's grim warn-

ing that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Ante,* at 2482. It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that [603] culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress, see Employment Non–Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments, H.R. 5452, 94th Cong., 1st Sess. (1975); that in some cases such "discrimination" is *mandated* by federal statute, see 10 U.S.C. § 654(b)(1) (mandating discharge from the Armed Forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see *Boy Scouts of America v. Dale,* 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," *ante,* at 2484; and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made [604] by the people, and not imposed by a governing caste that knows best.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). See *Halpern v. Toronto,* 2003 WL 34950 (Ontario Ct.App.); Cohen, Dozens in Canada Follow Gay Couple's Lead, Washington Post, June 12, 2003, p. A25. At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present

case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Ante,* at 2484. Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to *marriage,* procreation, contraception, family relationships, child rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Ante,* at 2482 (emphasis added). Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, *ante,* at 2484; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen [605]sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," *ante,* at 2478; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution," *ibid.?* Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.

The matters appropriate for this Court's resolution are only three: Texas's prohibition of sodomy neither infringes a "fundamental right" (which the Court does not dispute), nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws. I dissent.

Justice THOMAS, dissenting.

I join Justice SCALIA's dissenting opinion. I write separately to note that the law before the Court today "is . . . uncommonly silly." *Griswold v. Connecticut,* 381 U.S. 479, 527, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Stewart, J., dissenting). If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a Member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.' " *Id.,* at 530, 85 S.Ct. 1678. And, just like Justice Stewart, I "can find [neither in the Bill of Rights nor any other part of the [606]Constitution a] general right of privacy," *ibid.,* or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions," *ante,* at 2475.

539 U.S. 461, 156 L.Ed.2d 428

GEORGIA, Appellant,

v.

John ASHCROFT, Attorney General, et al.

No. 02–182.

Argued April 29, 2003.

Decided June 26, 2003.

State of Georgia sought preclearance of its state legislative redistricting plan

it allows that. Today's opinion permits [231] an unintelligible criminal statute to survive uncorrected, unguided, and unexplained. I respectfully dissent.

Justice THOMAS, dissenting.

For the reasons set forth in my opinion concurring in part and concurring in the judgment in *Shepard v. United States*, 544 U.S. 13, 27, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), I believe that "[t]he constitutional infirmity of § 924(e)(1) as applied to [James] makes today's decision an unnecessary exercise." *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and its progeny prohibit judges from "mak[ing] a finding that raises [a defendant's] sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant." *United States v. Booker*, 543 U.S. 220, 317–318, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (THOMAS, J., dissenting in part). Yet that is precisely what the Armed Career Criminal Act, 18 U.S.C. § 924(e) (2000 ed. and Supp. IV), permits in this case.

Petitioner Alphonso James pleaded guilty to being a felon in possession of a firearm, in violation of § 922(g)(1) (2000 ed.), which exposed him to a maximum sentence of 10 years under § 924(a)(2). Section 924(e)(1) (2000 ed., Supp. IV), however, mandated a minimum 15–year sentence if James had three prior convictions for "a violent felony or a serious drug offense." James admitted he had been convicted of three prior felonies, but he argued that one of those felonies—his conviction for attempted burglary of a dwelling, in violation of Fla. Stat. §§ 810.02 and 777.04 (2006)—was not a "violent felony" for purposes of 18 U.S.C. § 924(e)(1) (2000 ed., Supp. IV). The District Court resolved this disputed fact in favor of the Government and increased James' sentence accordingly. Relying on the scheme we initially created in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Court of Appeals affirmed.

Section 924(e)(1), in conjunction with *Taylor*, *Shepard*, and now today's decision, "explain[s] to lower courts how to conduct factfinding that is, according to the logic of this Court's [232] intervening precedents, unconstitutional in this very case." *Shepard*, *supra*, at 27, 125 S.Ct. 1254 (THOMAS, J., concurring in part and concurring in judgment). For that reason, I respectfully dissent.

550 U.S. 124, 167 L.Ed.2d 480

Alberto R. GONZALES, Attorney General, Petitioner,

v.

Leroy CARHART et al.

Alberto R. Gonzales, Attorney General, Petitioner,

v.

Planned Parenthood Federation of America, Inc., et al.

Nos. 05–380, 05–1382.

Argued Nov. 8, 2006.

Decided April 18, 2007.

Background: Four physicians brought action against Attorney General challenging

utes.'' *Ante,* at 1598 – 1599, n. 6. None of the provisions the Court cites, however, is similar in the crucial relevant respect: None prefaces its judicially-to-be-determined requirement of risk of physical injury with the word ''otherwise,'' preceded by four confusing examples that have little in common with respect to the supposedly defining characteristic. The phrase ''shades of red,'' standing alone, does not generate confusion or unpredictability; but the phrase ''fire-engine red, light pink, maroon, *navy blue,* or colors that otherwise involve shades of red'' assuredly does so.

constitutionality of the Partial-Birth Abortion Ban Act of 2003 on its face. The United States District Court for the District of Nebraska, Richard G. Kopf, J., 331 F.Supp.2d 805, held Act unconstitutional and enjoined enforcement of Act. The Court of Appeals for the Eighth Circuit, Bye, Circuit Judge, 413 F.3d 791, affirmed. In separate suit, abortion advocacy groups challenged Act's constitutionality on its face. The United States District Court for the Northern District of California, Phyllis J. Hamilton, J., 320 F.Supp.2d 957, invalidated statute and granted permanent injunction against its enforcement. The Court of Appeals for the Ninth Circuit, Reinhardt, Circuit Judge, 435 F.3d 1163, affirmed. Petitions for writs of certiorari were granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

(1) Act's prohibition on "intact" dilation and evacuation (D & E) procedure is not void for vagueness on its face;

(2) most reasonable reading of terms of Act is that it does not sweep too broadly to include prototypical D & Es;

(3) Act does not on its face impose unconstitutional substantial obstacle on women seeking late-term, but previability, abortions;

(4) Act furthered legitimate congressional purposes; and

(5) absence of health exception did not render Act facially unconstitutional.

Reversed.

Justice Thomas filed a concurring opinion in which Justice Scalia joined.

Justice Ginsburg filed a dissenting opinion in which Justices Stevens, Souter, and Breyer joined.

1. Abortion and Birth Control ⚿105

Government has legitimate interest in protecting the life of the fetus that may become a child.

2. Abortion and Birth Control ⚿106

Before viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy. U.S.C.A. Const.Amend. 5.

3. Abortion and Birth Control ⚿104, 106

State may not impose an undue burden on right of woman to terminate pregnancy prior to viability. U.S.C.A. Const. Amend. 5.

4. Abortion and Birth Control ⚿104

An "undue burden" exists on woman's right to terminate her pregnancy if a regulation's purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

5. Abortion and Birth Control ⚿103

Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted if they are not a substantial obstacle to the woman's exercise of the right to choose to terminate unwanted pregnancy. U.S.C.A. Const.Amend. 5.

6. Abortion and Birth Control ⚿109

Partial-Birth Abortion Ban Act of 2003 prohibits knowing performance of "intact" dilation and evacuation (D & E) procedure. 18 U.S.C.A. § 1531.

7. Abortion and Birth Control ⚿109

Prohibition on "intact" dilation and evacuation (D & E) procedure in Partial-Birth Abortion Ban Act of 2003 applies to both previability and postviability because,

by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb. 18 U.S.C.A. § 1531.

8. Criminal Law ⚿13.1

Void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. U.S.C.A. Const. Amend. 5.

9. Abortion and Birth Control ⚿146
Constitutional Law ⚿1133

Partial-Birth Abortion Ban Act of 2003 provides physicians of ordinary intelligence with opportunity to know what procedure is criminalized so as to avoid being void for vagueness on its face; statute requires that living fetus be delivered vaginally to one of two anatomical landmarks depending on fetus' presentation, thereby providing physicians with objective standard, requires performance thereafter of overt act other than completion of delivery "that kills the partially delivered living fetus," and contains scienter requirements concerning actions involved in prohibited abortion, such that physicians will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability. 18 U.S.C.A. § 1531(b)(1)(A).

10. Abortion and Birth Control ⚿146
Constitutional Law ⚿1133

Partial-Birth Abortion Ban Act of 2003, which criminalizes performance of partial-birth abortions, does not encourage arbitrary or discriminatory enforcement of ban on performance of "intact" dilation and evacuation (D & E) procedure, so as to be void for vagueness; statute's requirement that living fetus be delivered to one of two anatomical landmarks establishes minimal guidelines to govern law enforcement, and scienter requirements narrow prohibition and limit prosecutorial discretion. 18 U.S.C.A. § 1531(b)(1)(A).

11. Abortion and Birth Control ⚿109
Constitutional Law ⚿1144

Most reasonable reading and understanding of terms of Partial-Birth Abortion Ban Act of 2003 is that it proscribes intentionally performing "intact" dilation and evacuation (D & E) procedure, in which living fetus is vaginally delivered to one of two anatomical landmarks and fetal skull is then pierced or crushed, but does not prohibit prototypical second trimester D & Es in which the fetus is removed from uterus in pieces, and thus does not impose undue burden on second-trimester abortions based on overbreadth. 18 U.S.C.A. § 1531(b)(1)(A, B).

12. Statutes ⚿188, 208

In interpreting statutory texts courts use the ordinary meaning of terms unless context requires a different result.

13. Constitutional Law ⚿994

Under canon of constitutional avoidance, every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.

14. Constitutional Law ⚿994

Canon of constitutional avoidance does not apply if a statute is not genuinely susceptible to two constructions.

15. Abortion and Birth Control ⚿109

Intent requirement of Partial-Birth Abortion Ban Act of 2003, which excludes liability for an accidental performance of "intact" dilation and evacuation (D & E) procedure, prevents Act from imposing undue burden on its face on physicians who, because they cannot predict amount of cer-

vical dilation, may wind up performing partial intact delivery beyond Act's anatomical landmarks. 18 U.S.C.A. § 1531(b)(1)(A).

16. Abortion and Birth Control ⚿106, 109

Partial-Birth Abortion Ban Act of 2003, which prohibits "intact" dilation and evacuation (D & E) procedures both before and after viability, does not on its face impose unconstitutional substantial obstacle on women seeking late-term, but previability, abortions. 18 U.S.C.A. § 1531.

17. Abortion and Birth Control ⚿109

Stated legitimate congressional purposes of protecting innocent human life from inhumane procedure and protecting medical community's ethics and reputation were furthered by enactment of Partial-Birth Abortion Ban Act of 2003, prohibiting "intact" dilation and evacuation (D & E) procedures, such that Act was not facially unconstitutional on basis that it was purportedly designed to place a substantial obstacle in the path of a woman seeking an abortion. 18 U.S.C.A. § 1531.

18. Health ⚿111

Government has an interest in protecting the integrity and ethics of the medical profession.

19. Abortion and Birth Control ⚿108

Absence of health exception to ban on "intact" dilation and evacuation (D & E) procedure in Partial-Birth Abortion Ban Act of 2003 did not render Act facially unconstitutional as imposing undue burden on abortion right; disagreement in medical community over whether the barred procedure is ever necessary to preserve a woman's health did not render ban facially invalid, where regulation was rational and in pursuit of legitimate ends. 18 U.S.C.A. § 1531.

20. Statutes ⚿4

State and federal legislatures have wide discretion to pass legislation in areas where there is medical and scientific uncertainty.

21. Constitutional Law ⚿2480

Congressional factfinding is reviewed under a deferential standard.

22. Constitutional Law ⚿2480

Court retains an independent constitutional duty to review Congressional factual findings where constitutional rights are at stake.

23. Abortion and Birth Control ⚿108

Absence of health exception to Partial-Birth Abortion Act's ban on "intact" dilation and evacuation (D & E) procedure could not be upheld based on congressional findings alone, where some of Act's recitations were factually incorrect and some of its important findings had been superseded. 18 U.S.C.A. § 1531.

24. Abortion and Birth Control ⚿108

As-applied challenge to constitutionality of Partial-Birth Abortion Ban Act of 2003, rather than facial challenge, was proper means by which to challenge absence of health exception if it could be shown, under discrete circumstances, that condition had or was likely to occur in which procedure prohibited by Act was necessary to protect woman's health. 18 U.S.C.A. § 1531.

West Codenotes

Negative Treatment Reconsidered

18 U.S.C.A. § 1531

[124] *Syllabus* *

Following this Court's *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

L.Ed.2d 743, decision that Nebraska's "partial birth abortion" statute violated the Federal Constitution, as interpreted in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, and *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, Congress passed the Partial–Birth Abortion Ban Act of 2003(Act) to proscribe a particular method of ending fetal life in the later stages of pregnancy. The Act does not regulate the most common abortion procedures used in the first trimester of pregnancy, when the vast majority of abortions take place. In the usual second-trimester procedure, "dilation and evacuation" (D & E), the doctor dilates the cervix and then inserts surgical instruments into the uterus and maneuvers them to grab the fetus and pull it back through the cervix and vagina. The fetus is usually ripped apart as it is removed, and the doctor may take 10 to 15 passes to remove it in its entirety. The procedure that prompted the federal Act and various state statutes, including Nebraska's, is a variation of the standard D & E, and is herein referred to as "intact D & E." The main difference between the two procedures is that in intact D & E a doctor extracts the fetus intact or largely intact with only a few passes, pulling out its entire body instead of ripping it apart. In order to allow the head to pass through the cervix, the doctor typically pierces or crushes the skull.

The Act responded to *Stenberg* in two ways. First, Congress found that unlike this Court in *Stenberg,* it was not required to accept the District Court's factual findings, and that that there was a moral, medical, and ethical consensus that partial-birth abortion is a gruesome and inhumane procedure that is never medically necessary and should be prohibited. Second, the Act's language differs from that of the Nebraska statute struck down in *Stenberg.* Among other things, the Act prohibits "knowingly perform[ing] a partial-birth abortion . . . that is [not] necessary to save the life of a mother," 18 U.S.C. § 1531(a). It defines [125] "partial-birth abortion," § 1531(b)(1), as a procedure in which the doctor: "(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the [mother's] body . . ., or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the [mother's] body . . ., for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus"; and "(B) performs the overt act, other than completion of delivery, that kills the fetus."

In No. 05–380, respondent abortion doctors challenged the Act's constitutionality on its face, and the Federal District Court granted a permanent injunction prohibiting petitioner Attorney General from enforcing the Act in all cases but those in which there was no dispute the fetus was viable. The court found the Act unconstitutional because it (1) lacked an exception allowing the prohibited procedure where necessary for the mother's health and (2) covered not merely intact D & E but also other D & Es. Affirming, the Eighth Circuit found that a lack of consensus existed in the medical community as to the banned procedure's necessity, and thus *Stenberg* required legislatures to err on the side of protecting women's health by including a health exception. In No. 05–1382, respondent abortion advocacy groups brought suit challenging the Act. The District Court enjoined the Attorney General from enforcing the Act, concluding it was unconstitutional on its face because it (1) unduly burdened a woman's ability to choose a second-trimester abortion, (2) was too vague, and (3) lacked a health exception as required by *Stenberg.* The Ninth Circuit agreed and affirmed.

Held: Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. Pp. 1625 – 1639.

1. The *Casey* Court reaffirmed what it termed *Roe's* three-part "essential holding": First, a woman has the right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State. Second, the State has the power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering the woman's life or health. And third, the State has legitimate interests from the pregnancy's outset in protecting the health of the woman and the life of the fetus that may become a child. 505 U.S., at 846, 112 S.Ct. 2791. Though all three are implicated here, it is the third that requires the most extended discussion. In deciding whether the Act furthers the Government's legitimate interest in protecting fetal life, the Court assumes, *inter alia,* that an undue burden on the previability abortion |126right exists if a regulation's "purpose or effect is to place a substantial obstacle in the [woman's] path," *id.,* at 878, 112 S.Ct. 2791, but that "[r]egulations which do no more than create a structural mechanism by which the State ... may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose," *id.,* at 877, 112 S.Ct. 2791. *Casey* struck a balance that was central to its holding, and the Court applies *Casey's* standard here. A central premise of *Casey's* joint opinion—that the government has a legitimate, substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments below. Pp. 1625 – 1627.

2. The Act, on its face, is not void for vagueness and does not impose an undue burden from any overbreadth. Pp. 1626 – 1633.

(a) The Act's text demonstrates that it regulates and proscribes performing the intact D & E procedure. First, since the doctor must "vaginally delive[r] a living fetus," § 1531(b)(1)(A), the Act does not restrict abortions involving delivery of an expired fetus or those not involving vaginal delivery, *e.g.,* hysterotomy or hysterectomy. And it applies both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism within the womb, whether or not it is viable outside the womb. Second, because the Act requires the living fetus to be delivered to a specific anatomical landmark depending on the fetus' presentation, *ibid.,* an abortion not involving such partial delivery is permitted. Third, because the doctor must perform an "overt act, other than completion of delivery, that kills the partially delivered fetus," § 1531(b)(1)(B), the "overt act" must be separate from delivery. It must also occur after delivery to an anatomical landmark, since killing "the partially delivered" fetus, when read in context, refers to a fetus that has been so delivered, *ibid.* Fourth, given the Act's scienter requirements, delivery of a living fetus past an anatomical landmark by accident or inadvertence is not a crime because it is not "deliberat[e] and intentiona[l]," § 1531(b)(1)(A). Nor is such a delivery prohibited if the fetus has not been delivered for the purpose of performing an overt act that the [doctor] knows will kill [it]." *Ibid.* Pp. 1626 – 1628.

(b) The Act is not unconstitutionally vague on its face. It satisfies both requirements of the void-for-vagueness doctrine. First, it provides doctors "of ordinary intelligence a reasonable opportunity

to know what is prohibited," *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222, setting forth "relatively clear guidelines as to prohibited conduct" and providing "objective criteria" to evaluate whether a doctor has performed a prohibited procedure, *Posters 'N' Things, Ltd. v. United States*, [127] 511 U.S. 513, 525–526, 114 S.Ct. 1747, 128 L.Ed.2d 539. Second, it does not encourage arbitrary or discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903. Its anatomical landmarks "establish minimal guidelines to govern law enforcement," *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605, and its scienter requirements narrow the scope of its prohibition and limit prosecutorial discretion, see *Kolender, supra*, at 358, 103 S.Ct. 1855. Respondents' arbitrary enforcement arguments, furthermore, are somewhat speculative, since this is a preenforcement challenge. Pp. 1628 – 1629.

(c) The Court rejects respondents' argument that the Act imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. Pp. 1629 – 1633.

(i) The Act's text discloses that it prohibits a doctor from intentionally performing an intact D & E. Its dual prohibitions correspond with the steps generally undertaken in this procedure: The doctor (1) delivers the fetus until its head lodges in the cervix, usually past the anatomical landmark for a breech presentation, see § 1531(b)(1)(A), and (2) proceeds to the overt act of piercing or crushing the fetal skull after the partial delivery, see § 1531(b)(1)(B). The Act's scienter requirements limit its reach to those physicians who carry out the intact D & E, with the intent to undertake both steps at the outset. The Act excludes most D & Es in which the doctor intends to remove the fetus in pieces from the outset. This interpretation is confirmed by comparing the Act with the Nebraska statute in *Stenberg*. There, the Court concluded that the statute encompassed D & E, which "often involve[s] a physician pulling a 'substantial portion' of a still living fetus . . ., say, an arm or leg, into the vagina prior to the death of the fetus," 530 U.S., at 939, 120 S.Ct. 2597, and rejected the Nebraska Attorney General's limiting interpretation that the statute's reference to a "procedure" that " 'kill[s] the unborn child' " was to a distinct procedure, not to the abortion procedure as a whole, *id.*, at 943, 120 S.Ct. 2597. It is apparent Congress responded to these concerns because the Act adopts the phrase "delivers a living fetus," 18 U.S.C. § 1531(b)(1)(A), instead of " 'delivering . . . a living unborn child, or a substantial portion thereof,' " 530 U.S., at 938, 120 S.Ct. 2597, thereby targeting extraction of an entire fetus rather than removal of fetal pieces; identifies specific anatomical landmarks to which the fetus must be partially delivered, § 1531(b)(1)(A), thereby clarifying that the removal of a small portion of the fetus is not prohibited; requires the fetus to be delivered so that it is partially "outside the [mother's] body," *ibid.*, thereby establishing that delivering a substantial portion of the fetus into the vagina would not subject a doctor to criminal sanctions; and adds the overt-act requirement, § 1531(b)(1), thereby making the distinction the Nebraska statute failed to draw (but the Nebraska Attorney General [128] advanced). Finally, the canon of constitutional avoidance, see, *e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645, extinguishes any lingering doubt. Interpreting the Act not to prohibit standard D & E is the most reasonable reading and understanding of its terms. Pp. 1629 – 1631.

(ii) Respondents' contrary arguments are unavailing. The contention that any D & E may result in the delivery of a living fetus beyond the Act's anatomical landmarks because doctors cannot predict the amount the cervix will dilate before the procedure does not take account of the Act's intent requirements, which preclude liability for an accidental intact D & E. The evidence supports the legislative determination that an intact delivery is almost always a conscious choice rather than a happenstance, belying any claim that a standard D & E cannot be performed without intending or foreseeing an intact D & E. That many doctors begin every D & E with the objective of removing the fetus as intact as possible based on their belief that this is safer does not prove, as respondents suggest, that every D & E might violate the Act, thereby imposing an undue burden. It demonstrates only that those doctors must adjust their conduct to the law by not attempting to deliver the fetus to an anatomical landmark. Respondents have not shown that requiring doctors to intend dismemberment before such a delivery will prohibit the vast majority of D & E abortions. Pp. 1631 – 1633.

3. The Act, measured by its text in this facial attack, does not impose a "substantial obstacle" to late-term, but previability, abortions, as prohibited by the *Casey* plurality, 505 U.S., at 878, 112 S.Ct. 2791. Pp. 1632 – 1638.

(a) The contention that the Act's congressional purpose was to create such an obstacle is rejected. The Act's stated purposes are protecting innocent human life from a brutal and inhumane procedure and protecting the medical community's ethics and reputation. The government undoubtedly "has an interest in protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg,* 521 U.S. 702, 731, 117 S.Ct. 2258, 138 L.Ed.2d 772. Moreover, *Casey* reaffirmed that the government may use its voice and its regulatory authority to show its profound respect for the life within the woman. See, *e.g.,* 505 U.S., at 873, 112 S.Ct. 2791. The Act's ban on abortions involving partial delivery of a living fetus furthers the Government's objectives. Congress determined that such abortions are similar to the killing of a newborn infant. This Court has confirmed the validity of drawing boundaries to prevent practices that extinguish life and are close to actions that are condemned. *Glucksberg, supra,* at 732–735, and n. 23, 117 S.Ct. 2258. The Act also recognizes that respect for human life finds an ultimate expression in a mother's love for her child. Whether to have an abortion requires a difficult and painful moral decision, *Casey,* [129]505 U.S., at 852–853, 112 S.Ct. 2791, which some women come to regret. In a decision so fraught with emotional consequence, some doctors may prefer not to disclose precise details of the abortion procedure to be used. It is, however, precisely this lack of information that is of legitimate concern to the State. *Id.,* at 873, 112 S.Ct. 2791. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion. The objection that the Act accomplishes little because the standard D & E is in some respects as brutal, if not more, than intact D & E is unpersuasive. It was reasonable for Congress to think that partial-birth abortion, more than standard D & E, undermines the public's perception of the doctor's appropriate role during delivery, and perverts the birth process. Pp. 1632 – 1635.

(b) The Act's failure to allow the banned procedure's use where " 'necessary, in appropriate medical judgment,

for the preservation of the [mother's] health,' " *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 327–328, 126 S.Ct. 961, 163 L.Ed.2d 812, does not have the effect of imposing an unconstitutional burden on the abortion right. The Court assumes the Act's prohibition would be unconstitutional, under controlling precedents, if it "subject[ed] [women] to significant health risks." *Id.*, at 328, 126 S.Ct. 961. Whether the Act creates such risks was, however, a contested factual question below: The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their positions. The Court's precedents instruct that the Act can survive facial attack when this medical uncertainty persists. See, *e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 360, n. 3, 117 S.Ct. 2072, 138 L.Ed.2d 501. This traditional rule is consistent with *Casey*, which confirms both that the State has an interest in promoting respect for human life at all stages in the pregnancy, and that abortion doctors should be treated the same as other doctors. Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. Other considerations also support the Court's conclusion, including the fact that safe alternatives to the prohibited procedure, such as D & E, are available. In addition, if intact D & E is truly necessary in some circumstances, a prior injection to kill the fetus allows a doctor to perform the procedure, given that the Act's prohibition only applies to the delivery of "a living fetus," 18 U.S.C. § 1531(b)(1)(A). *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 77–79, 96 S.Ct. 2831, 49 L.Ed.2d 788, distinguished. The Court rejects certain of the parties' arguments. On the one hand, the Attorney General's contention that the Act should be upheld based on the congressional findings alone fails because some of the Act's recitations are factually [130]incorrect, and some of the important findings have been superseded. Also unavailing, however, is respondents' contention that an abortion regulation must contain a health exception if "substantial medical authority supports the proposition that banning a particular procedure could endanger women's health," *Stenberg*, 530 U.S., at 938, 120 S.Ct. 2597. Interpreting *Stenberg* as leaving no margin for legislative error in the face of medical uncertainty is too exacting a standard. Marginal safety considerations, including the balance of risks, are within the legislative competence where, as here, the regulation is rational and pursues legitimate ends, and standard, safe medical options are available. Pp. 1635 – 1639.

4. These facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. Cf. *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 546 U.S. 410, 412, 126 S.Ct. 1016, 163 L.Ed.2d 990. This is the proper manner to protect the woman's health if it can be shown that in discrete and well-defined instances a condition has or is likely to occur in which the procedure prohibited by the Act must be used. No as-applied challenge need be brought if the Act's prohibition threatens a woman's life, because the Act already contains a life exception. 18 U.S.C. § 1531(a). Pp. 1638 – 1640.

413 F.3d 791, No. 05–1382, 435 F.3d 1163, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 1639. GINSBURG, J., filed a dissenting opinion, in which STEVENS,

SOUTER, and BREYER, JJ., joined, *post,* p. 1640.

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For U.S. Supreme Court briefs, see:

2006 WL 1436690 (Pet.Brief)

2006 WL 2282123 (Pet.Brief)

2006 WL 2345934 (Resp.Brief)

2006 WL 2725690 (Resp.Brief)

2006 WL 2725691 (Resp.Brief)

2006 WL 3043976 (Reply.Brief)

Justice KENNEDY delivered the opinion of the Court.

[132]These cases require us to consider the validity of the Partial–Birth Abortion Ban Act of 2003(Act), 18 U.S.C. § 1531 (2000 ed., Supp. IV), a federal statute regulating abortion procedures. In recitations preceding its operative provisions the Act refers to the Court's opinion in *Stenberg v.* [133]*Carhart,* 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), which also addressed the subject of abortion procedures used in the later stages of pregnancy. Compared to the state statute at issue in *Stenberg,* the Act is more specific concerning the instances to which it applies and in this respect more precise in its coverage. We conclude the Act should be sustained against the objections lodged by the broad, facial attack brought against it.

In No. 05–380 *(Carhart)* respondents are LeRoy Carhart, William G. Fitzhugh, William H. Knorr, and Jill L. Vibhakar, doctors who perform second-trimester abortions. These doctors filed their complaint against the Attorney General of the United States in the United States District Court for the District of Nebraska. They challenged the constitutionality of the Act and sought a permanent injunction against its enforcement. *Carhart v. Ashcroft,* 331 F.Supp.2d 805 (2004). In 2004, after a 2–week trial, the District Court granted a permanent injunction that prohibited the Attorney General from enforcing the Act in all cases but those in which there was no dispute the fetus was viable. *Id.,* at 1048. The Court of Appeals for the Eighth Circuit affirmed. 413 F.3d 791 (2005). We granted certiorari. 546 U.S. 1169, 126 S.Ct. 2901, 165 L.Ed.2d 916 (2006).

In No. 05–1382 *(Planned Parenthood)* respondents are Planned Parenthood Federation of America, Inc., Planned Parenthood Golden Gate, and the City and County of San Francisco. The Planned Parenthood entities sought to enjoin enforcement of the Act in a suit filed in the United States District Court for the Northern District of California. *Planned*

Parenthood Federation of Am. v. Ashcroft, 320 F.Supp.2d 957 (2004). The City and County of San Francisco intervened as a plaintiff. In 2004, the District Court held a trial spanning a period just short of three weeks, and it, too, enjoined the Attorney General from enforcing the Act. *Id.*, at 1035. The Court of Appeals for the Ninth Circuit affirmed. 435 F.3d 1163 (2006). We granted certiorari. 547 U.S. 1205, 126 S.Ct. 2901, 165 L.Ed.2d 916 (2006).

[134] I

A

The Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in *Stenberg*, to discuss abortion procedures in some detail. Three United States District Courts heard extensive evidence describing the procedures. In addition to the two courts involved in the instant cases the District Court for the Southern District of New York also considered the constitutionality of the Act. *National Abortion Federation v. Ashcroft*, 330 F.Supp.2d 436 (2004). It found the Act unconstitutional, *id.*, at 493, and the Court of Appeals for the Second Circuit affirmed, *National Abortion Federation v. Gonzales*, 437 F.3d 278 (2006). The three District Courts relied on similar medical evidence; indeed, much of the evidence submitted to the *Carhart* court previously had been submitted to the other two courts. 331 F.Supp.2d, at 809–810. We refer to the District Courts' exhaustive opinions in our own discussion of abortion procedures.

Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development. Between 85 and 90 percent of the approximately 1.3 million abortions performed each year in the United States take place in the first three months of pregnancy, which is to say in the first trimester. *Planned Parenthood*, *supra*, at 960, and n. 4; App. in No. 05–1382, pp. 45–48. The most common first-trimester abortion method is vacuum aspiration (otherwise known as suction curettage) in which the physician vacuums out the embryonic tissue. Early in this trimester an alternative is to use medication, such as mifepristone (commonly known as RU–486), to terminate the pregnancy. *National Abortion Federation*, *supra*, at 464, n. 20. The Act does not regulate these procedures.

[135] Of the remaining abortions that take place each year, most occur in the second trimester. The surgical procedure referred to as "dilation and evacuation" or "D & E" is the usual abortion method in this trimester. *Planned Parenthood*, *supra*, at 960–961. Although individual techniques for performing D & E differ, the general steps are the same.

A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. *National Abortion Federation*, *supra*, at 465; App. in No. 05–1382, at 61. The steps taken to cause dilation differ by physician and gestational age of the fetus. See, *e.g.*, *Carhart*, *supra*, at 852, 856, 859, 862–865, 868, 870, 873–874, 876–877, 880, 883, 886. A doctor often begins the dilation process by inserting osmotic dilators, such as laminaria (sticks of seaweed), into the cervix. The dilators can be used in combination with drugs, such as misoprostol, that increase dilation. The resulting amount of dilation is not uniform, and a doctor does not know in advance how an individual patient will respond. In general the longer dilators remain in the cervix, the more it will dilate. Yet the length of time doctors employ osmotic dilators varies. Some may keep dilators in the cervix

for two days, while others use dilators for a day or less. *National Abortion Federation, supra,* at 464–465; *Planned Parenthood, supra,* at 961.

After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of [136]evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed. See, *e.g., National Abortion Federation, supra,* at 465; *Planned Parenthood,* 320 F.Supp.2d, at 962.

Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit. *Carhart, supra,* at 907–912; *National Abortion Federation, supra,* at 474–475.

The abortion procedure that was the impetus for the numerous bans on "partial-birth abortion," including the Act, is a variation of this standard D & E. See M. Haskell, Dilation and Extraction for Late Second Trimester Abortion (1992), 1 Appellant's App. in No. 04–3379(CA8), p. 109 (hereinafter Dilation and Extraction). The medical community has not reached unanimity on the appropriate name for this D & E variation. It has been referred to as "intact D & E," "dilation and extraction" (D & X), and "intact D & X." *National Abortion Federation, supra,* at 440, n. 2; see also F. Cunningham et al., Williams Obstetrics 243 (22d ed.2005) (identifying the procedure as D & X); Danforth's Obstetrics and Gynecology 567 (J. Scott, R. Gibbs, B. Karlan, & A. Haney eds. 9th ed.2003) (identifying the procedure as intact D & X); M. Paul, E. Lichtenberg, L. Borgatta, D. Grimes, & P. Stubblefield, A Clinician's Guide to Medical and Surgical [137]Abortion 136 (1999) (identifying the procedure as intact D & E). For discussion purposes this D & E variation will be referred to as intact D & E. The main difference between the two procedures is that in intact D & E a doctor extracts the fetus intact or largely intact with only a few passes. There are no comprehensive statistics indicating what percentage of all D & Es are performed in this manner.

Intact D & E, like regular D & E, begins with dilation of the cervix. Sufficient dilation is essential for the procedure. To achieve intact extraction some doctors thus may attempt to dilate the cervix to a greater degree. This approach has been called "serial" dilation. *Carhart,* 331 F.Supp.2d, at 856, 870, 873; *Planned Parenthood, supra,* at 965. Doctors who attempt at the outset to perform intact D & E may dilate for two full days or use up to 25 osmotic dilators. See, *e.g.,* Dilation and

Extraction 110; *Carhart*, *supra*, at 865, 868, 876, 886.

In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. One doctor, for example, testified:

> "If I know I have good dilation and I reach in and the fetus starts to come out and I think I can accomplish it, the abortion with an intact delivery, then I use my forceps a little bit differently. I don't close them quite so much, and I just gently draw the tissue out attempting to have an intact delivery, if possible." App. in No. 05–1382, at 74.

Rotating the fetus as it is being pulled decreases the odds of dismemberment. *Carhart*, *supra*, at 868–869; App. in No. 05–380, pp. 40–41; 5 Appellant's App. in No. 04–3379(CA8), at 1469. A doctor also "may use forceps to grasp a fetal part, pull it down, and re-grasp the fetus at a higher level—sometimes using both his hand and a forceps—to exert traction to retrieve the fetus intact until the head is lodged in the [cervix]." *Carhart*, *supra*, at 886–887.

[138] Intact D & E gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation. Dilation and Extraction 110–111. In the usual intact D & E the fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass. See, *e.g.*, *ibid.;* App. in No. 05–380, at 577; App. in No. 05–1382, at 74, 282. Haskell explained the next step as follows:

> " 'At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down).
>
> " 'While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.
>
> " '[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.
>
> " 'The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.' " H.R.Rep. No. 108–58, p. 3 (2003).

This is an abortion doctor's clinical description. Here is another description from a nurse who witnessed the same method performed on a $26^{1/2}$-week fetus and who testified before the Senate Judiciary Committee:

> " 'Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything[139] but the head. The doctor kept the head right inside the uterus . . . .
>
> " 'The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.
>
> " 'The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp . . . .
>
> " 'He cut the umbilical cord and delivered the placenta. He threw the baby

in a pan, along with the placenta and the instruments he had just used.' " *Ibid.*

Dr. Haskell's approach is not the only method of killing the fetus once its head lodges in the cervix, and "the process has evolved" since his presentation. *Planned Parenthood,* 320 F.Supp.2d, at 965. Another doctor, for example, squeezes the skull after it has been pierced "so that enough brain tissue exudes to allow the head to pass through." App. in No. 05–380, at 41; see also *Carhart,* 331 F.Supp.2d, at 866–867, 874. Still other physicians reach into the cervix with their forceps and crush the fetus' skull. *Id.,* at 858, 881. Others continue to pull the fetus out of the woman until it disarticulates at the neck, in effect decapitating it. These doctors then grasp the head with forceps, crush it, and remove it. *Id.,* at 864, 878; see also *Planned Parenthood, supra,* at 965.

Some doctors performing an intact D & E attempt to remove the fetus without collapsing the skull. See *Carhart, supra,* at 866, 869. Yet one doctor would not allow delivery of a live fetus younger than 24 weeks because "the objective of [his] procedure is to perform an abortion," not a birth. App. in No. 05–1382, at 408–409. The doctor thus answered in the affirmative when asked whether he would "hold the fetus' head on the internal side of the [cervix] in order to [140]collapse the skull" and kill the fetus before it is born. *Id.,* at 409; see also *Carhart, supra,* at 862, 878. Another doctor testified he crushes a fetus' skull not only to reduce its size but also to ensure the fetus is dead before it is removed. For the staff to have to deal with a fetus that has "some viability to it, some movement of limbs," according to this doctor, "[is] always a difficult situation." App. in No. 05–380, at 94; see *Carhart, supra,* at 858.

D & E and intact D & E are not the only second-trimester abortion methods. Doctors also may abort a fetus through medical induction. The doctor medicates the woman to induce labor, and contractions occur to deliver the fetus. Induction, which unlike D & E should occur in a hospital, can last as little as 6 hours but can take longer than 48. It accounts for about 5 percent of second-trimester abortions before 20 weeks of gestation and 15 percent of those after 20 weeks. Doctors turn to two other methods of second-trimester abortion, hysterotomy and hysterectomy, only in emergency situations because they carry increased risk of complications. In a hysterotomy, as in a cesarean section, the doctor removes the fetus by making an incision through the abdomen and uterine wall to gain access to the uterine cavity. A hysterectomy requires the removal of the entire uterus. These two procedures represent about 0.07 percent of second-trimester abortions. *National Abortion Federation,* 330 F.Supp.2d, at 467; *Planned Parenthood, supra,* at 962–963.

B

After Dr. Haskell's procedure received public attention, with ensuing and increasing public concern, bans on " 'partial birth abortion' " proliferated. By the time of the *Stenberg* decision, about 30 States had enacted bans designed to prohibit the procedure. 530 U.S., at 995–996, and nn. 12–13, 120 S.Ct. 2597 (THOMAS, J., dissenting); see also H.R.Rep. No. 108–58, at 4–5. In 1996, Congress also acted to ban partial-birth abortion. President Clinton vetoed the congressional legislation,[141] and the Senate failed to override the veto. Congress approved another bill banning the procedure in 1997, but President Clinton again vetoed it. In 2003, after this Court's decision in *Stenberg,* Congress passed the Act at issue here. H.R.Rep. No. 108–58, at 12–14. On November 5,

2003, President Bush signed the Act into law. It was to take effect the following day. 18 U.S.C. § 1531(a) (2000 ed., Supp. IV).

The Act responded to *Stenberg* in two ways. First, Congress made factual findings. Congress determined that this Court in *Stenberg* "was required to accept the very questionable findings issued by the district court judge," § 2(7), 117 Stat. 1202, notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 768, ¶ (7) (hereinafter Congressional Findings), but that Congress was "not bound to accept the same factual findings," *id.*, ¶ (8). Congress found, among other things, that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited." *Id.*, ¶ (1).

Second, and more relevant here, the Act's language differs from that of the Nebraska statute struck down in *Stenberg*. See 530 U.S., at 921–922, 120 S.Ct. 2597 (quoting Neb.Rev.Stat. Ann. §§ 28–328(1), 28–326(9) (Supp.1999)). The operative provisions of the Act provide in relevant part:

> "(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.
>
> [142]"(b) As used in this section—
>
> "(1) the term 'partial-birth abortion' means an abortion in which the person performing the abortion—
>
> "(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
>
> "(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and
>
> "(2) the term 'physician' means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: *Provided, however,* That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.
>
> . . . . .
>
> "(d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.
>
> "(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the be-

ginning of the [143]trial for not more than 30 days to permit such a hearing to take place.

"(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section."

18 U.S.C. § 1531 (2000 ed., Supp. IV). The Act also includes a provision authorizing civil actions that is not of relevance here. § 1531(c).

C

The District Court in *Carhart* concluded the Act was unconstitutional for two reasons. First, it determined the Act was unconstitutional because it lacked an exception allowing the procedure where necessary for the health of the mother. 331 F.Supp.2d, at 1004–1030. Second, the District Court found the Act deficient because it covered not merely intact D & E but also certain other D & Es. *Id.*, at 1030–1037.

The Court of Appeals for the Eighth Circuit addressed only the lack of a health exception. 413 F.3d, at 803–804. The court began its analysis with what it saw as the appropriate question—"whether 'substantial medical authority' supports the medical necessity of the banned procedure." *Id.*, at 796 (quoting *Stenberg, supra*, at 938, 120 S.Ct. 2597). This was the proper framework, according to the Court of Appeals, because "when a lack of consensus exists in the medical community, the Constitution requires legislatures to err on the side of protecting women's health by including a health exception." 413 F.3d, at 796. The court rejected the Attorney General's attempt to demonstrate changed evidentiary circumstances since *Stenberg* and considered itself bound by *Stenberg's* conclusion that a health exception was required. 413 F.3d, at 803 (explaining "[t]he record in [the] case and the record in *Stenberg* [were] similar in all significant respects"). It invalidated the Act. *Ibid.*

[144]D

The District Court in *Planned Parenthood* concluded the Act was unconstitutional "because it (1) pose[d] an undue burden on a woman's ability to choose a second trimester abortion; (2)[was] unconstitutionally vague; and (3) require[d] a health exception as set forth by . . . *Stenberg*." 320 F.Supp.2d, at 1034–1035.

The Court of Appeals for the Ninth Circuit agreed. Like the Court of Appeals for the Eighth Circuit, it concluded the absence of a health exception rendered the Act unconstitutional. The court interpreted *Stenberg* to require a health exception unless "there is *consensus in the medical community* that the banned procedure is never medically necessary to preserve the health of women." 435 F.3d, at 1173. Even after applying a deferential standard of review to Congress' factual findings, the Court of Appeals determined "substantial disagreement exists in the medical community regarding whether" the procedures prohibited by the Act are ever necessary to preserve a woman's health. *Id.*, at 1175–1176.

The Court of Appeals concluded further that the Act placed an undue burden on a woman's ability to obtain a second-trimester abortion. The court found the textual differences between the Act and the Nebraska statute struck down in *Stenberg* insufficient to distinguish D & E and intact D & E. 435 F.3d, at 1178–1180. As a result, according to the Court of Appeals, the Act imposed an undue burden because it prohibited D & E. *Id.*, at 1180–1181.

Finally, the Court of Appeals found the Act void for vagueness. *Id.*, at 1181. Abortion doctors testified they were uncer-

tain which procedures the Act made criminal. The court thus concluded the Act did not offer physicians clear warning of its regulatory reach. *Id.*, at 1181–1184. Resting on its understanding of the remedial framework established by this Court in *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328–330, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006), the Court of Appeals held [145] the Act was unconstitutional on its face and should be permanently enjoined. 435 F.3d, at 1184–1191.

II

The principles set forth in the joint opinion in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), did not find support from all those who join the instant opinion. See *id.*, at 979–1002, 112 S.Ct. 2791 (SCALIA, J., joined by THOMAS, J., *inter alios*, concurring in judgment in part and dissenting in part). Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.

[1] *Casey* involved a challenge to *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The opinion contains this summary:

> "It must be stated at the outset and with clarity that *Roe's* essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each." 505 U.S., at 846, 112 S.Ct. 2791 (opinion of the Court).

[146] Though all three holdings are implicated in the instant cases, it is the third that requires the most extended discussion; for we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.

To implement its holding, *Casey* rejected both *Roe's* rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted. 505 U.S., at 875–876, 878, 112 S.Ct. 2791 (plurality opinion). On this point *Casey* overruled the holdings in two cases because they undervalued the State's interest in potential life. See *id.*, at 881–883, 112 S.Ct. 2791 (joint opinion) (overruling *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983)).

[2–5] We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." 505 U.S., at 879, 112 S.Ct. 2791 (plurality opinion). It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman

seeking an abortion before the fetus attains viability." *Id.,* at 878, 112 S.Ct. 2791. On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.,* at 877, 112 S.Ct. 2791. *Casey*, in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar.

III

[6] We begin with a determination of the Act's operation and effect. A straightforward reading of the Act's text demonstrates its purpose and the scope of its provisions: It regulates[147] and proscribes, with exceptions or qualifications to be discussed, performing the intact D & E procedure.

Respondents agree the Act encompasses intact D & E, but they contend its additional reach is both unclear and excessive. Respondents assert that, at the least, the Act is void for vagueness because its scope is indefinite. In the alternative, respondents argue the Act's text proscribes all D & Es. Because D & E is the most common second-trimester abortion method, respondents suggest the Act imposes an undue burden. In this litigation the Attorney General does not dispute that the Act would impose an undue burden if it covered standard D & E.

We conclude that the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face.

A

The Act punishes "knowingly perform[ing]" a "partial-birth abortion." § 1531(a) (2000 ed., Supp. IV). It defines the unlawful abortion in explicit terms. § 1531(b)(1).

[7] First, the person performing the abortion must "vaginally delive[r] a living fetus." § 1531(b)(1)(A). The Act does not restrict an abortion procedure involving the delivery of an expired fetus. The Act, furthermore, is inapplicable to abortions that do not involve vaginal delivery (for instance, hysterotomy or hysterectomy). The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb. See, *e.g., Planned Parenthood,* 320 F.Supp.2d, at 971–972. We do not understand this point to be contested by the parties.

Second, the Act's definition of partial-birth abortion requires the fetus to be delivered "until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part[148] of the fetal trunk past the navel is outside the body of the mother." § 1531(b)(1)(A) (2000 ed., Supp. IV). The Attorney General concedes, and we agree, that if an abortion procedure does not involve the delivery of a living fetus to one of these "anatomical 'landmarks' "—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply. Brief for Petitioner in No. 05–380, p. 46.

Third, to fall within the Act, a doctor must perform an "overt act, other than completion of delivery, that kills the partially delivered living fetus." § 1531(b)(1)(B) (2000 ed., Supp. IV). For purposes of criminal liability, the overt act causing the fetus' death must be separate from delivery. And the overt act must

occur after the delivery to an anatomical landmark. This is because the Act proscribes killing "the partially delivered" fetus, which, when read in context, refers to a fetus that has been delivered to an anatomical landmark. *Ibid.*

Fourth, the Act contains scienter requirements concerning all the actions involved in the prohibited abortion. To begin with, the physician must have "deliberately and intentionally" delivered the fetus to one of the Act's anatomical landmarks. § 1531(b)(1)(A). If a living fetus is delivered past the critical point by accident or inadvertence, the Act is inapplicable. In addition, the fetus must have been delivered "for the purpose of performing an overt act that the [doctor] knows will kill [it]." *Ibid.* If either intent is absent, no crime has occurred. This follows from the general principle that where scienter is required no crime is committed absent the requisite state of mind. See generally 1 W. LaFave, Substantive Criminal Law § 5.1 (2d ed.2003) (hereinafter LaFave); 1 C. Torcia, Wharton's Criminal Law § 27 (15th ed.1993).

B

[8] Respondents contend the language described above is indeterminate, and they thus argue the Act is unconstitutionally vague on its face. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525, 114 S.Ct. 1747, 128 L.Ed.2d 539 (1994). The Act satisfies both requirements.

[9] The Act provides doctors "of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Indeed, it sets forth "relatively clear guidelines as to prohibited conduct" and provides "objective criteria" to evaluate whether a doctor has performed a prohibited procedure. *Posters 'N' Things, supra*, at 525–526, 114 S.Ct. 1747. Unlike the statutory language in *Stenberg* that prohibited the delivery of a "'substantial portion'" of the fetus—where a doctor might question how much of the fetus is a substantial portion—the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other. *Stenberg*, 530 U.S., at 922, 120 S.Ct. 2597 (quoting Neb. Rev.Stat. Ann. § 28–326(9) (Supp.1999)). Doctors performing D & E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability.

This conclusion is buttressed by the intent that must be proved to impose liability. The Court has made clear that scienter requirements alleviate vagueness concerns. *Posters 'N' Things, supra*, at 526, 114 S.Ct. 1747; see also *Colautti v. Franklin*, 439 U.S. 379, 395, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*"). The Act requires the doctor deliberately to have delivered the fetus to an anatomical landmark. 18 U.S.C. § 1531(b)(1)(A) (2000 ed., Supp. IV). Because a doctor performing a D & E will not face criminal liability if he or she delivers a fetus beyond the prohibited point by mistake, the Act cannot be described as "a trap for those who act in good faith." *Co-*

lautti, supra, at 395, 99 S.Ct. 675 (internal quotation marks omitted).

[10] Respondents likewise have failed to show that the Act should be invalidated on its face because it encourages arbitrary or discriminatory enforcement. *Kolender, supra,* at 357, 103 S.Ct. 1855. Just as the Act's anatomical landmarks provide doctors with objective standards, they also "establish minimal guidelines to govern law enforcement." *Smith v. Goguen,* 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). The scienter requirements narrow the scope of the Act's prohibition and limit prosecutorial discretion. It cannot be said that the Act "vests virtually complete discretion in the hands of [law enforcement] to determine whether the [doctor] has satisfied [its provisions]." *Kolender, supra,* at 358, 103 S.Ct. 1855 (invalidating a statute regulating loitering). Respondents' arguments concerning arbitrary enforcement, furthermore, are somewhat speculative. This is a preenforcement challenge, where "no evidence has been, or could be, introduced to indicate whether the [Act] has been enforced in a discriminatory manner or with the aim of inhibiting [constitutionally protected conduct]." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 503, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). The Act is not vague.

C

[11] We next determine whether the Act imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. A review of the statutory text discloses the limits of its reach. The Act prohibits intact D & E; and, notwithstanding respondents' arguments, it does not prohibit the D & E procedure in which the fetus is removed in parts.

1

The Act prohibits a doctor from intentionally performing an intact D & E. The dual prohibitions of the Act, both of which are necessary for criminal liability, correspond with the steps generally undertaken during this type of procedure.[151] First, a doctor delivers the fetus until its head lodges in the cervix, which is usually past the anatomical landmark for a breech presentation. See 18 U.S.C. § 1531(b)(1)(A) (2000 ed., Supp. IV). Second, the doctor proceeds to pierce the fetal skull with scissors or crush it with forceps. This step satisfies the overt-act requirement because it kills the fetus and is distinct from delivery. See § 1531(b)(1)(B). The Act's intent requirements, however, limit its reach to those physicians who carry out the intact D & E after intending to undertake both steps at the outset.

The Act excludes most D & Es in which the fetus is removed in pieces, not intact. If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability. A doctor performing a standard D & E procedure can often "tak[e] about 10–15 'passes' through the uterus to remove the entire fetus." *Planned Parenthood,* 320 F.Supp.2d, at 962. Removing the fetus in this manner does not violate the Act because the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery. § 1531(b)(1) (2000 ed., Supp. IV).

A comparison of the Act with the Nebraska statute struck down in *Stenberg* confirms this point. The statute in *Stenberg* prohibited " 'deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such

procedure knows will kill the unborn child and does kill the unborn child.' " 530 U.S., at 922, 120 S.Ct. 2597 (quoting Neb.Rev. Stat. Ann. § 28–326(9) (Supp.1999)). The Court concluded that this statute encompassed D & E because "D & E will often involve a physician pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus." 530 U.S., at 939, 120 S.Ct. 2597. The Court also rejected the limiting interpretation urged by Nebraska's Attorney General that the statute's reference to
[152] a "procedure" that " 'kill[s] the unborn child' " was to a distinct procedure, not to the abortion procedure as a whole. *Id.*, at 943, 120 S.Ct. 2597.

[12] Congress, it is apparent, responded to these concerns because the Act departs in material ways from the statute in *Stenberg*. It adopts the phrase "delivers a living fetus," § 1531(b)(1)(A) (2000 ed., Supp. IV), instead of " 'delivering ... a living unborn child, or a substantial portion thereof,' " 530 U.S., at 938, 120 S.Ct. 2597 (quoting Neb.Rev.Stat. Ann. § 28–326(9) (Supp.1999)). The Act's language, unlike the statute in *Stenberg,* expresses the usual meaning of "deliver" when used in connection with "fetus," namely, extraction of an entire fetus rather than removal of fetal pieces. See Stedman's Medical Dictionary 470 (27th ed.2000) (defining deliver as "[t]o assist a woman in childbirth" and "[t]o extract from an enclosed place, as the fetus from the womb, an object or foreign body"); see also I. Dox, B. Melloni, G. Eisner, & J. Melloni, The HarperCollins Illustrated Medical Dictionary 160 (4th ed.2001); Merriam-Webster's Collegiate Dictionary 306 (10th ed.1997). The Act thus displaces the interpretation of "delivering" dictated by the Nebraska statute's reference to a "substantial portion" of the fetus. *Stenberg, supra,* at 944, 120 S.Ct. 2597 (indicating that the Nebraska "statute itself specifies that it applies *both* to delivering 'an intact unborn child' *or* 'a substantial portion thereof' "). In interpreting statutory texts courts use the ordinary meaning of terms unless context requires a different result. See, *e.g.,* 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47:28 (rev. 6th ed.2000). Here, unlike in *Stenberg,* the language does not require a departure from the ordinary meaning. D & E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix.

The identification of specific anatomical landmarks to which the fetus must be partially delivered also differentiates the Act from the statute at issue in *Stenberg*.
[153] § 1531(b)(1)(A) (2000 ed., Supp. IV). The Court in *Stenberg* interpreted " 'substantial portion' " of the fetus to include an arm or a leg. 530 U.S., at 939, 120 S.Ct. 2597. The Act's anatomical landmarks, by contrast, clarify that the removal of a small portion of the fetus is not prohibited. The landmarks also require the fetus to be delivered so that it is partially "outside the body of the mother." § 1531(b)(1)(A). To come within the ambit of the Nebraska statute, on the other hand, a substantial portion of the fetus only had to be delivered into the vagina; no part of the fetus had to be outside the body of the mother before a doctor could face criminal sanctions. *Id.,* at 938–939, 120 S.Ct. 2597.

By adding an overt-act requirement Congress sought further to meet the Court's objections to the state statute considered in *Stenberg*. Compare 18 U.S.C. § 1531(b)(1) (2000 ed., Supp. IV) with Neb. Rev.Stat. Ann. § 28–326(9) (Supp.1999). The Act makes the distinction the Nebraska statute failed to draw (but the Nebraska Attorney General advanced) by differentiating between the overall partial-birth

abortion and the distinct overt act that kills the fetus. See *Stenberg, supra,* at 943–944, 120 S.Ct. 2597. The fatal overt act must occur after delivery to an anatomical landmark, and it must be something "other than [the] completion of delivery." § 1531(b)(1)(B). This distinction matters because, unlike intact D & E, standard D & E does not involve a delivery followed by a fatal act.

[13, 14] The canon of constitutional avoidance, finally, extinguishes any lingering doubt as to whether the Act covers the prototypical D & E procedure. " '[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (quoting *Hooper v. California,* 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895)). It is true this longstanding maxim of statutory interpretation has, in the past, fallen by the wayside when the Court confronted a statute regulating abortion. The Court at times employed an antagonistic[154] " 'canon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.' " *Stenberg, supra,* at 977, 120 S.Ct. 2597 (KENNEDY, J., dissenting) (quoting *Thornburgh,* 476 U.S., at 829, 106 S.Ct. 2169 (O'Connor, J., dissenting); some internal quotation marks omitted). *Casey* put this novel statutory approach to rest. *Stenberg, supra,* at 977, 120 S.Ct. 2597 (KENNEDY, J., dissenting). *Stenberg* need not be interpreted to have revived it. We read that decision instead to stand for the uncontroversial proposition that the canon of constitutional avoidance does not apply if a statute is not "genuinely susceptible to two constructions." *Almendarez–Torres v. United States,* 523 U.S. 224, 238, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); see also *Clark v. Martinez,* 543 U.S. 371, 385, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005). In *Stenberg* the Court found the statute covered D & E. 530 U.S., at 938–945, 120 S.Ct. 2597. Here, by contrast, interpreting the Act so that it does not prohibit standard D & E is the most reasonable reading and understanding of its terms.

2

[15] Contrary arguments by respondents are unavailing. Respondents look to situations that might arise during D & E, situations not examined in *Stenberg.* They contend—relying on the testimony of numerous abortion doctors—that D & E may result in the delivery of a living fetus beyond the Act's anatomical landmarks in a significant fraction of cases. This is so, respondents say, because doctors cannot predict the amount the cervix will dilate before the abortion procedure. It might dilate to a degree that the fetus will be removed largely intact. To complete the abortion, doctors will commit an overt act that kills the partially delivered fetus. Respondents thus posit that any D & E has the potential to violate the Act, and that a physician will not know beforehand whether the abortion will proceed in a prohibited manner. Brief for Respondent Planned Parenthood et al. in No. 05–1382, p. 38.

[155]This reasoning, however, does not take account of the Act's intent requirements, which preclude liability from attaching to an accidental intact D & E. If a doctor's intent at the outset is to perform a D & E in which the fetus would not be delivered to either of the Act's anatomical landmarks, but the fetus nonetheless is delivered past one of those points, the requisite and prohibited scienter is not present. 18 U.S.C. § 1531(b)(1)(A) (2000 ed., Supp. IV). When a doctor in that situation completes an abortion by per-

forming an intact D & E, the doctor does not violate the Act. It is true that intent to cause a result may sometimes be inferred if a person "knows that that result is practically certain to follow from his conduct." 1 LaFave § 5.2(a), at 341. Yet abortion doctors intending at the outset to perform a standard D & E procedure will not know that a prohibited abortion "is practically certain to follow from" their conduct. *Ibid.* A fetus is only delivered largely intact in a small fraction of the overall number of D & E abortions. *Planned Parenthood,* 320 F.Supp.2d, at 965.

The evidence also supports a legislative determination that an intact delivery is almost always a conscious choice rather than a happenstance. Doctors, for example, may remove the fetus in a manner that will increase the chances of an intact delivery. See, *e.g.,* App. in No. 05–1382, pp. 74, 452. And intact D & E is usually described as involving some manner of serial dilation. See, *e.g.,* Dilation and Extraction 110. Doctors who do not seek to obtain this serial dilation perform an intact D & E on far fewer occasions. See, *e.g., Carhart,* 331 F.Supp.2d, at 857–858 ("In order for intact removal to occur on a regular basis, Dr. Fitzhugh would have to dilate his patients with a second round of laminaria"). This evidence belies any claim that a standard D & E cannot be performed without intending or foreseeing an intact D & E.

Many doctors who testified on behalf of respondents, and who objected to the Act, do not perform an intact D & E by accident. On the contrary, they begin every D & E abortion [156] with the objective of removing the fetus as intact as possible. See, *e.g., id.,* at 869 ("Since Dr. Chasen believes that the intact D & E is safer than the dismemberment D & E, Dr. Chasen's goal is to perform an intact D & E every time"); see also *id.,* at 873, 886. This does not prove, as respondents suggest, that every D & E might violate the Act and that the Act therefore imposes an undue burden. It demonstrates only that those doctors who intend to perform a D & E that would involve delivery of a living fetus to one of the Act's anatomical landmarks must adjust their conduct to the law by not attempting to deliver the fetus to either of those points. Respondents have not shown that requiring doctors to intend dismemberment before delivery to an anatomical landmark will prohibit the vast majority of D & E abortions. The Act, then, cannot be held invalid on its face on these grounds.

IV

[16] Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey,* 505 U.S., at 878, 112 S.Ct. 2791 (plurality opinion). The abortions affected by the Act's regulations take place both previability and postviability; so the quoted language and the undue burden analysis it relies upon are applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions. The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.

A

[17] The Act's purposes are set forth in recitals preceding its operative provisions. A description of the prohibited abortion procedure demonstrates the rationale for the congressional enactment. The Act proscribes a method of abortion [157] in which a fetus is killed just inches before

completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." Congressional Findings ¶ (14)(N). The Act expresses respect for the dignity of human life.

[18] Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion. The findings in the Act explain:

> "Partial-birth abortion ... confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life." *Id.,* ¶ (14)(J).

There can be no doubt the government "has an interest in protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg,* 521 U.S. 702, 731, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); see also *Barsky v. Board of Regents of Univ. of N. Y.,* 347 U.S. 442, 451, 74 S.Ct. 650, 98 L.Ed. 829 (1954) (indicating the State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine). Under our precedents it is clear the State has a significant role to play in regulating the medical profession.

Casey reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after *Roe* had "undervalue[d] the State's interest in potential life." 505 U.S., at 873, 112 S.Ct. 2791 (plurality opinion); see also *id.,* at 871, 112 S.Ct. 2791. The plurality opinion indicated "[t]he fact that a law which serves a valid purpose, one not designed to strike [158] at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.,* at 874, 112 S.Ct. 2791. This was not an idle assertion. The three premises of *Casey* must coexist. See *id.,* at 846, 112 S.Ct. 2791 (opinion of the Court). The third premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey's* requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life. Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant," Congressional Findings ¶ (14)(L), and thus it was concerned

with "draw[ing] a bright line that clearly distinguishes abortion and infanticide," *id.*, ¶ (14)(G). The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned. *Glucksberg* found reasonable the State's "fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia." 521 U.S., at 732–735, and n. 23, 117 S.Ct. 2258.

[159]Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. *Casey, supra,* at 852–853, 112 S.Ct. 2791 (opinion of the Court). While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05–380, pp. 22–24. Severe depression and loss of esteem can follow. See *ibid.*

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. See, *e.g., National Abortion Federation,* 330 F.Supp.2d, at 466, n. 22 ("Most of [the plaintiffs'] experts acknowledged that they do not describe to their patients what [the D & E and intact D & E] procedures entail in clear and precise terms"); see also *id.,* at 479.

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. *Casey, supra,* at 873, 112 S.Ct. 2791 (plurality opinion) ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning"). The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what [160]she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

It is objected that the standard D & E is in some respects as brutal, if not more, than the intact D & E, so that the legislation accomplishes little. What we have already said, however, shows ample justification for the regulation. Partial-birth abortion, as defined by the Act, differs from a standard D & E because the for-

mer occurs when the fetus is partially outside the mother to the point of one of the Act's anatomical landmarks. It was reasonable for Congress to think that partial-birth abortion, more than standard D & E, "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." Congressional Findings ¶(14)(K). There would be a flaw in this Court's logic, and an irony in its jurisprudence, were we first to conclude a ban on both D & E and intact D & E was overbroad and then to say it is irrational to ban only intact D & E because that does not proscribe both procedures. In sum, we reject the contention that the congressional purpose of the Act was "to place a substantial obstacle in the path of a woman seeking an abortion." 505 U.S., at 878, 112 S.Ct. 2791 (plurality opinion).

[161] B

[19] The Act's furtherance of legitimate government interests bears upon, but does not resolve, the next question: whether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where " 'necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother.' " *Ayotte*, 546 U.S., at 327–328, 126 S.Ct. 961 (quoting *Casey*, *supra*, at 879, 112 S.Ct. 2791 (plurality opinion)). The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it "subject[ed] [women] to significant health risks." *Ayotte*, *supra*, at 328, 126 S.Ct. 961; see also *Casey*, *supra*, at 880, 112 S.Ct. 2791 (opinion of the Court). In *Ayotte* the parties agreed a health exception to the challenged parental-involvement statute was necessary "to avert serious and often irreversible damage to [a pregnant minor's] health." 546 U.S., at 328, 126 S.Ct. 961. Here, by contrast, whether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position.

Respondents presented evidence that intact D & E may be the safest method of abortion, for reasons similar to those adduced in *Stenberg*. See 530 U.S., at 932, 120 S.Ct. 2597. Abortion doctors testified, for example, that intact D & E decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments and does not require the removal of bony fragments of the dismembered fetus, fragments that may be sharp. Respondents also presented evidence that intact D & E was safer both because it reduces the risks that fetal parts will remain in the uterus and because it takes less time to complete. Respondents, in addition, proffered evidence that intact D & E was safer for women with certain medical conditions or women with fetuses that had certain anomalies. See, *e.g.*, *Carhart*, 331 F.Supp.2d, at 923–929; *National* [162] *Abortion Federation*, 330 F.Supp.2d, at 470–474; *Planned Parenthood*, 320 F.Supp.2d, at 982–983.

These contentions were contradicted by other doctors who testified in the District Courts and before Congress. They concluded that the alleged health advantages were based on speculation without scientific studies to support them. They considered D & E always to be a safe alternative. See, *e.g.*, *Carhart*, *supra*, at 930–940; *National Abortion Federation*, *supra*, at 470–474; *Planned Parenthood*, 320 F.Supp.2d, at 983.

There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women. See, *e.g., id.,* at 1033 ("[T]here continues to be a division of opinion among highly qualified experts regarding the necessity or safety of intact D & E"); see also *National Abortion Federation, supra,* at 482. The three District Courts that considered the Act's constitutionality appeared to be in some disagreement on this central factual question. The District Court for the District of Nebraska concluded "the banned procedure is, sometimes, the safest abortion procedure to preserve the health of women." *Carhart, supra,* at 1017, 120 S.Ct. 2597. The District Court for the Northern District of California reached a similar conclusion. *Planned Parenthood, supra,* at 1002, 112 S.Ct. 2791 (finding intact D & E was "under certain circumstances . . . significantly safer than D & E by disarticulation"). The District Court for the Southern District of New York was more skeptical of the purported health benefits of intact D & E. It found the Attorney General's "expert witnesses reasonably and effectively refuted [the plaintiffs'] proffered bases for the opinion that [intact D & E] has safety advantages over other second-trimester abortion procedures." *National Abortion Federation,* 330 F.Supp.2d, at 479. In addition it did "not believe that many of [the plaintiffs'] purported reasons for why [intact D & E] is medically necessary [were] credible; rather [it found them to be] theoretical or false." *Id.,* at 480. The court nonetheless invalidated[163] the Act because it determined "a significant body of medical opinion . . . holds that D & E has safety advantages over induction and that [intact D & E] has some safety advantages (however hypothetical and unsubstantiated by scientific evidence) over D & E for some women in some circumstances." *Ibid.*

[20] The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. See *Kansas v. Hendricks,* 521 U.S. 346, 360, n. 3, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); *Jones v. United States,* 463 U.S. 354, 364–365, n. 13, 370, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983); *Lambert v. Yellowley,* 272 U.S. 581, 597, 47 S.Ct. 210, 71 L.Ed. 422 (1926); *Collins v. Texas,* 223 U.S. 288, 297–298, 32 S.Ct. 286, 56 L.Ed. 439 (1912); *Jacobson v. Massachusetts,* 197 U.S. 11, 30–31, 25 S.Ct. 358, 49 L.Ed. 643 (1905); see also *Stenberg, supra,* at 969–972, 120 S.Ct. 2597 (KENNEDY, J., dissenting); *Marshall v. United States,* 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad").

This traditional rule is consistent with *Casey,* which confirms the State's interest in promoting respect for human life at all stages in the pregnancy. Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community. In *Casey* the controlling opinion held an informed-consent requirement in the abortion context was "no different from a requirement that a doctor give certain specific information about any medical procedure." 505 U.S., at 884, 112 S.Ct. 2791 (joint opinion). The opinion stated "the doctor-patient relation here is entitled to the same solicitude it receives in other contexts." *Ibid.;* see also *Webster v. Reproductive Health*

Services, 492 U.S. 490, 518–519, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) [164](plurality opinion) (criticizing *Roe's* trimester framework because, *inter alia,* it "left this Court to serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States" (internal quotation marks omitted)); *Mazurek v. Armstrong,* 520 U.S. 968, 973, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) *(per curiam)* (upholding a restriction on the performance of abortions to licensed physicians despite the respondents' contention "all health evidence contradicts the claim that there is any health basis for the law" (internal quotation marks omitted)).

Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. See *Hendricks, supra,* at 360, n. 3, 117 S.Ct. 2072. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure. As we have noted, the Act does not proscribe D & E. One District Court found D & E to have extremely low rates of medical complications. *Planned Parenthood, supra,* at 1000, 112 S.Ct. 2791. Another indicated D & E was "generally the safest method of abortion during the second trimester." *Carhart,* 331 F.Supp.2d, at 1031; see also *National Abortion Federation, supra,* at 467–468 (explaining that "[e]xperts testifying for both sides" agreed D & E was safe). In addition the Act's prohibition only applies to the delivery of "a living fetus." 18 U.S.C. § 1531(b)(1)(A) (2000 ed., Supp. IV). If the intact D & E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure.

The instant cases, then, are different from *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 77–79, 96 S.Ct. 2831, 49 L.Ed.2d 788 [165](1976), in which the Court invalidated a ban on saline amniocentesis, the then-dominant second-trimester abortion method. The Court found the ban in *Danforth* to be "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." *Id.,* at 79, 96 S.Ct. 2831. Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.

[21–23] In reaching the conclusion the Act does not require a health exception we reject certain arguments made by the parties on both sides of these cases. On the one hand, the Attorney General urges us to uphold the Act on the basis of the congressional findings alone. Brief for Petitioner in No. 05–380, at 23. Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake. See *Crowell v. Benson,* 285 U.S. 22, 60, 52 S.Ct. 285, 76 L.Ed. 598 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function").

As respondents have noted, and the District Courts recognized, some recita-

tions in the Act are factually incorrect. See *National Abortion Federation*, 330 F.Supp.2d, at 482, 488–491. Whether or not accurate at the time, some of the important findings have been superseded. Two examples suffice. Congress determined no medical schools provide instruction on the prohibited procedure. Congressional Findings ¶ (14)(B). The testimony in the District Courts, however, demonstrated intact D & E is taught at medical schools. *National Abortion Federation*, *supra*, at 490; *Planned Parenthood*, 320 F.Supp.2d, at 1029. Congress also found there existed a medical consensus that the prohibited procedure
166 is never medically necessary. Congressional Findings ¶ (1). The evidence presented in the District Courts contradicts that conclusion. See, *e.g.*, *Carhart*, *supra*, at 1012–1015, 120 S.Ct. 2597; *National Abortion Federation*, *supra*, at 488–489; *Planned Parenthood*, *supra*, at 1025–1026. Uncritical deference to Congress' factual findings in these cases is inappropriate.

On the other hand, relying on the Court's opinion in *Stenberg*, respondents contend that an abortion regulation must contain a health exception "if 'substantial medical authority supports the proposition that banning a particular procedure could endanger women's health.'" Brief for Respondents in No. 05–380, p. 19 (quoting 530 U.S., at 938, 120 S.Ct. 2597); see also Brief for Respondent Planned Parenthood et al. in No. 05–1382, at 12 (same). As illustrated by respondents' arguments and the decisions of the Courts of Appeals, *Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty. *Carhart*, 413 F.3d, at 796; *Planned Parenthood*, 435 F.3d, at 1173; see also *National Abortion Federation*, 437 F.3d, at 296 (Walker, C. J., concurring) (explaining the standard under *Stenberg* "is a virtually insurmountable evidentiary hurdle").

A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve
167 a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.

V

[24] The considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. The Government has acknowledged that preenforcement, as-applied challenges to the Act can be maintained. Tr. of Oral Arg. in No. 05–380, pp. 21–23. This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied

challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.

The latitude given facial challenges in the First Amendment context is inapplicable here. Broad challenges of this type impose "a heavy burden" upon the parties maintaining the suit. *Rust v. Sullivan,* 500 U.S. 173, 183, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). What that burden consists of in the specific context of abortion statutes has been a subject of some question. Compare *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 514, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) ("[B]ecause appellees are making a facial challenge to a statute, they must show that no set of circumstances exists under which the Act would be valid" (internal quotation marks omitted)), with *Casey,* 505 U.S., at 895, 112 S.Ct. 2791 (opinion of the Court) (indicating a spousal-notification statute would impose an undue burden "in a large fraction of the cases in which [it] is relevant" and holding the statutory provision facially invalid). See also *Janklow v. Planned Parenthood, Sioux Falls Clinic,* 517 U.S. 1174, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996). We need not resolve that debate.

As the previous sections of this opinion explain, respondents have not demonstrated that the Act would be unconstitutional[168] in a large fraction of relevant cases. *Casey, supra,* at 895, 112 S.Ct. 2791 (opinion of the Court). We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications. It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *United States v. Raines,* 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) (internal quotation marks omitted). For this reason, "[a]s-applied challenges are the basic building blocks of constitutional adjudication." Fallon, As–Applied and Facial Challenges and Third–Party Standing, 113 Harv. L.Rev. 1321, 1328 (2000).

The Act is open to a proper as-applied challenge in a discrete case. Cf. *Wisconsin Right to Life, Inc. v. Federal Election Comm'n,* 546 U.S. 410, 412, 126 S.Ct. 1016, 163 L.Ed.2d 990 (2006) *(per curiam)*. No as-applied challenge need be brought if the prohibition in the Act threatens a woman's life because the Act already contains a life exception. 18 U.S.C. § 1531(a) (2000 ed., Supp. IV).

* * *

Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. For these reasons the judgments of the Courts of Appeals for the Eighth and Ninth Circuits are reversed.

It is so ordered.

Justice THOMAS, with whom Justice SCALIA joins, concurring.

I join the Court's opinion because it accurately applies current jurisprudence, including *Planned Parenthood of*[169] *Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), has no basis in the Constitution. See *Casey, supra,* at 979, 112 S.Ct. 2791 (SCALIA, J.,

concurring in judgment in part and dissenting in part); *Stenberg v. Carhart*, 530 U.S. 914, 980–983, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (THOMAS, J., dissenting). I also note that whether the Partial–Birth Abortion Ban Act of 2013 constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it. See *Cutter v. Wilkinson*, 544 U.S. 709, 727, n. 2, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (THOMAS, J., concurring).

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court declared that "[l]iberty finds no refuge in a jurisprudence of doubt." There was, the Court said, an "imperative" need to dispel doubt as to "the meaning and reach" of the Court's 7–to–2 judgment, rendered nearly two decades earlier in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). 505 U.S., at 845, 112 S.Ct. 2791. Responsive to that need, the Court endeavored to provide secure guidance to "[s]tate and federal courts as well as legislatures throughout the Union," by defining "the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures." *Ibid.*

Taking care to speak plainly, the *Casey* Court restated and reaffirmed *Roe's* essential holding. 505 U.S., at 845–846, 112 S.Ct. 2791. First, the Court addressed the type of abortion regulation permissible prior to fetal viability. It recognized "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." *Id.*, at 846, 112 S.Ct. 2791. Second, the Court acknowledged "the State's power to restrict abortions *after fetal viability*, if the law [170] contains exceptions for pregnancies which endanger the woman's life *or health*." *Ibid.* (emphasis added). Third, the Court confirmed that "the State has legitimate interests from the outset of the pregnancy in protecting *the health of the woman* and the life of the fetus that may become a child." *Ibid.* (emphasis added).

In reaffirming *Roe*, the *Casey* Court described the centrality of "the decision whether to bear . . . a child," *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), to a woman's "dignity and autonomy," her "personhood" and "destiny," her "conception of . . . her place in society." 505 U.S., at 851–852, 112 S.Ct. 2791. Of signal importance here, the *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect "the health of the woman." *Id.*, at 846, 112 S.Ct. 2791.

Seven years ago, in *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), the Court invalidated a Nebraska statute criminalizing the performance of a medical procedure that, in the political arena, has been dubbed "partial-birth abortion." [1] With fidelity to the *Roe-Casey* line of precedent, the Court held the Nebraska statute unconstitutional in part be-

1. The term "partial-birth abortion" is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions. See *Planned Parenthood Federation of Am. v. Ashcroft*, 320 F.Supp.2d 957, 964 (N.D.Cal.2004), aff'd, 435 F.3d 1163 (C.A.9 2006). The medical community refers to the procedure as either dilation & extraction (D & X) or intact dilation and evacuation (intact D & E). See, *e.g.*, *ante*, at 1621; *Stenberg v. Carhart*, 530 U.S. 914, 927, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000).

cause it lacked the requisite protection for the preservation of a woman's health. *Stenberg,* 530 U.S., at 930, 120 S.Ct. 2597; cf. *Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 327, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006).

Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians[171] and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey,* between previability and postviability abortions. And, for the first time since *Roe,* the Court blesses a prohibition with no exception safeguarding a woman's health.

I dissent from the Court's disposition. Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman's health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices.

I

A

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." 505 U.S., at 869, 112 S.Ct. 2791 (plurality opinion). See also *id.,* at 852, 112 S.Ct. 2791 (majority opinion).[2] "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." *Id.,* at 896–897, 112 S.Ct. 2791 (quoting *Hoyt v. Florida,* 368 U.S. 57, 62, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961)). Those views, this Court made clear in *Casey,* "are no longer consistent with our understanding of the family, the individual, or the Constitution." 505 U.S., at 897, 112 S.Ct. 2791. Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." *Id.,* at 856, 112 S.Ct. 2791. Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." [172] *Ibid.* Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. See, *e.g.,* Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L.Rev. 261 (1992); Law, Rethinking Sex and the Constitution, 132 U. Pa. L.Rev. 955, 1002–1028 (1984).

In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health. See, *e.g., Ayotte,* 546 U.S., at 327–328, 126 S.Ct. 961 ("[O]ur precedents hold . . . that a State may not restrict access to abortions that are necessary, in appropriate medical judgment, for the preservation of the life or health of the [woman]." (quoting *Casey,* 505 U.S., at 879, 112 S.Ct. 2791 (plurality opinion))); *Stenberg,* 530 U.S., at

2. *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 851–852, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), described more precisely than did *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the impact of abortion restrictions on women's liberty. *Roe's* focus was in considerable measure on "vindicat[ing] the right of the physician to administer medical treatment according to his professional judgment." *Id.,* at 165, 93 S.Ct. 705.

930, 120 S.Ct. 2597 ("Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation."). See also *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768–769, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (invalidating a *post*-viability abortion regulation for "fail[ure] to require that [a pregnant woman's] health be the physician's paramount consideration").

We have thus ruled that a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion. See *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 79, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (holding unconstitutional a ban on a method of abortion that "force[d] a woman ... to terminate her pregnancy by methods more dangerous to her health"). See also *Stenberg*, 530 U.S., at 931, 120 S.Ct. 2597 ("[Our cases] make clear that a risk to ... women's health is the same whether it happens [173] to arise from regulating a particular method of abortion, or from barring abortion entirely."). Indeed, we have applied the rule that abortion regulation must safeguard a woman's health to the particular procedure at issue here—intact dilation and evacuation (intact D & E).[3]

In *Stenberg*, we expressly held that a statute banning intact D & E was unconstitutional in part because it lacked a health exception. 530 U.S., at 930, 937, 120 S.Ct. 2597. We noted that there existed a "division of medical opinion" about the relative [174] safety of intact D & E, *id.*, at 937, 120 S.Ct. 2597, but we made clear that as long as "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health," a health exception is required, *id.*, at 938, 120 S.Ct. 2597. We explained:

> "The word 'necessary' in *Casey's* phrase 'necessary, in appropriate medi-

3. Dilation and evacuation (D & E) is the most frequently used abortion procedure during the second trimester of pregnancy; intact D & E is a variant of the D & E procedure. See *ante*, at 1620 – 1621, 1621 – 1622; *Stenberg*, 530 U.S., at 924, 927, 120 S.Ct. 2597; *Planned Parenthood*, 320 F.Supp.2d, at 966. Second-trimester abortions (*i.e.*, midpregnancy, previability abortions) are, however, relatively uncommon. Between 85 and 90 percent of all abortions performed in the United States take place during the first three months of pregnancy. See *ante*, at 1620. See also *Stenberg*, 530 U.S., at 923–927, 120 S.Ct. 2597; *National Abortion Federation v. Ashcroft*, 330 F.Supp.2d 436, 464 (S.D.N.Y.2004), aff'd *sub nom. National Abortion Federation v. Gonzales*, 437 F.3d 278 (C.A.2 2006); *Planned Parenthood*, 320 F.Supp.2d, at 960, and n. 4.

Adolescents and indigent women, research suggests, are more likely than other women to have difficulty obtaining an abortion during the first trimester of pregnancy. Minors may be unaware they are pregnant until relatively late in pregnancy, while poor women's financial constraints are an obstacle to timely receipt of services. See Finer, Frohwirth, Dauphinee, Singh, & Moore, Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States, 74 Contraception 334, 341–343 (2006). See also Drey et al., Risk Factors Associated with Presenting for Abortion in the Second Trimester, 107 Obstetrics & Gynecology 128, 133 (Jan.2006) (concluding that women who have second-trimester abortions typically discover relatively late that they are pregnant). Severe fetal anomalies and health problems confronting the pregnant woman are also causes of second-trimester abortions; many such conditions cannot be diagnosed or do not develop until the second trimester. See, *e.g.*, Finer, *supra*, at 344; F. Cunningham et al., Williams Obstetrics 242, 290, 328–329 (22d ed.2005); cf. Schechtman, Gray, Baty, & Rothman, Decision–Making for Termination of Pregnancies with Fetal Anomalies: Analysis of 53,000 Pregnancies, 99 Obstetrics & Gynecology 216, 220–221 (Feb.2002) (nearly all women carrying fetuses with the most serious central nervous system anomalies chose to abort their pregnancies).

> cal judgment, for the preservation of the life or health of the [pregnant woman],' cannot refer to an absolute necessity or to absolute proof. Medical treatments and procedures are often considered appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases. Neither can that phrase require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey's* words 'appropriate medical judgment' must embody the judicial need to tolerate responsible differences of medical opinion . . . ." *Id.*, at 937, 120 S.Ct. 2597 (citation omitted).

Thus, we reasoned, division in medical opinion "at most means uncertainty, a factor that signals the presence of risk, not its absence." *Ibid.* "[A] statute that altogether forbids [intact D & E] . . . . consequently must contain a health exception." *Id.*, at 938, 120 S.Ct. 2597. See also *id.*, at 948, 120 S.Ct. 2597 (O'Connor, J., concurring) ("Th[e] lack of a health exception necessarily renders the statute unconstitutional.").

B

In 2003, a few years after our ruling in *Stenberg,* Congress passed the Partial–Birth Abortion Ban Act—without an exception for women's health. See 18 U.S.C. § 1531(a) (2000 ed., Supp. IV).[4] The congressional findings on which the
175 Partial–Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede. *Ante,* at 1637 – 1638. See *National Abortion Federation v. Ashcroft,* 330 F.Supp.2d 436, 482 (S.D.N.Y. 2004) ("Congress did not . . . carefully consider the evidence before arriving at its findings."), aff'd *sub nom. National Abortion Federation v. Gonzales,* 437 F.3d 278 (C.A.2 2006). See also *Planned Parenthood Federation of Am. v. Ashcroft,* 320 F.Supp.2d 957, 1019 (N.D.Cal.2004) ("[N]one of the six physicians who testified before Congress had ever performed an intact D & E. Several did not provide abortion services at all; and one was not even an obgyn . . . .[T]he oral testimony before Congress was not only unbalanced, but intentionally polemic."), aff'd, 435 F.3d 1163 (C.A.9 2006); *Carhart v. Ashcroft,* 331 F.Supp.2d 805, 1011 (Neb.2004) ("Congress arbitrarily relied upon the opinions of doctors who claimed to have no (or very little) recent and relevant experience with surgical abortions, and disregarded the views of doctors who had significant and relevant experience with those procedures."), aff'd, 413 F.3d 791 (C.A.8 2005).

Many of the Act's recitations are incorrect. See *ante,* at 1637 – 1638. For example, Congress determined that no medical schools provide instruction on intact D & E. § 2(14)(B), 117 Stat. 1204, notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 769, ¶ (14)(B) (Congressional Findings). But in fact, numerous leading medical schools teach the procedure. See *Planned Parenthood,* 320 F.Supp.2d, at 1029; *National Abortion Federation,* 330 F.Supp.2d, at 479. See also Brief for ACOG as *Amicus Curiae* 18 ("Among the schools that now teach the intact variant are Columbia, Cornell, Yale, New York University, Northwestern, University of

4. The Act's sponsors left no doubt that their intention was to nullify our ruling in *Stenberg,* 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743. See, *e.g.,* 149 Cong. Rec. 5731 (2003) (statement of Sen. Santorum) (''Why are we here? We are here because the Supreme Court defended the indefensible . . . . We have responded to the Supreme Court.''). See also 148 Cong. Rec. 14273 (2002) (statement of Rep. Linder) (rejecting proposition that Congress has ''no right to legislate a ban on this horrible practice because the Supreme Court says [it] cannot'').

Pittsburgh,[176] University of Pennsylvania, University of Rochester, and University of Chicago.").

More important, Congress claimed there was a medical consensus that the banned procedure is never necessary. Congressional Findings ¶ (1). But the evidence "very clearly demonstrate[d] the opposite." *Planned Parenthood*, 320 F.Supp.2d, at 1025. See also *Carhart*, 331 F.Supp.2d, at 1008–1009 ("[T]here was no evident consensus in the record that Congress compiled. There was, however, a substantial body of medical opinion presented to Congress in opposition. If anything ... the congressional record establishes that there was a 'consensus' in favor of the banned procedure."); *National Abortion Federation*, 330 F.Supp.2d, at 488 ("The congressional record itself undermines [Congress'] finding" that there is a medical consensus that intact D & E "is never medically necessary and should be prohibited." (internal quotation marks omitted)).

Similarly, Congress found that "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures." Congressional Findings (14)(B), in notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 769. But the congressional record includes letters from numerous individual physicians stating that pregnant women's health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D & E carries meaningful safety advantages over other methods. See *National Abortion Federation*, 330 F.Supp.2d, at 490. See also *Planned Parenthood*, 320 F.Supp.2d, at 1021 ("Congress in its findings ... chose to disregard the statements by ACOG and other medical organizations."). No comparable medical groups supported the ban. In fact, "all of the government's own witnesses disagreed with many of the specific congressional findings." *Id.*, at 1024.

[177]C

In contrast to Congress, the District Courts made findings after full trials at which all parties had the opportunity to present their best evidence. The courts had the benefit of "much more extensive medical and scientific evidence ... concerning the safety and necessity of intact D & Es." *Planned Parenthood*, 320 F.Supp.2d, at 1014; cf. *National Abortion Federation*, 330 F.Supp.2d, at 482 (District Court "heard more evidence during its trial than Congress heard over the span of eight years.").

During the District Court trials, "numerous" "extraordinarily accomplished" and "very experienced" medical experts explained that, in certain circumstances and for certain women, intact D & E is safer than alternative procedures and necessary to protect women's health. *Carhart*, 331 F.Supp.2d, at 1024–1027; see *Planned Parenthood*, 320 F.Supp.2d, at 1001 ("[A]ll of the doctors who actually perform intact D & Es concluded that in their opinion and clinical judgment, intact D & Es remain the safest option for certain individual women under certain individual health circumstances, and are significantly safer for these women than other abortion techniques, and are thus medically necessary."); cf. *ante*, at 1635 ("Respondents presented evidence that intact D & E may be the safest method of abortion, for reasons similar to those adduced in *Stenberg*.").

According to the expert testimony plaintiffs introduced, the safety advantages of intact D & E are marked for women with certain medical conditions, for example,

uterine scarring, bleeding disorders, heart disease, or compromised immune systems. See *Carhart*, 331 F.Supp.2d, at 924–929, 1026–1027; *National Abortion Federation*, 330 F.Supp.2d, at 472–473; *Planned Parenthood*, 320 F.Supp.2d, at 992–994, 1001. Further, plaintiffs' experts testified that intact D & E is significantly safer for women with certain pregnancy-related conditions, such as placenta previa and accreta, and for women carrying fetuses with certain abnormalities, such [178] as severe hydrocephalus. See *Carhart*, 331 F.Supp.2d, at 924, 1026–1027; *National Abortion Federation*, 330 F.Supp.2d, at 473–474; *Planned Parenthood*, 320 F.Supp.2d, at 992–994, 1001. See also *Stenberg*, 530 U.S., at 929, 120 S.Ct. 2597; Brief for ACOG as *Amicus Curiae* 2, 13–16.

Intact D & E, plaintiffs' experts explained, provides safety benefits over D & E by dismemberment for several reasons: *First*, intact D & E minimizes the number of times a physician must insert instruments through the cervix and into the uterus, and thereby reduces the risk of trauma to, and perforation of, the cervix and uterus—the most serious complication associated with nonintact D & E. See *Carhart*, 331 F.Supp.2d, at 923–928, 1025; *National Abortion Federation*, 330 F.Supp.2d, at 471; *Planned Parenthood*, 320 F.Supp.2d, at 982, 1001. *Second*, removing the fetus intact, instead of dismembering it *in utero*, decreases the likelihood that fetal tissue will be retained in the uterus, a condition that can cause infection, hemorrhage, and infertility. See *Carhart*, 331 F.Supp.2d, at 923–928, 1025–1026; *National Abortion Federation*, 330 F.Supp.2d, at 472; *Planned Parenthood*, 320 F.Supp.2d, at 1001. *Third*, intact D & E diminishes the chances of exposing the patient's tissues to sharp bony fragments sometimes resulting from dismemberment of the fetus. See *Carhart*, 331 F.Supp.2d, at 923–928, 1026; *National Abortion Federation*, 330 F.Supp.2d, at 471; *Planned Parenthood*, 320 F.Supp.2d, at 1001. *Fourth*, intact D & E takes less operating time than D & E by dismemberment, and thus may reduce bleeding, the risk of infection, and complications relating to anesthesia. See *Carhart*, 331 F.Supp.2d, at 923–928, 1026; *National Abortion Federation*, 330 F.Supp.2d, at 472; *Planned Parenthood*, 320 F.Supp.2d, at 1001. See also *Stenberg*, 530 U.S., at 928–929, 932, 120 S.Ct. 2597; Brief for ACOG as *Amicus Curiae* 2, 11–13.

Based on thoroughgoing review of the trial evidence and the congressional record, each of the District Courts to consider the issue rejected Congress' findings as unreasonable [179] and not supported by the evidence. See *Carhart*, 331 F.Supp.2d, at 1008–1027; *National Abortion Federation*, 330 F.Supp.2d, at 482, 488–491; *Planned Parenthood*, 320 F.Supp.2d, at 1032. The trial courts concluded, in contrast to Congress' findings, that "significant medical authority supports the proposition that in some circumstances, [intact D & E] is the safest procedure." *Id.*, at 1033 (quoting *Stenberg*, 530 U.S., at 932, 120 S.Ct. 2597); accord *Carhart*, 331 F.Supp.2d, at 1008–1009, 1017–1018; *National Abortion Federation*, 330 F.Supp.2d, at 480–482; [5] cf. *Stenberg*, 530 U.S., at 932, 120 S.Ct. 2597 ("[T]he record shows that significant medical authority supports the proposition that

5. Even the District Court for the Southern District of New York, which was more skeptical of the health benefits of intact D & E, see *ante*, at 1635 – 1636, recognized: "[T]he Government's own experts disagreed with almost all of Congress's factual findings"; a "significant body of medical opinion" holds that intact D & E has safety advantages over nonintact D & E; "[p]rofessional medical associations have also expressed their view that [intact D & E] may be the safest procedure for some women"; and "[t]he evidence indicates that the same disagreement among experts found by the Supreme Court in *Sten-*

in some circumstances, [intact D & E] would be the safest procedure.").

The District Courts' findings merit this Court's respect. See, *e.g.,* Fed. Rule Civ. Proc. 52(a); *Salve Regina College v. Russell,* 499 U.S. 225, 233, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991). Today's opinion supplies no reason to reject those findings. Nevertheless, despite the District Courts' appraisal of the weight of the evidence, and in undisguised conflict with *Stenberg,* the Court asserts that the Partial–Birth Abortion Ban Act can survive "when . . . medical uncertainty persists." *Ante,* at 1636. This assertion is bewildering. Not only does it defy the Court's longstanding precedent affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty, see *supra,* at 1641 – 1642; it gives short shrift to the records before us, carefully canvassed by the District Courts. [180]Those records indicate that "the majority of highly-qualified experts on the subject believe intact D & E to be the safest, most appropriate procedure under certain circumstances." *Planned Parenthood,* 320 F.Supp.2d, at 1034. See *supra,* at 1644 – 1645.

The Court acknowledges some of this evidence, *ante,* at 1635, but insists that, because some witnesses disagreed with ACOG and other experts' assessment of risk, the Act can stand. *Ante,* at 1635 – 1636, 1638 – 1639. In this insistence, the Court brushes under the rug the District Courts' well-supported findings that the physicians who testified that intact D & E is never necessary to preserve the health of a woman had slim authority for their opinions. They had no training for, or personal experience with, the intact D & E procedure, and many performed abortions only on rare occasions. See *Planned Parenthood,* 320 F.Supp.2d, at 980; *Carhart,* 331 F.Supp.2d, at 1025; cf. *National Abortion Federation,* 330 F.Supp.2d, at 462–464. Even indulging the assumption that the Government witnesses were equally qualified to evaluate the relative risks of abortion procedures, their testimony could not erase the "significant medical authority support[ing] the proposition that in some circumstances, [intact D & E] would be the safest procedure." *Stenberg,* 530 U.S., at 932, 120 S.Ct. 2597.[6]

[181]II

A

The Court offers flimsy and transparent justifications for upholding a nationwide

berg existed throughout the time that Congress was considering the legislation, despite Congress's findings to the contrary." *National Abortion Federation,* 330 F.Supp.2d, at 480–482.

6. The majority contends that "[i]f the intact D & E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure." *Ante,* at 1637 – 1638. But a "significant body of medical opinion believes that inducing fetal death by injection is almost always inappropriate to the preservation of the health of women undergoing abortion because it poses tangible risk and provides no benefit to the woman." *Carhart v. Ashcroft,* 331 F.Supp.2d 805, 1028 (Neb.2004) (internal quotation marks omitted), aff'd, 413 F.3d 791 (C.A.8 2005). In some circumstances, injections are "absolutely [medically] contraindicated." 331 F.Supp.2d, at 1027. See also *id.,* at 907–912; *National Abortion Federation,* 330 F.Supp.2d, at 474–475; *Planned Parenthood,* 320 F.Supp.2d, at 995–997. The Court also identifies medical induction of labor as an alternative. See *ante,* at 1644. That procedure, however, requires a hospital stay, *ibid.,* rendering it inaccessible to patients who lack financial resources, and it too is considered less safe for many women, and impermissible for others. See *Carhart,* 331 F.Supp.2d, at 940–949, 1017; *National Abortion Federation,* 330 F.Supp.2d, at 468–470; *Planned Parenthood,* 320 F.Supp.2d, at 961, n. 5, 992–994, 1000–1002.

ban on intact D & E *sans* any exception to safeguard a woman's health. Today's ruling, the Court declares, advances "a premise central to [*Casey's*] conclusion"—*i.e.,* the Government's "legitimate and substantial interest in preserving and promoting fetal life." *Ante,* at 1626. See also *ibid.* ("[W]e must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child."). But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion. See *Stenberg,* 530 U.S., at 930, 120 S.Ct. 2597. And surely the statute was not designed to protect the lives or health of pregnant women. *Id.,* at 951, 120 S.Ct. 2597 (GINSBURG, J., concurring); cf. *Casey,* 505 U.S., at 846, 112 S.Ct. 2791 (recognizing along with the State's legitimate interest in the life of the fetus, its "legitimate interes[t] . . . in protecting the *health of the woman*" (emphasis added)). In short, the Court upholds a law that, while doing nothing to "preserv[e] . . . fetal life," *ante,* at 1626, bars a woman from choosing intact D & E although her doctor "reasonably believes [that procedure] will best protect [her]," *Stenberg,* 530 U.S., at 946, 120 S.Ct. 2597 (STEVENS, J., concurring).

As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the nonintact D & E procedure. See *ante,* at 1637. But why not, one might ask. [182]Nonintact D & E could equally be characterized as "brutal," *ante,* at 1633, involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs, *ante,* at 1620 – 1621, 1621 – 1622. "[T]he notion that either of these two equally gruesome procedures . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational." *Stenberg,* 530 U.S., at 946–947, 120 S.Ct. 2597 (STEVENS, J., concurring).

Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. *Ante,* at 1633 – 1634. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, *ante,* at 1621, 1637 – 1638, or a fetus delivered through medical induction or cesarean, *ante,* at 1644. Yet, the availability of those procedures—along with D & E by dismemberment—the Court says, saves the ban on intact D & E from a declaration of unconstitutionality. *Ante,* at 1637 – 1638. Never mind that the procedures deemed acceptable might put a woman's health at greater risk. See *supra,* at 1646, and n. 6; cf. *ante,* at 1621, 1635 – 1636.

Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. See *ante,* at 1633 – 1634 ("Congress could . . . conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition."). Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent. See, *e.g.,* *Casey,* 505 U.S., at 850, 112 S.Ct. 2791 ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."); *Lawrence v. Texas,* 539 U.S. 558, 571, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (Though "[f]or many persons [objections to homosexual conduct] are not trivial

[183] concerns but profound and deep convictions accepted as ethical and moral principles," the power of the State may not be used "to enforce these views on the whole society through operation of the criminal law." (citing *Casey*, 505 U.S., at 850, 112 S.Ct. 2791)).

Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from "[s]evere depression and loss of esteem." *Ante*, at 1634.[7] Because of women's [184] fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D & E procedure. *Ante*, at 1633 – 1634.[8] The solution the Court approves, then, is *not* to require doctors to

7. The Court is surely correct that, for most women, abortion is a painfully difficult decision. See *ante*, at 1633 – 1634. But "neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have . . . ." Cohen, Abortion and Mental Health: Myths and Realities, 9 Guttmacher Policy Rev. 8 (2006); see generally Bazelon, Is There a Post–Abortion Syndrome? N.Y. Times Magazine, Jan. 21, 2007, p. 40. See also, *e.g.*, American Psychological Association, APA Briefing Paper on the Impact of Abortion (2005) (rejecting theory of a postabortion syndrome and stating that "[a]ccess to legal abortion to terminate an unwanted pregnancy is vital to safeguard both the physical and mental health of women"); Schmiege & Russo, Depression and Unwanted First Pregnancy: Longitudinal Cohort Study, 331 British Medical J. 1303 (2005) (finding no credible evidence that choosing to terminate an unwanted first pregnancy contributes to risk of subsequent depression); Gilchrist, Hannaford, Frank, & Kay, Termination of Pregnancy and Psychiatric Morbidity, 167 British J. of Psychiatry 243, 247–248 (1995) (finding, in a cohort of more than 13,000 women, that the rate of psychiatric disorder was no higher among women who terminated pregnancy than among those who carried pregnancy to term); Stotland, The Myth of the Abortion Trauma Syndrome, 268 JAMA 2078, 2079 (1992) ("Scientific studies indicate that legal abortion results in fewer deleterious sequelae for women compared with other possible outcomes of unwanted pregnancy. There is no evidence of an abortion trauma syndrome."); American Psychological Association, Council Policy Manual: (N)(I)(3), Public Interest (1989) (declaring assertions about widespread severe negative psychological effects of abortion to be "without fact"). But see Cougle, Reardon, & Coleman, Generalized Anxiety Following Unintended Pregnancies Resolved Through Childbirth and Abortion: A Cohort Study of the 1995 National Survey of Family Growth, 19 J. Anxiety Disorders 137, 142 (2005) (advancing theory of a postabortion syndrome but acknowledging that "no causal relationship between pregnancy outcome and anxiety could be determined" from study); Reardon et al., Psychiatric Admissions of Low–Income Women Following Abortion and Childbirth, 168 Canadian Medical Assn. J. 1253, 1255–1256 (May 13, 2003) (concluding that psychiatric admission rates were higher for women who had an abortion compared with women who delivered); cf. Major, Psychological Implications of Abortion—Highly Charged and Rife with Misleading Research, 168 Canadian Medical Assn. J. 1257, 1258 (May 13, 2003) (critiquing Reardon study for failing to control for a host of differences between women in the delivery and abortion samples).

8. Notwithstanding the "bond of love" women often have with their children, see *ante*, at 1633 – 1634, not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity. See *Casey*, 505 U.S., at 891, 112 S.Ct. 2791 ("[O]n an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault."). See also Glander, Moore, Michielutte, & Parsons, The Prevalence of Domestic Violence Among Women Seeking Abortion, 91 Obstetrics & Gynecology 1002 (1998); Holmes, Resnick, Kilpatrick, & Best, Rape–Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women, 175 Am. J. Obstetrics & Gynecology 320 (Aug.1996).

inform women, accurately and adequately, of the different procedures and their attendant risks. Cf. *Casey*, 505 U.S., at 873, 112 S.Ct. 2791 (plurality opinion) ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning."). Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.[9]

[185] This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. Compare, *e.g.*, *Muller v. Oregon*, 208 U.S. 412, 422–423, 28 S.Ct. 324, 52 L.Ed. 551 (1908) ("protective" legislation imposing hours-of-work limitations on women only held permissible in view of women's "physical structure and a proper discharge of her maternal functio[n]"); *Bradwell v. State*, 16 Wall. 130, 141, 21 L.Ed. 442 (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother."), with *United States v. Virginia*, 518 U.S. 515, 533, 542, n. 12, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (State may not rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women; "[s]uch judgments have . . . impeded . . . women's progress toward full citizenship stature throughout our Nation's history"); *Califano v. Goldfarb*, 430 U.S. 199, 207, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977) (gender-based Social Security classification rejected because it rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency" (internal quotation marks omitted)).

Though today's majority may regard women's feelings on the matter as "self-evident," *ante*, at 1634, this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society," *Casey*, 505 U.S., at 852, 112 S.Ct. 2791. See also [186] *id.*, at 877, 112 S.Ct. 2791 (plurality opinion) ("[M]eans chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."); *supra*, at 1641 – 1642.

B

In cases on a "woman's liberty to determine whether to [continue] her pregnancy," this Court has identified viability as a critical consideration. See *Casey*, 505 U.S., at 869–870, 112 S.Ct. 2791 (plurality opinion). "[T]here is no line [more worka-

9. Eliminating or reducing women's reproductive choices is manifestly *not* a means of protecting them. When safe abortion procedures cease to be an option, many women seek other means to end unwanted or coerced pregnancies. See, *e.g.*, World Health Organization, Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2000, pp. 3, 16 (4th ed. 2004) (''Restrictive legislation is associated with a high incidence of unsafe abortion'' worldwide; unsafe abortion represents 13 percent of all ''maternal'' deaths); Henshaw, Unintended Pregnancy and Abortion: A Public Health Perspective, in A Clinician's Guide to Medical and Surgical Abortion 11, 19 (M. Paul, E. Lichtenberg, L. Borgatta, D. Grimes, & P. Stubblefield eds. 1999) (''Before legalization, large numbers of women in the United States died from unsafe abortions.''); H. Boonstra, R. Gold, C. Richards, & L. Finer, Abortion in Women's Lives 13, and fig. 2.2 (2006) (''as late as 1965, illegal abortion still accounted for an estimated . . . 17% of all officially reported pregnancy-related deaths''; ''[d]eaths from abortion declined dramatically after legalization'').

ble] than viability," the Court explained in *Casey,* for viability is "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. . . . In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." *Id.*, at 870, 112 S.Ct. 2791.

Today, the Court blurs that line, maintaining that "[t]he Act [legitimately] appl[ies] both previability and postviability because . . . a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Ante,* at 1627. Instead of drawing the line at viability, the Court refers to Congress' purpose to differentiate "abortion and infanticide" based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed. See *ante,* at 1633 – 1634 (quoting Congressional Findings ¶ (14)(G)).

One wonders how long a line that saves no fetus from destruction will hold in face of the Court's "moral concerns." See *supra,* at 1647; cf. *ante,* at 1627 (noting that "[i]n this litigation" the Attorney General "does not dispute that the Act would impose an undue burden if it covered standard D & E"). The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions[187] not by the titles of their medical specialties, but by the pejorative label "abortion doctor." *Ante,* at 1625, 1631, 1632, 1635, 1636. A fetus is described as an "unborn child," and as a "baby," *ante,* at 1620, 1622 – 1623; second-trimester, previability abortions are referred to as "late-term," *ante,* at 1632; and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience," *ante,* at 1620, 1638. Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act, *ante,* at 1633 – 1634, 1638. And, most troubling, *Casey's* principles, confirming the continuing vitality of "the essential holding of *Roe,*" are merely "assume[d]" for the moment, *ante,* at 1626, 1635, rather than "retained" or "reaffirmed," *Casey,* 505 U.S., at 846, 112 S.Ct. 2791.

III

A

The Court further confuses our jurisprudence when it declares that "facial attacks" are not permissible in "these circumstances," *i.e.,* where medical uncertainty exists. *Ante,* at 1638; see *ibid.* ("In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack."). This holding is perplexing given that, in materially identical circumstances we held that a statute lacking a health exception was unconstitutional on its face. *Stenberg,* 530 U.S., at 930, 120 S.Ct. 2597; see *id.*, at 937, 120 S.Ct. 2597 (in facial challenge, law held unconstitutional because "significant body of medical opinion believes [the] procedure may bring with it greater safety for *some patients*" (emphasis added)). See also *Sabri v. United States,* 541 U.S. 600, 609–610, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (identifying abortion as one setting in which we have recognized the validity of facial challenges); Fallon, Making Sense of Overbreadth, 100 Yale L.J. 853, 859, n. 29 (1991)

("[V]irtually all of the abortion cases reaching the Supreme Court since *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), have involved facial attacks on state statutes, and the Court, whether accepting [188] or rejecting the challenges on the merits, has typically accepted this framing of the question presented."). Accord Fallon, As–Applied and Facial Challenges and Third–Party Standing, 113 Harv. L.Rev. 1321, 1356 (2000); Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L.Rev. 235, 271–276 (1994).

Without attempting to distinguish *Stenberg* and earlier decisions, the majority asserts that the Act survives review because respondents have not shown that the ban on intact D & E would be unconstitutional "in a large fraction of [relevant] cases." *Ante,* at 1639 (citing *Casey,* 505 U.S., at 895, 112 S.Ct. 2791). But *Casey* makes clear that, in determining whether any restriction poses an undue burden on a "large fraction" of women, the relevant class is *not* "all women," nor "all pregnant women," nor even all women "seeking abortions." *Ibid.* Rather, a provision restricting access to abortion "must be judged by reference to those [women] for whom it is an actual rather than an irrelevant restriction." *Ibid.* Thus the absence of a health exception burdens *all* women for whom it is relevant—women who, in the judgment of their doctors, require an intact D & E because other procedures would place their health at risk.[10] Cf. *Stenberg,* 530 U.S., at 934, 120 S.Ct. 2597 (accepting the "relative rarity" of medically indicated intact D & Es as true but not "highly relevant"—for "the health exception question is whether protecting women's health requires an exception for those infrequent occasions"); *Ayotte,* 546 U.S., at 328, 126 S.Ct. 961 (facial challenge entertained where "[i]n some very small percentage of cases ... women ... need immediate abortions to avert serious, and often irreversible damage to their health"). It makes no sense to conclude that this facial challenge fails because respondents have not shown that a health exception is necessary [189] for a large fraction of second-trimester abortions, including those for which a health exception is unnecessary: The very purpose of a health *exception* is to protect women in *exceptional* cases.

B

If there is anything at all redemptive to be said of today's opinion, it is that the Court is not willing to foreclose entirely a constitutional challenge to the Act. "The Act is open," the Court states, "to a proper as-applied challenge in a discrete case." *Ante,* at 1639; see *ante,* at 1639 ("The Government has acknowledged that preenforcement, as-applied challenges to the Act can be maintained."). But the Court offers no clue on what a "proper" lawsuit might look like. See *ante,* at 1638 – 1639. Nor does the Court explain why the injunctions ordered by the District Courts should not remain in place, trimmed only to exclude instances in which another procedure would safeguard a woman's health at least equally well. Surely the Court cannot mean that no suit may be brought until a woman's health is immediately jeopardized by the ban on intact D & E. A woman "suffer[ing] from medical complications," *ante,* at 1639, needs access to the

10. There is, in short, no fraction because the numerator and denominator are the same: The health exception reaches only those cases where a woman's health is at risk. Perhaps for this reason, in mandating safeguards for women's health, we have never before invoked the "large fraction" test.

medical procedure at once and cannot wait for the judicial process to unfold. See *Ayotte,* 546 U.S., at 328, 126 S.Ct. 961.

The Court appears, then, to contemplate another lawsuit by the initiators of the instant actions. In such a second round, the Court suggests, the challengers could succeed upon demonstrating that "in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." *Ante,* at 1638. One may anticipate that such a preenforcement challenge will be mounted swiftly, to ward off serious, sometimes irremediable harm, to women whose health would be endangered by the intact D & E prohibition.

The Court envisions that in an as-applied challenge, "the nature of the medical risk can be better quantified and balanced." *Ibid.* But it should not escape notice that the record[190] already includes hundreds and hundreds of pages of testimony identifying "discrete and well-defined instances" in which recourse to an intact D & E would better protect the health of women with particular conditions. See *supra,* at 1644 – 1645. Record evidence also documents that medical exigencies, unpredictable in advance, may indicate to a well-trained doctor that intact D & E is the safest procedure. See ibid. In light of this evidence, our unanimous decision just one year ago in *Ayotte* counsels against reversal. See 546 U.S., at 331, 126 S.Ct. 961 (remanding for reconsideration of the remedy for the absence of a health exception, suggesting that an injunction prohibiting unconstitutional applications might suffice).

The Court's allowance only of an "as-applied challenge in a discrete case," *ante,* at 1639—jeopardizes women's health and places doctors in an untenable position. Even if courts were able to carve out exceptions through piecemeal litigation for "discrete and well-defined instances," *ante,* at 1638, women whose circumstances have not been anticipated by prior litigation could well be left unprotected. In treating those women, physicians would risk criminal prosecution, conviction, and imprisonment if they exercise their best judgment as to the safest medical procedure for their patients. The Court is thus gravely mistaken to conclude that narrow as-applied challenges are "the proper manner to protect the health of the woman." Cf. *ibid.*

IV

As the Court wrote in *Casey,* "overruling *Roe's* central holding would not only reach an unjustifiable result under principles of *stare decisis,* but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." 505 U.S., at 865, 112 S.Ct. 2791. "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, [191]indispensable." *Id.*, at 854, 112 S.Ct. 2791. See also *id.*, at 867, 112 S.Ct. 2791 ("[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

Though today's opinion does not go so far as to discard *Roe* or *Casey,* the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of "the rule of law" and the "principles of *stare decisis*." Congress imposed a ban despite our clear prior holdings that the State cannot proscribe an abortion procedure when its use is necessary to protect a woman's health. See *supra,* at 1643, n. 4. Although Congress' findings could not withstand the crucible of trial, the Court

defers to the legislative override of our Constitution-based rulings. See *supra*, at 1643–1644. A decision so at odds with our jurisprudence should not have staying power.

In sum, the notion that the Partial–Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court's defense of the statute provides no saving explanation. In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives. See *supra*, at 1641, n. 2; *supra*, at 1643, n. 4. When "a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue." *Stenberg*, 530 U.S., at 952, 120 S.Ct. 2597 (GINSBURG, J., concurring) (quoting *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (C.A.7 1999) (Posner, C. J., dissenting)).

* * *

For the reasons stated, I dissent from the Court's disposition and would affirm the judgments before us for review.

550 U.S. 618, 167 L.Ed.2d 982

Lilly M. LEDBETTER, Petitioner,

v.

The GOODYEAR TIRE & RUBBER CO., INC.

No. 05–1074.

Argued Nov. 27, 2006.

Decided May 29, 2007.

Background: Female retiree sued former employer, alleging that sex discrimination-based poor performance evaluations she had received earlier in her tenure with employer had resulted in lower pay than her male colleagues through end of her career, and asserting claims under Title VII and Equal Pay Act. The United States District Court for the Northern District of Alabama, U.W. Clemon, C.J., granted summary judgment for employer on Equal Pay Act claim, but entered judgment on jury verdict for retiree on Title VII claim. The United States Court of Appeals for the Eleventh Circuit reversed, 421 F.3d 1169. Certiorari was granted.

Holding: The United States Supreme Court, Justice Alito, held that discrete discriminatory acts triggering time limit for filing Equal Employment Opportunity Commission (EEOC) charge could only be discriminatory pay decisions, abrogating *Forsyth v. Federation Employment & Guidance Serv.,* 409 F.3d 565.

Affirmed.

Justice Ginsburg filed dissenting opinion joined by Justices Stevens, Souter, and Breyer.

1. Civil Rights ⇐1505(3)

Time for filing charge of employment discrimination with Equal Employment Opportunity Commission (EEOC), under Title VII, begins when discrete discriminatory act occurs, e.g. termination, failure to promote, denial of transfer, or refusal to hire. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C.A. § 2000e-5(e)(1).

2. Civil Rights ⇐1505(7)

In employee's Title VII claim against employer alleging individual sex discrimination in pay and raises, discrete discriminatory acts triggering time limit for filing Equal Employment Opportunity Commission (EEOC) charge could only be discriminatory pay decisions, not later nondiscriminatory pay decisions that allegedly perpetuated effects of earlier decisions, nor issuance of paychecks without showing of facial, structural discrimination; latter events lacked defining element of disparate-treatment claim, namely discriminatory intent; abrogating *Forsyth v. Federation Employment & Guidance Serv.,* 409 F.3d 565. Civil Rights Act of 1964, §§ 703(a)(1), 706(e)(1), 42 U.S.C.A. §§ 2000e-2(a)(1), 2000e-5(e)(1).

3. Civil Rights ⇐1505(7)

For purposes of determining timeliness of filing of employment discrimination charge with Equal Employment Opportunity Commission (EEOC), under Title VII, new violation does not occur, and new charging period does not commence, upon occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from past discrimination; however, if employer engages in series of acts each of which is intentionally discriminatory, then fresh violation takes place when each act is committed. Civil Rights Act of 1964, § 706(e)(1), (f)(1), 42 U.S.C.A. § 2000e-5(e)(1), (f)(1).

4. Civil Rights ⇐1505(7)

Employer violates Title VII, and triggers new Equal Employment Opportunity Commission (EEOC) charging period, whenever employer issues paychecks using discriminatory pay structure; however, new Title VII violation does not occur, and new charging period is not triggered, when

employer issues paychecks pursuant to system that is facially nondiscriminatory and neutrally applied. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C.A. § 2000e-5(e)(1).

5. Civil Rights ⇨1505(7)

When employee alleges serial violations of Title VII's proscription against employment discrimination, i.e. series of actionable wrongs, as opposed to hostile work environment, timely Equal Employment Opportunity Commission (EEOC) charge must be filed with respect to each discrete alleged violation. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C.A. § 2000e-5(e)(1).

618 *Syllabus* *

During most of the time that petitioner Ledbetter was employed by respondent Goodyear, salaried employees at the plant where she worked were given or denied raises based on performance evaluations. Ledbetter submitted a questionnaire to the Equal Employment Opportunity Commission (EEOC) in March 1998 and a formal EEOC charge in July 1998. After her November 1998 retirement, she filed suit, asserting, among other things, a sex discrimination claim under Title VII of the Civil Rights Act of 1964. The District Court allowed her Title VII pay discrimination claim to proceed to trial. There, Ledbetter alleged that several supervisors had in the past given her poor evaluations because of her sex; that as a result, her pay had not increased as much as it would have if she had been evaluated fairly; that those past pay decisions affected the amount of her pay throughout her employment; and that by the end of her employment, she was earning significantly less than her male colleagues. Goodyear maintained that the evaluations had been nondiscriminatory, but the jury found for Ledbetter, awarding backpay and damages. On appeal, Goodyear contended that the pay discrimination claim was time barred with regard to all pay decisions made before September 26, 1997—180 days before Ledbetter filed her EEOC questionnaire—and that no discriminatory act relating to her pay occurred after that date. The Eleventh Circuit reversed, holding that a Title VII pay discrimination claim cannot be based on allegedly discriminatory events that occurred before the last pay decision that affected the employee's pay during the EEOC charging period, and concluding that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions during that period, denials of raises in 1997 and 1998.

Held: Because the later effects of past discrimination do not restart the clock for filing an EEOC charge, Ledbetter's claim is untimely. Pp. 2166 – 2178.

(a) An individual wishing to bring a Title VII lawsuit must first file an EEOC charge within, as relevant here, 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e–5(e)(1). In addressing the issue of an EEOC charge's timeliness, this Court has stressed the need to identify with care the specific employment practice 619 at issue. Ledbetter's arguments—that the paychecks that she received during the charging period and the 1998 raise denial each violated Title VII and triggered a new EEOC charging period—fail because they would require the Court in effect to jettison the defining element of the disparate-treatment claim on which her Title VII

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

recovery was based, discriminatory intent. *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571, *Delaware State College v. Ricks,* 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431, *Lorance v. AT & T Technologies, Inc.,* 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961, and *National Railroad Passenger Corporation v. Morgan,* 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106, clearly instruct that the EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But if an employer engages in a series of separately actionable intentionally discriminatory acts, then a fresh violation takes place when each act is committed. Ledbetter makes no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions occurring before that period were not communicated to her. She argues simply that Goodyear's nondiscriminatory conduct during the charging period gave present effect to discriminatory conduct outside of that period. But current effects alone cannot breathe life into prior, uncharged discrimination. Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory employment decision was made and communicated to her. Her attempt to shift forward the intent associated with prior discriminatory acts to the 1998 pay decision is unsound, for it would shift intent away from the act that consummated the discriminatory employment practice to a later act not performed with bias or discriminatory motive, imposing liability in the absence of the requisite intent. Her argument would also distort Title VII's "integrated, multistep enforcement procedure." *Occidental Life Ins. Co. of Cal. v. EEOC,* 432 U.S. 355, 359, 97 S.Ct. 2447, 53 L.Ed.2d 402. The short EEOC filing deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation. *Id.,* at 367–368, 97 S.Ct. 2447. Nothing in Title VII supports treating the intent element of Ledbetter's disparate-treatment claim any differently from the employment practice element of the claim. Pp. 2166 – 2172.

(b) *Bazemore v. Friday,* 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 *(per curiam),* which concerned a disparate-treatment pay claim, is entirely consistent with *Evans, Ricks, Lorance,* and *Morgan. Bazemore's* rule is that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. It is not, as Ledbetter contends, a "paycheck accrual rule" under which each paycheck, even if not accompanied by discriminatory intent, triggers a
620 new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted that paycheck's amount, no matter how long ago the discrimination occurred. Because Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate based on sex or that it later applied this system to her within the charging period with discriminatory animus, *Bazemore* is of no help to her. Pp. 2171 – 2176.

(c) Ledbetter's "paycheck accrual rule" is also not supported by either analogies to the statutory regimes of the Equal Pay Act of 1963, the Fair Labor Standards Act of 1938, or the National Labor Relations Act, or policy arguments for giving special treatment to pay claims. Pp. 2176 – 2178.

421 F.3d 1169, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 2178.

Kevin K. Russell, Washington, DC, for the petitioner.

Glen D. Nager, for the respondent.

Irving L. Gornstein, for the United States as amicus curiae, by special leave of the Court, supporting the respondent.

Pamela S. Karlan, Stanford Law School, Supreme Court Litigation Clinic, Stanford, CA, Robert L. Wiggins, Jr., Jon C. Goldfarb, Wiggins, Childs, Quinn & Pantazis, Birmingham, AL, Kevin K. Russell, Counsel of Record, Amy Howe, Howe & Russell, P.C., Washington, DC, for petitioner.

Jay St. Clair, Bradley, Arant, Rose & White LLP, Birmingham, AL, Glen D. Nager, Counsel of Record, Michael A. Carvin, Shay Dvoretzky, Jones Day, Washington, DC, for Respondent.

For U.S. Supreme Court briefs, see:

2006 WL 2610990 (Pet.Brief)

2006 WL 3014119 (Resp.Brief)

2006 WL 3336479 (Reply.Brief)

Justice ALITO delivered the opinion of the Court.

[1] |621 This case calls upon us to apply established precedent in a slightly different context. We have previously held that the time for filing a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) begins when the discriminatory act occurs. We have explained that this rule applies to any "[d]iscrete ac[t]" of discrimination, including discrimination in "termination, failure to promote, denial of transfer, [and] refusal to hire." *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 114, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). Because a pay-setting decision is a "discrete act," it follows that the period for filing an EEOC charge begins when the act occurs. Petitioner, having abandoned her claim under the Equal Pay Act, asks us to deviate from our prior decisions in order to permit her to assert her claim under Title VII. Petitioner also contends that discrimination in pay is different from other types of employment discrimination and thus should be governed by a different rule. But because a pay-setting decision is a discrete act that occurs at a particular point in time, these arguments must be rejected. We therefore affirm the judgment of the Court of Appeals.

I

Petitioner Lilly Ledbetter (Ledbetter) worked for respondent Goodyear Tire & Rubber Company (Goodyear) at its Gadsden, Alabama, plant from 1979 until 1998. During much of this time, salaried employees at the plant were given or denied raises based on their supervisors' evaluation of their performance. In March 1998, Ledbetter submitted a questionnaire to the EEOC alleging certain acts of sex discrimination, and in July of that year she filed a formal EEOC charge. After taking early retirement in November 1998, |622 Ledbetter commenced this action, in which she asserted, among other claims, a Title VII pay discrimination claim and a claim under the Equal Pay Act of 1963(EPA), 77 Stat. 56, 29 U.S.C. § 206(d).

The District Court granted summary judgment in favor of Goodyear on several of Ledbetter's claims, including her EPA claim, but allowed others, including her Title VII pay discrimination claim, to proceed to trial. In support of this latter claim, Ledbetter introduced evidence that during the course of her employment sev-

eral supervisors had given her poor evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment. Toward the end of her time with Goodyear, she was being paid significantly less than any of her male colleagues. Goodyear maintained that the evaluations had been nondiscriminatory, but the jury found for Ledbetter and awarded her backpay and damages.

On appeal, Goodyear contended that Ledbetter's pay discrimination claim was time barred with respect to all pay decisions made prior to September 26, 1997—that is, 180 days before the filing of her EEOC questionnaire.[1] And Goodyear argued that no discriminatory act relating to Ledbetter's pay occurred after that date.

The Court of Appeals for the Eleventh Circuit reversed, holding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay decision that affected the employee's pay during the EEOC |623 charging period. 421 F.3d 1169, 1182–1183 (2005). The Court of Appeals then concluded that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions that occurred within that time span, namely, a decision made in 1997 to deny Ledbetter a raise and a similar decision made in 1998. *Id.,* at 1186–1187.

Ledbetter filed a petition for a writ of certiorari but did not seek review of the Court of Appeals' holdings regarding the sufficiency of the evidence in relation to the 1997 and 1998 pay decisions. Rather, she sought review of the following question:

> "Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period." Pet. for Cert. i.

In light of disagreement among the Courts of Appeals as to the proper application of the limitations period in Title VII disparate-treatment pay cases, compare 421 F.3d 1169 with *Forsyth v. Federation Employment & Guidance Serv.,* 409 F.3d 565 (C.A.2 2005); *Shea v. Rice,* 409 F.3d 448 (C.A.D.C.2005), we granted certiorari, 548 U.S. 903, 126 S.Ct. 2965, 165 L.Ed.2d 949 (2006).

II

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice" to discriminate "against any individual with respect to his compensation ... because of such individual's ... sex." 42 U.S.C. § 2000e–2(a)(1). An individual wishing to challenge an employment practice under this provision must first file a charge with the EEOC. § 2000e–5(e)(1). Such a charge must be filed within a specified period (either 180 or 300 days, depending on the State) |624 "after the alleged unlawful employment practice occurred," *ibid.,* and if the employee does not submit a timely EEOC charge, the employee may

1. The parties assume that the EEOC charging period runs backwards from the date of the questionnaire, even though Ledbetter's discriminatory pay claim was not added until the July 1998 formal charge. 421 F.3d 1169, 1178 (C.A.11 2005). We likewise assume for the sake of argument that the filing of the questionnaire, rather than the formal charge, is the appropriate date.

not challenge that practice in court, § 2000e–5(f)(1).

[2] In addressing the issue whether an EEOC charge was filed on time, we have stressed the need to identify with care the specific employment practice that is at issue. *Morgan,* 536 U.S., at 110–111, 122 S.Ct. 2061. Ledbetter points to two different employment practices as possible candidates. Primarily, she urges us to focus on the paychecks that were issued to her during the EEOC charging period (the 180–day period preceding the filing of her EEOC questionnaire), each of which, she contends, was a separate act of discrimination. Alternatively, Ledbetter directs us to the 1998 decision denying her a raise, and she argues that this decision was "unlawful because it carried forward intentionally discriminatory disparities from prior years." Reply Brief for Petitioner 20. Both of these arguments fail because they would require us in effect to jettison the defining element of the legal claim on which her Title VII recovery was based.

Ledbetter asserted disparate treatment, the central element of which is discriminatory intent. See *Chardon v. Fernandez,* 454 U.S. 6, 8, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981) *(per curiam); Teamsters* v. *United States,* 431 U.S. 324, 335, n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 1002, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988) (Blackmun, J., joined by Brennan, and Marshall, JJ., concurring in part and concurring in judgment) ("[A] disparate-treatment challenge focuses exclusively on the intent of the employer"). However, Ledbetter does not assert that the relevant Goodyear decisionmakers acted with actual discriminatory intent either when they issued her checks during the EEOC charging period or when they denied her a raise in 1998. Rather, she argues that the paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner *prior to* the EEOC charging period. Brief for Petitioner 22. Similarly, she maintains that the 625 1998 decision was unlawful because it "carried forward" the effects of prior, uncharged discrimination decisions. Reply Brief for Petitioner 20. In essence, she suggests that it is sufficient that discriminatory acts that occurred prior to the charging period had continuing effects during that period. Brief for Petitioner 13 ("[E]ach paycheck that offers a woman less pay than a similarly situated man because of her sex is a separate violation of Title VII with its own limitations period, regardless of whether the paycheck simply implements a prior discriminatory decision made outside the limitations period"); see also Reply Brief for Petitioner 20. This argument is squarely foreclosed by our precedents.

In *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), we rejected an argument that is basically the same as Ledbetter's. Evans was forced to resign because the airline refused to employ married flight attendants, but she did not file an EEOC charge regarding her termination. Some years later, the airline rehired her but treated her as a new employee for seniority purposes. *Id.,* at 554–555, 97 S.Ct. 1885. Evans then sued, arguing that, while any suit based on the original discrimination was time barred, the airline's refusal to give her credit for her prior service gave "present effect to [its] past illegal act and therefore perpetuate[d] the consequences of forbidden discrimination." *Id.,* at 557, 97 S.Ct. 1885.

We agreed with Evans that the airline's "seniority system [did] indeed have a continuing impact on her pay and fringe benefits," *id.,* at 558, 97 S.Ct. 1885, but we noted that "the critical question [was]

whether any present *violation* exist[ed]," *ibid.* (emphasis in original). We concluded that the continuing effects of the precharging period discrimination did not make out a present violation. As Justice STEVENS wrote for the Court:

> "United was entitled to treat [Evans' termination] as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a [626] timely charge ... is merely an unfortunate event in history which has no present legal consequences." *Ibid.*

It would be difficult to speak to the point more directly.

Equally instructive is *Delaware State College v. Ricks,* 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), which concerned a college professor, Ricks, who alleged that he had been discharged because of national origin. In March 1974, Ricks was denied tenure, but he was given a final, nonrenewable 1–year contract that expired on June 30, 1975. *Id.,* at 252–253, 101 S.Ct. 498. Ricks delayed filing a charge with the EEOC until April 1975, *id.,* at 254, 101 S.Ct. 498, but he argued that the EEOC charging period ran from the date of his actual termination rather than from the date when tenure was denied. In rejecting this argument, we recognized that "one of the *effects* of the denial of tenure," namely, his ultimate termination, "did not occur until later." *Id.,* at 258, 101 S.Ct. 498 (emphasis in original). But because Ricks failed to identify any specific discriminatory act "that continued until, or occurred at the time of, the actual termination of his employment," *id.,* at 257, 101 S.Ct. 498, we held that the EEOC charging period ran from "the time the tenure decision was made and communicated to Ricks," *id.,* at 258, 101 S.Ct. 498.

This same approach dictated the outcome in *Lorance v. AT & T Technologies, Inc.,* 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989), which grew out of a change in the way in which seniority was calculated under a collective-bargaining agreement. Before 1979, all employees at the plant in question accrued seniority based simply on years of employment at the plant. In 1979, a new agreement made seniority for workers in the more highly paid (and traditionally male) position of "tester" depend on time spent in that position alone and not in other positions in the plant. Several years later, when female testers were laid off due to low seniority as calculated under the new provision, they filed an EEOC charge alleging that the 1979 scheme had been adopted with discriminatory intent, namely, to protect incumbent male testers when women with substantial [627] plant seniority began to move into the traditionally male tester positions. *Id.,* at 902–903, 109 S.Ct. 2261.

We held that the plaintiffs' EEOC charge was not timely because it was not filed within the specified period after the adoption in 1979 of the new seniority rule. We noted that the plaintiffs had not alleged that the new seniority rule treated men and women differently or that the rule had been applied in a discriminatory manner. Rather, their complaint was that the rule was adopted originally with discriminatory intent. *Id.,* at 905, 109 S.Ct. 2261. And as in *Evans* and *Ricks,* we held that the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt. 490 U.S., at 907–908, 109 S.Ct. 2261. We stated:

> "Because the claimed invalidity of the facially nondiscriminatory and neutrally applied tester seniority system is wholly dependent on the alleged illegality of signing the underlying agreement, it is

the date of that signing which governs the limitations period." *Id.*, at 911[, 109 S.Ct. 2261].[2]

|628 Our most recent decision in this area confirms this understanding. In *Morgan*, we explained that the statutory term "employment practice" generally refers to "a discrete act or single 'occurrence' " that takes place at a particular point in time. 536 U.S., at 110–111, 122 S.Ct. 2061. We pointed to "termination, failure to promote, denial of transfer, [and] refusal to hire" as examples of such "discrete" acts, and we held that a Title VII plaintiff "can only file a charge to cover discrete acts that 'occurred' within the appropriate time period." *Id.*, at 114, 122 S.Ct. 2061.

[3] The instruction provided by *Evans*, *Ricks*, *Lorance*, and *Morgan* is clear. The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed. See *Morgan*, *supra*, at 113, 122 S.Ct. 2061.

Ledbetter's arguments here—that the paychecks that she received during the charging period and the 1998 raise denial each violated Title VII and triggered a new EEOC charging period—cannot be reconciled with *Evans*, *Ricks*, *Lorance*, and *Morgan*. Ledbetter, as noted, makes no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions that occurred prior to that period were not communicated to her. Instead, she argues simply that Goodyear's conduct during the charging period gave present effect to discriminatory conduct outside of that period. Brief for Petitioner 13. But current effects alone cannot breathe life into prior, uncharged discrimination; as we held in *Evans*, such effects in themselves have "no present legal consequences." 431 U.S., at 558, 97 S.Ct. 1885. Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so, |629 and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming that prior failure.

In an effort to circumvent the need to prove discriminatory intent during the charging period, Ledbetter relies on the intent associated with other decisions made by other persons at other times. Reply Brief for Petitioner 6 ("Intentional discrimination . . . occurs when . . . differential treatment takes place, even if the

2. After *Lorance*, Congress amended Title VII to cover the specific situation involved in that case. See 42 U.S.C. § 2000e–5(e)(2) (allowing for Title VII liability arising from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application). The dissent attaches great significance to this amendment, suggesting that it shows that *Lorance* was wrongly reasoned as an initial matter. *Post*, at 2182 – 2184 (opinion of GINSBURG, J.). However, the very legislative history cited by the dissent explains that this amendment and the other 1991 Title VII amendments " 'expand[ed] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.' " *Post*, at 2183 (emphasis added). For present purposes, what is most important about the amendment in question is that it applied only to the adoption of a discriminatory seniority system, not to other types of employment discrimination. *Evans* and *Ricks*, upon which *Lorance* relied, 490 U.S., at 906–908, 109 S.Ct. 2261, and which employed identical reasoning, were left in place, and these decisions are more than sufficient to support our holding today.

intent to engage in that conduct for a discriminatory purpose was made previously").

Ledbetter's attempt to take the intent associated with the prior pay decisions and shift it to the 1998 pay decision is unsound. It would shift intent from one act (the act that consummates the discriminatory employment practice) to a later act that was not performed with bias or discriminatory motive. The effect of this shift would be to impose liability in the absence of the requisite intent.

Our cases recognize this point. In *Evans*, for example, we did not take the airline's discriminatory intent in 1968, when it discharged the plaintiff because of her sex, and attach that intent to its later act of neutrally applying its seniority rules. Similarly, in *Ricks*, we did not take the discriminatory intent that the college allegedly possessed when it denied Ricks tenure and attach that intent to its subsequent act of terminating his employment when his nonrenewable contract ran out. On the contrary, we held that "the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks." 449 U.S., at 258, 101 S.Ct. 498.

Not only would Ledbetter's argument effectively eliminate the defining element of her disparate-treatment claim, but it would distort Title VII's "integrated, multistep enforcement procedure." *Occidental Life Ins. Co. of Cal. v. EEOC,* 432 U.S. 355, 359, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977). We have previously noted the legislative compromises that preceded the enactment of Title VII, 630 *Mohasco Corp. v. Silver,* 447 U.S. 807, 819–821, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980); *EEOC v. Commercial Office Products Co.,* 486 U.S. 107, 126, 108 S.Ct. 1666, 100 L.Ed.2d 96 (1988) (STEVENS, J., joined by Rehnquist, C. J., and SCALIA, J., dissenting). Respectful of the legislative process that crafted this scheme, we must "give effect to the statute as enacted," *Mohasco, supra,* at 819, 100 S.Ct. 2486, and we have repeatedly rejected suggestions that we extend or truncate Congress' deadlines. See, *e.g., Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229, 236–240, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976) (union grievance procedures do not toll EEOC filing deadline); *Alexander v. Gardner–Denver Co.,* 415 U.S. 36, 47–49, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (arbitral decisions do not foreclose access to court following a timely filed EEOC complaint).

Statutes of limitations serve a policy of repose. *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 554–555, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). They

> "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' " *United States v. Kubrick,* 444 U.S. 111, 117[, 100 S.Ct. 352, 62 L.Ed.2d 259] (1979) (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.,* 321 U.S. 342, 349[, 64 S.Ct. 582, 88 L.Ed. 788] (1944)).

The EEOC filing deadline "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Ricks, supra,* at 256–257, 101 S.Ct. 498. Certainly, the 180–day EEOC charging deadline, 42 U.S.C. § 2000e–5(e)(1), is short by any measure, but "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Mohasco, supra,* at 825, 100 S.Ct. 2486. This short deadline reflects Congress' strong preference for the prompt

resolution of employment discrimination allegations 631 through voluntary conciliation and cooperation. *Occidental Life Ins., supra,* at 367–368, 97 S.Ct. 2447; *Alexander, supra,* at 44, 94 S.Ct. 1011.

A disparate-treatment claim comprises two elements: an employment practice, and discriminatory intent. Nothing in Title VII supports treating the intent element of Ledbetter's claim any differently from the employment practice element.[3] If anything, concerns regarding stale claims weigh more heavily with respect to proof of the intent associated with employment practices than with the practices themselves. For example, in a case such as this in which the plaintiff's claim concerns the denial of raises, the employer's challenged acts (the decisions not to increase the employee's pay at the times in question) will almost always be documented and will typically not even be in dispute. By contrast, the employer's intent is almost always disputed, and evidence relating to intent may fade quickly with time. In most disparate-treatment cases, much if not all of the evidence of intent is circumstantial. Thus, the critical issue in a case involving a long-past performance evaluation will often be whether the evaluation was so far off the mark that a sufficient inference of discriminatory intent can be drawn. See *Watson,* 487 U.S., at 1004, 108 S.Ct. 2777 (Blackmun, J., joined by Brennan and Marshall, JJ., concurring in part and concurring in judgment) (noting that in a disparate-treatment claim, the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), factors establish discrimination by inference). See also, *e.g., Zhuang v. Datacard* 632 *Corp.,* 414 F.3d 849 (C.A.8 2005) (rejecting inference of discrimination from performance evaluations); *Cooper v. Southern Co.,* 390 F.3d 695, 732–733 (C.A.11 2004) (same). This can be a subtle determination, and the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened.[4]

Ledbetter contends that employers would be protected by the equitable doctrine of laches, but Congress plainly did not think that laches was sufficient in this context. Indeed, Congress took a diametrically different approach, including in Title VII a provision allowing only a few months in most cases to file a charge with the EEOC. 42 U.S.C. § 2000e–5(e)(1).

Ultimately, "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco, supra,* at 826,

3. Of course, there may be instances where the elements forming a cause of action span more than 180 days. Say, for instance, an employer forms an illegal discriminatory intent toward an employee but does not act on it until 181 days later. The charging period would not begin to run until the employment practice was executed on day 181 because until that point the employee had no cause of action. The act and intent had not yet been joined. Here, by contrast, Ledbetter's cause of action was fully formed and present at the time that the discriminatory employment actions were taken against her, at which point she could have, and should have, sued.

4. The dissent dismisses this concern, *post,* at 2185 – 2186, but this case illustrates the problems created by tardy lawsuits. Ledbetter's claims of sex discrimination turned principally on the misconduct of a single Goodyear supervisor, who, Ledbetter testified, retaliated against her when she rejected his sexual advances during the early 1980's, and did so again in the mid–1990's when he falsified deficiency reports about her work. His misconduct, Ledbetter argues, was "a principal basis for [her] performance evaluation in 1997." Brief for Petitioner 6; see also *id.,* at 5–6, 8, 11 (stressing the same supervisor's misconduct). Yet, by the time of trial, this supervisor had died and therefore could not testify. A timely charge might have permitted his evidence to be weighed contemporaneously.

100 S.Ct. 2486. By operation of §§ 2000e–5(e)(1) and 2000e–5(f)(1), a Title VII "claim is time barred if it is not filed within these time limits." *Morgan*, 536 U.S., at 109, 122 S.Ct. 2061; *Electrical Workers*, 429 U.S., at 236, 97 S.Ct. 441. We therefore reject the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period. Ledbetter's claim is, for this reason, untimely.

633 III

A

In advancing her two theories Ledbetter does not seriously contest the logic of *Evans*, *Ricks*, *Lorance*, and *Morgan* as set out above, but rather argues that our decision in *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) *(per curiam)*, requires different treatment of her claim because it relates to pay. Ledbetter focuses specifically on our statement that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." *Id.*, at 395, 106 S.Ct. 3000. She argues that in *Bazemore* we adopted a "paycheck accrual rule" under which each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted the amount of that paycheck, no matter how long ago the discrimination occurred. On this reading, *Bazemore* dispensed with the need to prove actual discriminatory intent in pay cases and, without giving any hint that it was doing so, repudiated the very different approach taken previously in *Evans* and *Ricks*. Ledbetter's interpretation is unsound.

Bazemore concerned a disparate-treatment pay claim brought against the North Carolina Agricultural Extension Service (Service). 478 U.S., at 389–390, 106 S.Ct. 3000. Service employees were originally segregated into "a white branch" and "a 'Negro branch,' " with the latter receiving less pay, but in 1965 the two branches were merged. *Id.*, at 390–391, 106 S.Ct. 3000. After Title VII was extended to public employees in 1972, black employees brought suit claiming that pay disparities attributable to the old dual pay scale persisted. *Id.*, at 391, 106 S.Ct. 3000. The Court of Appeals rejected this claim, which it interpreted to be that the " 'discriminatory difference in salaries should have been affirmatively eliminated.' " *Id.*, at 395, 106 S.Ct. 3000.

This Court reversed in a *per curiam* opinion, *id.*, at 386–388, 106 S.Ct. 3000, but all of the Members of the Court joined Justice Brennan's 634 separate opinion, see *id.*, at 388, 106 S.Ct. 3000 (opinion concurring in part). Justice Brennan wrote:

> "The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act

or practice, it is liable under that statute. While recovery may not be permitted for pre–1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed." *Id.,* at 395, 106 S.Ct. 3000 (emphasis in original).

Far from adopting the approach that Ledbetter advances here, this passage made a point that was "too obvious to warrant extended discussion," *ibid.;* namely, that when an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees. An employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure is used.

Bazemore thus is entirely consistent with our prior precedents, as Justice Brennan's opinion took care to point out. Noting that *Evans* turned on whether " 'any *present violation* exist[ed],' " Justice Brennan stated that the *Bazemore* [635] plaintiffs were alleging that the defendants "ha[d] *not* from the date of the Act forward made all their employment decisions in a wholly nondiscriminatory way," 478 U.S., at 396–397, n. 6, 106 S.Ct. 3000 (emphasis in original; internal quotation marks and brackets omitted)-which is to say that they had engaged in fresh discrimination. Justice Brennan added that the Court's "holding in no sense g[ave] legal effect to the pre–1972 actions, but, consistent with *Evans* ... focuse[d] on the present salary structure, which is illegal if it *is a mere continuation of the pre–1965 discriminatory pay structure*." *Id.,* at 397, n. 6, 106 S.Ct. 3000 (emphasis added).

The sentence in Justice Brennan's opinion on which Ledbetter chiefly relies comes directly after the passage quoted above, and makes a similarly obvious point:

"Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.,* at 395–396[, 106 S.Ct. 3000].[5]

5. That the focus in *Bazemore* was on a current violation, not the carrying forward of a past act of discrimination, was made clearly by the side opinion in the Court of Appeals:

''[T]he majority holds, in effect, that because the pattern of discriminatory salaries here challenged originated before applicable provisions of the Civil Rights Act made their payment illegal, any 'lingering effects' of that earlier pattern cannot (presumably on an indefinitely maintained basis) be considered in assessing a challenge to post-act continuation of that pattern.''

''*Hazelwood[School Dist. v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977),] and *Evans* indeed made it clear that an employer cannot be found liable, or sanctioned with remedy, for employment decisions made before they were declared illegal or as to which the claimant has lost any right of action by lapse of time. For this reason it is generally true that, as the catch-phrase has it, Title VII imposed 'no obligation to catch-up,' i.e., affirmatively to remedy present effects of pre-Act discrimination, whether in composing a work force or otherwise. But those cases cannot be thought to insulate employment decisions that presently are illegal on the basis that at one time *comparable* decisions were legal when made by the particular employer. It is therefore one thing to say that an employer who upon the effective date of Title VII finds itself with a racially unbalanced work-force need not act affirmatively to redress the balance; and quite another to say that it may also continue to make discriminatory hiring decisions because it was by that means that its present work force was composed. It may not, in short, under the *Hazelwood/Evans* principle continue practices now violative simply because at one time they were not.'' *Bazemore v. Friday,* 751 F.2d 662, 695–696 (C.A.4 1984) (Phillips, J., concurring

|636In other words, a freestanding violation may always be charged within its own charging period regardless of its connection to other violations. We repeated this same point more recently in *Morgan:* "The existence of past acts and the employee's prior knowledge of their occurrence ... does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed." 536 U.S., at 113, 122 S.Ct. 2061.[6] Neither of these opinions stands for the proposition that an action not comprising an employment practice and alleged discriminatory intent is separately chargeable, just because it is related to some past act of discrimination.

Ledbetter attempts to eliminate the obvious inconsistencies between her interpretation of *Bazemore* and the *Evans/Ricks/Lorance/Morgan* line of cases on the ground that none of the latter cases involved pay raises, but the logic of our prior cases is fully applicable to pay cases. To take *Evans* |637as an example, the employee there was unlawfully terminated; this caused her to lose seniority; and the loss of seniority affected her wages, among other things. 431 U.S., at 555, n. 5, 97 S.Ct. 1885 ("[S]eniority determine[s] a flight attendant's wages; the duration and timing of vacations; rights to retention in the event of layoffs and rights to re-employment thereafter; and rights to preferential selection of flight assignments"). The relationship between past discrimination and adverse present effects was the same in *Evans* as it is here. Thus, the argument that Ledbetter urges us to accept here would necessarily have commanded a different outcome in *Evans.*

[4] *Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is "facially nondiscriminatory and neutrally applied." *Lorance,* 490 U.S., at 911, 109 S.Ct. 2261. The fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period.

Because Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with any discriminatory animus, *Bazemore* is of no help to her. Rather, all Ledbetter has alleged is that Goodyear's agents discriminated against her individually in the past and that this discrimination reduced the amount of later paychecks. Because Ledbetter did not file timely EEOC charges relating to her employer's discriminatory pay decisions in the past, she cannot maintain a suit based on that past discrimination at this time.

in part and dissenting in part) (emphasis in original; footnotes omitted).

6. The briefs filed with this Court in *Bazemore v. Friday,* 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) *(per curiam),* further elucidate the point. The petitioners described the Service's conduct as "[t]he continued use of a racially explicit base wage." Brief for Petitioner Bazemore et al. in *Bazemore v. Friday,* O.T.1985, No. 85–93, p. 33. The United States' brief also properly distinguished the commission of a discrete discriminatory act with continuing adverse results from the intentional carrying forward of a discriminatory pay system. Brief for Federal Petitioners in *Bazemore v. Friday,* O.T.1984, Nos. 85–93 and 85–428, p. 17. This case involves the former, not the latter.

638 B

The dissent also argues that pay claims are different. Its principal argument is that a pay discrimination claim is like a hostile work environment claim because both types of claims are " 'based on the cumulative effect of individual acts,' " *post,* at 2180 – 2181, but this analogy overlooks the critical conceptual distinction between these two types of claims. And although the dissent relies heavily on *Morgan,* the dissent's argument is fundamentally inconsistent with *Morgan's* reasoning.

Morgan distinguished between "discrete" acts of discrimination and a hostile work environment. A discrete act of discrimination is an act that in itself "constitutes a separate actionable 'unlawful employment practice' " and that is temporally distinct. 536 U.S., at 114, 117, 122 S.Ct. 2061. As examples we identified "termination, failure to promote, denial of transfer, or refusal to hire." *Id.*, at 114, 122 S.Ct. 2061. A hostile work environment, on the other hand, typically comprises a succession of harassing acts, each of which "may not be actionable on its own." In addition, a hostile work environment claim "cannot be said to occur on any particular day." *Id.*, at 115–116, 122 S.Ct. 2061. In other words, the actionable wrong is the environment, not the individual acts that, taken together, create the environment.[7]

[5] Contrary to the dissent's assertion, *post,* at 2180 – 2181, what Ledbetter alleged was not a single wrong consisting of a succession of acts. Instead, she alleged a series of discrete discriminatory 639 acts, see Brief for Petitioner 13, 15 (arguing that payment of each paycheck constituted a separate violation of Title VII), each of which *was* independently identifiable and actionable, and *Morgan* is perfectly clear that when an employee alleges "serial violations," *i.e.,* a series of actionable wrongs, a timely EEOC charge must be filed with respect to each discrete alleged violation. 536 U.S., at 113, 122 S.Ct. 2061.

While this fundamental misinterpretation of *Morgan* is alone sufficient to show that the dissent's approach must be rejected, it should also be noted that the dissent is coy as to whether it would apply the same rule to all pay discrimination claims or whether it would limit the rule to cases like Ledbetter's, in which multiple discriminatory pay decisions are alleged. The dissent relies on the fact that Ledbetter was allegedly subjected to a series of discriminatory pay decisions over a period of time, and the dissent suggests that she did not realize for some time that she had been victimized. But not all pay cases share these characteristics.

If, as seems likely, the dissent would apply the same rule in all pay cases, then, if a single discriminatory pay decision made 20 years ago continued to affect an employee's pay today, the dissent would presumably hold that the employee could file a timely EEOC charge today. And the dissent would presumably allow this even if the employee had full knowledge of all the circumstances relating to the 20–year–old decision at the time it was made.[8]

7. Moreover, the proposed hostile salary environment claim would go far beyond *Morgan's* limits. *Morgan* still required at least some of the discriminatorily motivated acts predicate to a hostile work environment claim to occur within the charging period. 536 U.S., at 117, 122 S.Ct. 2061 ("Provided that *an act contributing to the claim occurs within the filing period,* the entire time period of the hostile environment may be considered by a court" (emphasis added)). But the dissent would permit claims where no one acted in any way with an improper motive during the charging period. *Post,* at 2181, 2186.

8. The dissent admits as much, responding only that an employer could resort to equita-

The dissent, it appears, proposes that we adopt a special rule for pay cases based on the particular characteristics of one case that is 640certainly not representative of all pay cases and may not even be typical. We refuse to take that approach.

IV

In addition to the arguments previously discussed, Ledbetter relies largely on analogies to other statutory regimes and on extrastatutory policy arguments to support her "paycheck accrual rule."

A

Ledbetter places significant weight on the EPA, which was enacted contemporaneously with Title VII and prohibits paying unequal wages for equal work because of sex. 29 U.S.C. § 206(d). Stating that "the lower courts routinely hear [EPA] claims challenging pay disparities that first arose outside the limitations period," Ledbetter suggests that we should hold that Title VII is violated each time an employee receives a paycheck that reflects past discrimination. Brief for Petitioner 34–35.

The simple answer to this argument is that the EPA and Title VII are not the same. In particular, the EPA does not require the filing of a charge with the EEOC or proof of intentional discrimination. See § 206(d)(1) (asking only whether the alleged inequality resulted from "any other factor other than sex"). Ledbetter originally asserted an EPA claim, but that claim was dismissed by the District Court and is not before us. If Ledbetter had pursued her EPA claim, she would not face the Title VII obstacles that she now confronts.[9]

641Ledbetter's appeal to the Fair Labor Standards Act of 1938 (FLSA) is equally unavailing. Stating that it is "well established that the statute of limitations for violations of the minimum wage and overtime provisions of the [FLSA] runs anew with each paycheck," Brief for Petitioner 35, Ledbetter urges that the same should be true in a Title VII pay case. Again, however, Ledbetter's argument overlooks the fact that an FLSA minimum wage or overtime claim does not require proof of a specific intent to discriminate. See 29 U.S.C. § 207 (establishing overtime rules); cf. § 255(a) (establishing 2–year statute of limitations for FLSA claims, except for claims of a "willful violation," which may be commenced within 3 years).

ble doctrines such as laches. *Post,* at 2186. But first, as we have noted, Congress has already determined that defense to be insufficient. *Supra,* at 2184 – 2185. Second, it is far from clear that a suit filed under the dissent's theory, alleging that a paycheck paid recently within the charging period was itself a freestanding violation of Title VII because it reflected the effects of 20–year–old discrimination, would even be barred by laches.

9. The Magistrate Judge recommended dismissal of Ledbetter's EPA claim on the ground that Goodyear had demonstrated that the pay disparity resulted from Ledbetter's consistently weak performance, not her sex. App. to Pet. for Cert. 71a–77a. The Magistrate Judge also recommended dismissing the Title VII disparate-pay claim on the same basis. *Id.,* at 65a–69a. Ledbetter objected to the Magistrate Judge's disposition of the Title VII and EPA claims, arguing that the Magistrate Judge had improperly resolved a disputed factual issue. See Plaintiff's Objections to Magistrate Judge's Report and Recommendation, 1 Record in No. 03–15264–G (CA11), Doc. 32. The District Court sustained this objection as to the ''disparate pay'' claim, but without specifically mentioning the EPA claim, which had been dismissed by the Magistrate Judge on the same basis. See App. to Pet. for Cert. 43a–44a. While the record is not entirely clear, it appears that at this point Ledbetter elected to abandon her EPA claim, proceeding to trial with only the Title VII disparate-pay claim, thus giving rise to the dispute the Court must now resolve.

Ledbetter is on firmer ground in suggesting that we look to cases arising under the National Labor Relations Act (NLRA) since the NLRA provided a model for Title VII's remedial provisions and, like Title VII, requires the filing of a timely administrative charge (with the National Labor Relations Board) before suit may be maintained. *Lorance,* 490 U.S., at 909, 109 S.Ct. 2261; *Ford Motor Co. v. EEOC,* 458 U.S. 219, 226, n. 8, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982). Cf. 29 U.S.C. § 160(b) ("[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board").

Ledbetter argues that the NLRA's 6–month statute of limitations begins anew for each paycheck reflecting a prior violation of the statute, but our precedents suggest otherwise. In *Machinists v. NLRB,* 362 U.S. 411, 416–417, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960), we [642]held that "where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice[,] the use of the earlier unfair labor practice [merely] serves to cloak with illegality that which was otherwise lawful." This interpretation corresponds closely to our analysis in *Evans* and *Ricks* and supports our holding in the present case.

B

Ledbetter, finally, makes a variety of policy arguments in favor of giving the alleged victims of pay discrimination more time before they are required to file a charge with the EEOC. Among other things, she claims that pay discrimination is harder to detect than other forms of employment discrimination.[10]

We are not in a position to evaluate Ledbetter's policy arguments, and it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the "prompt processing of all charges of employment discrimination," *Mohasco,* 447 U.S., at 825, 100 S.Ct. 2486, and the interest in repose.

Ledbetter's policy arguments for giving special treatment to pay claims find no support in the statute and are inconsistent with our precedents.[11] We apply the statute as written, [643]and this means that any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by statute.

10. We have previously declined to address whether Title VII suits are amenable to a discovery rule. *National Railroad Passenger Corporation v. Morgan,* 536 U.S. 101, 114, n. 7, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.

11. Ledbetter argues that the EEOC's endorsement of her approach in its Compliance Manual and in administrative adjudications merits deference. But we have previously declined to extend *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), deference to the Compliance Manual, *Morgan, supra,* at 111, n. 6, 122 S.Ct. 2061, and similarly decline to defer to the EEOC's adjudicatory positions. The EEOC's views in question are based on its misreading of *Bazemore.* See, *e.g., Amft v. Mineta,* No. 07A40116, 2006 WL 985183, *5 (EEOC Office of Fed. Operations, Apr. 6, 2006); *Albritton v. Potter,* No. 01A44063, 2004 WL 2983682, *2 (EEOC Office of Fed. Operations, Dec. 17, 2004). Agencies have no special claim to deference in their interpretation of our decisions. *Reno v. Bossier Parish School Bd.,* 528 U.S. 320, 336, n. 5, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000). Nor do we see reasonable ambiguity in the statute itself, which makes no distinction between compensation and other sorts of claims and which clearly requires that discrete employment actions alleged to be un-

* * *

For these reasons, the judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

It is so ordered.

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

Lilly Ledbetter was a supervisor at Goodyear Tire & Rubber's plant in Gadsden, Alabama, from 1979 until her retirement in 1998. For most of those years, she worked as an area manager, a position largely occupied by men. Initially, Ledbetter's salary was in line with the salaries of men performing substantially similar work. Over time, however, her pay slipped in comparison to the pay of male area managers with equal or less seniority. By the end of 1997, Ledbetter was the only woman working as an area manager and the pay discrepancy between Ledbetter and her 15 male counterparts was stark: Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, the highest paid, $5,236. See 421 F.3d 1169, 1174 (C.A.11 2005); Brief for Petitioner 4.

Ledbetter launched charges of discrimination before the Equal Employment Opportunity Commission (EEOC) in March 1998. Her formal administrative complaint specified that, in violation of Title VII, Goodyear paid her a discriminatorily[644] low salary because of her sex. See 42 U.S.C. § 2000e–2(a)(1) (rendering it unlawful for an employer "to discriminate against any individual with respect to [her] compensation . . . because of such individual's . . . sex"). That charge was eventually tried to a jury, which found it "more likely than not that [Goodyear] paid [Ledbetter] a[n] unequal salary because of her sex." App. 102. In accord with the jury's liability determination, the District Court entered judgment for Ledbetter for backpay and damages, plus counsel fees and costs.

The Court of Appeals for the Eleventh Circuit reversed. Relying on Goodyear's system of annual merit-based raises, the court held that Ledbetter's claim, in relevant part, was time barred. 421 F.3d, at 1171, 1182–1183. Title VII provides that a charge of discrimination "shall be filed within [180] days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e–5(e)(1).[1] Ledbetter charged, and proved at trial, that within the 180–day period, her pay was substantially less than the pay of men doing the same work. Further, she introduced evidence sufficient to establish that discrimination against female managers at the Gadsden plant, not performance inadequacies on her part, accounted for the pay differential. See, *e.g.,* App. 36–47, 51–68, 82–87, 90–98, 112–113. That evidence was unavailing, the Eleventh Circuit held, and the Court today agrees, because it was incumbent on Ledbetter to file charges year by year, each time Goodyear failed to increase her salary commensurate with the salaries of male peers. Any annual pay decision not contested immediately (within 180 days), the Court affirms, becomes grandfathered, a *fait accompli* beyond the province of Title VII ever to repair.

[645]The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only

lawful be motivated "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).

1. If the complainant has first instituted proceedings with a state or local agency, the filing period is extended to 300 days or 30 days after the denial of relief by the agency. 42 U.S.C. § 2000e–5(e)(1). Because the 180–day period applies to Ledbetter's case, that figure will be used throughout. See *ante,* at 2166, 2167.

over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.

Pay disparities are thus significantly different from adverse actions "such as termination, failure to promote, . . . or refusal to hire," all involving fully communicated discrete acts, "easy to identify" as discriminatory. See *National Railroad Passenger Corporation v. Morgan,* 536 U.S. 101, 114, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). It is only when the disparity becomes apparent and sizable, *e.g.*, through future raises calculated as a percentage of current salaries, that an employee in Ledbetter's situation is likely to comprehend her plight and, therefore, to complain. Her initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.

On questions of time under Title VII, we have identified as the critical inquiries: "What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" *Id.,* at 110, 122 S.Ct. 2061. Our precedent suggests, and lower courts have overwhelmingly held, that the unlawful practice is the *current payment* of salaries infected by gender-based (or race-based) discrimination—a practice that occurs whenever a paycheck delivers less to a woman than to a similarly situated man. See *Bazemore v. Friday,* 478 U.S. 385, 395, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (Brennan, J., joined by all other Members of the Court, concurring in part).

646 I

Title VII proscribes as an "unlawful employment practice" discrimination "against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). An individual seeking to challenge an employment practice under this proscription must file a charge with the EEOC within 180 days "after the alleged unlawful employment practice occurred." § 2000e–5(e)(1). See *ante,* at 2166; *supra,* at 2178, n. 1.

Ledbetter's petition presents a question important to the sound application of Title VII: What activity qualifies as an unlawful employment practice in cases of discrimination with respect to compensation. One answer identifies the pay-setting decision, and that decision alone, as the unlawful practice. Under this view, each particular salary-setting decision is discrete from prior and subsequent decisions, and must be challenged within 180 days on pain of forfeiture. Another response counts both the pay-setting decision and the actual payment of a discriminatory wage as unlawful practices. Under this approach, each payment of a wage or salary infected by sex-based discrimination constitutes an unlawful employment practice; prior decisions, outside the 180–day charge-filing period, are not themselves actionable, but they are relevant in determining the lawfulness of conduct within the period. The Court adopts the first view, see *ante,* at 2165, 2166 – 2167, 2169 – 2170, but the second is more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose.

A

In *Bazemore,* we unanimously held that an employer, the North Carolina Agricultural Extension Service, committed an unlawful employment practice each time it

paid black employees less than similarly situated white employees. 478 U.S., at 395, 106 S.Ct. 3000 (opinion of Brennan, J.). Before 1965, the Extension 647 Service was divided into two branches: a white branch and a "Negro branch." *Id.*, at 390, 106 S.Ct. 3000. Employees in the "Negro branch" were paid less than their white counterparts. In response to the Civil Rights Act of 1964, which included Title VII, the State merged the two branches into a single organization, made adjustments to reduce the salary disparity, and began giving annual raises based on nondiscriminatory factors. *Id.*, at 390–391, 394–395, 106 S.Ct. 3000. Nonetheless, "some pre-existing salary disparities continued to linger on." *Id.*, at 394, 106 S.Ct. 3000 (internal quotation marks omitted). We rejected the Court of Appeals' conclusion that the plaintiffs could not prevail because the lingering disparities were simply a continuing effect of a decision lawfully made prior to the effective date of Title VII. See *id.*, at 395–396, 106 S.Ct. 3000. Rather, we reasoned, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." *Id.*, at 395, 106 S.Ct. 3000. Paychecks perpetuating past discrimination, we thus recognized, are actionable not simply because they are "related" to a decision made outside the charge-filing period, cf. *ante,* at 2174, but because they discriminate anew each time they issue, see *Bazemore,* 478 U.S., at 395–396, and n. 6, 106 S.Ct. 3000; *Morgan,* 536 U.S., at 111–112, 122 S.Ct. 2061.

Subsequently, in *Morgan,* we set apart, for purposes of Title VII's timely filing requirement, unlawful employment actions of two kinds: "discrete acts" that are "easy to identify" as discriminatory, and acts that recur and are cumulative in impact. See *id.,* at 110, 113–115, 122 S.Ct. 2061. "[A][d]iscrete ac[t] such as termination, failure to promote, denial of transfer, or refusal to hire," *id.,* at 114, 122 S.Ct. 2061, we explained, " 'occur[s]' on the day that it 'happen[s].' A party, therefore, must file a charge within . . . 180 . . . days of the date of the act or lose the ability to recover for it." *Id.*, at 110, 122 S.Ct. 2061; see *id.*, at 113, 122 S.Ct. 2061 ("[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act.").

648 "[D]ifferent in kind from discrete acts," we made clear, are "claims . . . based on the cumulative effect of individual acts." *Id.,* at 115, 122 S.Ct. 2061. The *Morgan* decision placed hostile work environment claims in that category. "Their very nature involves repeated conduct." *Ibid.* "The unlawful employment practice" in hostile work environment claims "cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Ibid.* (internal quotation marks omitted). The persistence of the discriminatory conduct both indicates that management should have known of its existence and produces a cognizable harm. *Ibid.* Because the very nature of the hostile work environment claim involves repeated conduct,

> "[i]t does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Id.*, at 117[, 122 S.Ct. 2061].

Consequently, although the unlawful conduct began in the past, "a charge may be

filed at a later date and still encompass the whole." *Ibid.*

Pay disparities, of the kind Ledbetter experienced, have a closer kinship to hostile work environment claims than to charges of a single episode of discrimination. Ledbetter's claim, resembling Morgan's, rested not on one particular paycheck, but on "the cumulative effect of individual acts." See *id.*, at 115, 122 S.Ct. 2061. See also Brief for Petitioner 13, 15–17, and n. 9 (analogizing Ledbetter's claim to the recurring and cumulative harm at issue in *Morgan*); Reply Brief for Petitioner 13 (distinguishing pay discrimination from "easy to identify" discrete acts (internal quotation marks omitted)).
649 She charged insidious discrimination building up slowly but steadily. See Brief for Petitioner 5–8. Initially in line with the salaries of men performing substantially the same work, Ledbetter's salary fell 15 to 40 percent behind her male counterparts only after successive evaluations and percentage-based pay adjustments. See *supra*, at 2178. Over time, she alleged and proved, the repetition of pay decisions undervaluing her work gave rise to the current discrimination of which she complained. Though component acts fell outside the charge-filing period, with each new paycheck, Goodyear contributed incrementally to the accumulating harm. See *Morgan*, 536 U.S., at 117, 122 S.Ct. 2061; *Bazemore*, 478 U.S., at 395–396, 106 S.Ct. 3000; cf. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502, n. 15, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968).[2]

B

The realities of the workplace reveal why the discrimination with respect to compensation that Ledbetter suffered does not fit within the category of singular discrete acts "easy to identify." A worker knows immediately if she is denied a promotion or transfer, if she is fired or refused employment. And promotions, transfers, hirings, and firings are generally public events, known to co-workers. When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext. Compensation disparities, in contrast, are often hidden from sight. It is not unusual, decisions in point illustrate, for management to decline to publish
650 employee pay levels, or for employees to keep private their own salaries. See, *e.g.*, *Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1008–1009 (C.A.10 2002) (plaintiff did not know what her colleagues earned until a printout listing of salaries appeared on her desk, seven years after her starting salary was set lower than her co-workers' salaries); *McMillan v. Massachusetts Soc. for Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (C.A.1 1998) (plaintiff worked for employer for years before learning of salary disparity published in a newspaper).[3] Tellingly, as the record in this case bears

2. *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 117, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), the Court emphasizes, required that "an act contributing to the claim occu[r] within the [charge-]filing period." *Ante*, at 2175, and n. 7 (emphasis deleted; internal quotation marks omitted). Here, each paycheck within the filing period compounded the discrimination Ledbetter encountered, and thus contributed to the "actionable wrong," *i.e.*, the succession of acts composing the pattern of discriminatory pay, of which she complained.

3. See also Bierman & Gely, "Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law, 25 Berkeley J. Emp. & Lab. L. 167, 168, 171 (2004) (one-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers;

out, Goodyear kept salaries confidential; employees had only limited access to information regarding their colleagues' earnings. App. 56–57, 89.

The problem of concealed pay discrimination is particularly acute where the disparity arises not because the female employee is flatly denied a raise but because male counterparts are given larger raises. Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision. She may have little reason even to suspect discrimination until a pattern develops incrementally and she ultimately becomes aware of the disparity. Even if an employee suspects that the reason for a comparatively low raise is not performance but sex (or another protected ground), the amount involved may seem too small, or the employer's intent too ambiguous, to make the issue immediately actionable—or winnable.

Further separating pay claims from the discrete employment actions identified in *Morgan*, an employer gains from sex-based pay disparities in a way it does not from a discriminatory denial of promotion, hiring, or transfer. When a [651]male employee is selected over a female for a higher level position, someone still gets the promotion and is paid a higher salary; the employer is not enriched. But when a woman is paid less than a similarly situated man, the employer reduces its costs each time the pay differential is implemented. Furthermore, decisions on promotions, like decisions installing seniority systems, often implicate the interests of third-party employees in a way that pay differentials do not. Cf. *Teamsters v. United States*, 431 U.S. 324, 352–353, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (recognizing that seniority systems involve "vested . . . rights of employees" and concluding that Title VII was not intended to "destroy or water down" those rights). Disparate pay, by contrast, can be remedied at any time solely at the expense of the employer who acts in a discriminatory fashion.

C

In light of the significant differences between pay disparities and discrete employment decisions of the type identified in *Morgan*, the cases on which the Court relies hold no sway. See *ante*, at 2167 – 2170 (discussing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), and *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989)). *Evans* and *Ricks* both involved a single, immediately identifiable act of discrimination: in *Evans*, a constructive discharge, 431 U.S., at 554, 97 S.Ct. 1885; in *Ricks*, a denial of tenure, 449 U.S., at 252, 101 S.Ct. 498. In each case, the employee filed charges well after the discrete discriminatory act occurred: When United Airlines forced Evans to resign because of its policy barring married female flight attendants, she filed no charge; only four years later, when Evans was rehired, did she allege that the airline's former no-marriage rule was unlawful and therefore should not operate to deny her seniority credit for her prior service. See *Evans*, 431 U.S., at 554–557, 97 S.Ct. 1885. Similarly, when Delaware State College denied Ricks tenure, he did not object until his terminal contract came to an end, one year later. *Ricks*, 449 U.S., at 253–254, 257–258, 101 S.Ct. 498. [652]No repetitive, cumulative discriminatory employment practice was at issue in either case. See *Ev-*

only one in ten employers has adopted a pay openness policy).

ans, 431 U.S., at 557–558, 97 S.Ct. 1885; *Ricks,* 449 U.S., at 258, 101 S.Ct. 498.[4]

Lorance is also inapposite, for, in this Court's view, it too involved a one-time discrete act: the adoption of a new seniority system that "had its genesis in sex discrimination." See 490 U.S., at 902, 905, 109 S.Ct. 2261 (internal quotation marks omitted). The Court's extensive reliance on *Lorance, ante,* at 2168 – 2170, 2172, 2174, moreover, is perplexing for that decision is no longer effective: In the 1991 Civil Rights Act, Congress superseded *Lorance's* holding. § 112, 105 Stat. 1079 (codified as amended at 42 U.S.C. § 2000e–5(e)(2)). Repudiating our judgment that a facially neutral seniority system adopted with discriminatory intent must be challenged immediately, Congress provided:

> "For purposes of this section, an unlawful employment practice occurs ... when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system." *Ibid.*

Congress thus agreed with the dissenters in *Lorance* that "the harsh reality of [that] decision" was "glaringly at odds with the purposes of Title VII." 490 U.S., at 914, 109 S.Ct. 2261 (opinion of Marshall, J.). See also § 3, 105 Stat. 1071 (1991 Civil Rights Act was designed "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination").

True, § 112 of the 1991 Civil Rights Act directly addressed only seniority systems. See *ante,* at 2169, and n. 2. But Congress made clear (1) its view that this Court had unduly *contracted* the scope of protection afforded by Title VII and other civil rights statutes, and (2) its aim to generalize the ruling in *Bazemore.* As the Senate Report accompanying the proposed Civil Rights Act of 1990, the precursor to the 1991 Act, explained:

> "Where, as was alleged in *Lorance,* an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law. In *Bazemore* ..., for example, ... the Supreme Court properly held that each application of th[e] racially motivated salary structure, *i.e.,* each new paycheck, constituted a distinct violation of Title VII. Section 7(a)(2) generalizes the result correctly reached in *Bazemore.*" Civil Rights Act of 1990, S.Rep. No. 101–315, p. 54 (1990).[5]

See also 137 Cong. Rec. 29046, 29047 (1991) (Sponsors' Interpretative Memorandum) ("This legislation should be inter-

4. The Court also relies on *Machinists v. NLRB,* 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960), which like *Evans* and *Ricks,* concerned a discrete act: the execution of a collective-bargaining agreement containing a union security clause. 362 U.S., at 412, 417, 80 S.Ct. 822. In *Machinists,* it was undisputed that under the National Labor Relations Act (NLRA), a union and an employer may not agree to a union security clause "if at the time of original execution the union does not represent a majority of the employees in the [bargaining] unit." *Id.,* at 412–414, 417, 80 S.Ct. 822. The complainants, however, failed to file a charge within the NLRA's six-month charge-filing period; instead, they filed charges 10 and 12 months after the execution of the agreement, objecting to its subsequent enforcement. See *id.,* at 412, 414, 80 S.Ct. 822. Thus, as in *Evans* and *Ricks,* but in contrast to Ledbetter's case, the employment decision at issue was easily identifiable and occurred on a single day.

5. No Senate Report was submitted with the Civil Rights Act of 1991, which was in all material respects identical to the proposed 1990 Act.

preted as disapproving the extension of *[Lorance]* to contexts outside of seniority systems."). But cf. *ante,* at 2174 (relying on *Lorance* to conclude that "when an employer issues paychecks pursuant to a system that is facially nondiscriminatory and neutrally applied" a new Title VII violation does not occur (internal quotation marks omitted)).

Until today, in the more than 15 years since Congress amended Title VII, the Court had not once relied upon [654]*Lorance*. It is mistaken to do so now. Just as Congress' "goals in enacting Title VII . . . never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first [180] days," 490 U.S., at 914, 109 S.Ct. 2261 (Marshall, J., dissenting), Congress never intended to immunize forever discriminatory pay differentials unchallenged within 180 days of their adoption. This assessment gains weight when one comprehends that even a relatively minor pay disparity will expand exponentially over an employee's working life if raises are set as a percentage of prior pay.

A clue to congressional intent can be found in Title VII's backpay provision. The statute expressly provides that backpay may be awarded for a period of up to two years before the discrimination charge is filed. 42 U.S.C. § 2000e–5(g)(1) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."). This prescription indicates that Congress contemplated challenges to pay discrimination commencing before, but continuing into, the 180–day filing period. See *Morgan,* 536 U.S., at 119, 122 S.Ct. 2061 ("If Congress intended to limit liability to conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of backpay."). As we recognized in *Morgan,* "the fact that Congress expressly limited the amount of recoverable damages elsewhere to a particular time period [*i.e.,* two years] indicates that the [180–day] timely filing provision was not meant to serve as a specific limitation . . . [on] the conduct that may be considered." *Ibid.*

D

In tune with the realities of wage discrimination, the Courts of Appeals have overwhelmingly judged as a present violation the payment of wages infected by discrimination: Each paycheck less than the amount payable had the employer adhered to a nondiscriminatory compensation regime, courts have held, constitutes a cognizable harm. See, *e.g.,* [655]*Forsyth v. Federation Employment and Guidance Serv.,* 409 F.3d 565, 573 (C.A.2 2005) ("Any paycheck given within the [charge-filing] period . . . would be actionable, even if based on a discriminatory pay scale set up outside of the statutory period."); *Shea v. Rice,* 409 F.3d 448, 452–453 (C.A.D.C.2005) ("[An] employer commit[s] a separate unlawful employment practice each time he pa[ys] one employee less than another for a discriminatory reason" (citing *Bazemore,* 478 U.S., at 396, 106 S.Ct. 3000)); *Goodwin,* 275 F.3d, at 1009–1010 ("*[Bazemore]* has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination—instead it is itself a continually recurring violation . . . . [E]ach race-based discriminatory salary payment constitutes a fresh violation of Title VII." (footnote omitted)); *Anderson v. Zubieta,* 180 F.3d 329, 335 (C.A.D.C.1999) ("The Courts of Appeals have repeatedly reached the . . . conclusion" that pay discrimination is "actionable upon receipt of each paycheck."); accord *Hildebrandt v. Illinois Dept. of Natural Resources,* 347 F.3d 1014,

1025–1029 (C.A.7 2003); *Cardenas v. Massey,* 269 F.3d 251, 257 (C.A.3 2001); *Ashley v. Boyle's Famous Corned Beef Co.,* 66 F.3d 164, 167–168 (C.A.8 1995) (en banc); *Brinkley–Obu v. Hughes Training, Inc.,* 36 F.3d 336, 347–349 (C.A.4 1994); *Gibbs v. Pierce Cty. Law Enforcement Support Agcy.,* 785 F.2d 1396, 1399–1400 (C.A.9 1986).

Similarly in line with the real-world characteristics of pay discrimination, the EEOC—the federal agency responsible for enforcing Title VII, see, *e.g.,* 42 U.S.C. §§ 2000e–5(f), 2000e–12(a)—has interpreted the Act to permit employees to challenge disparate pay each time it is received. The EEOC's Compliance Manual provides that "[r]epeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period." 2 EEOC Compliance Manual § 2–IV–C(1)(a), p. 605:0024, and n. 183 (2006); cf. *id.,* § 10–III, p. 633:0002 [656](Title VII requires an employer to eliminate pay disparities attributable to a discriminatory system, even if that system has been discontinued).

The EEOC has given effect to its interpretation in a series of administrative decisions. See *Albritton v. Potter,* No. 01A44063, 2004 WL 2983682, *2 (EEOC Office of Fed. Operations, Dec. 17, 2004) (although disparity arose and employee became aware of the disparity outside the charge-filing period, claim was not time barred because "[e]ach paycheck that complainant receives which is less than that of similarly situated employees outside of her protected classes could support a claim under Title VII if discrimination is found to be the reason for the pay discrepancy." (citing *Bazemore,* 478 U.S., at 396, 106 S.Ct. 3000)). See also *Bynum–Doles v. Winter,* No. 01A53973, 2006 WL 2096290 (EEOC Office of Fed. Operations, July 18, 2006); *Ward v. Potter,* No. 01A60047, 2006 WL 721992 (EEOC Office of Fed. Operations, Mar. 10, 2006). And in this very case, the EEOC urged the Eleventh Circuit to recognize that Ledbetter's failure to challenge any particular pay-setting decision when that decision was made "does not deprive her of the right to seek relief for discriminatory paychecks she received in 1997 and 1998." Brief of EEOC in Support of Petition for Rehearing and Suggestion for Rehearing En Banc, in No. 03–15264–GG (CA11), p. 14 (hereinafter EEOC Brief) (citing *Morgan,* 536 U.S., at 113, 122 S.Ct. 2061).[6]

[657]II

The Court asserts that treating pay discrimination as a discrete act, limited to each particular pay-setting decision, is necessary to "protec[t] employers from the burden of defending claims arising from employment decisions that are long past." *Ante,* at 2170 (quoting *Ricks,* 449 U.S., at 256–257, 101 S.Ct. 498). But the discrimination of which Ledbetter complained is *not* long past. As she alleged, and as the jury found, Goodyear continued to treat

6. The Court dismisses the EEOC's considerable "experience and informed judgment," *Firefighters v. Cleveland,* 478 U.S. 501, 518, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986) (internal quotation marks omitted), as unworthy of any deference in this case, see *ante,* at 2177, n. 11. But the EEOC's interpretations mirror workplace realities and merit at least respectful attention. In any event, the level of deference due the EEOC here is an academic question, for the agency's conclusion that Ledbetter's claim is not time barred is the best reading of the statute even if the Court "were interpreting [Title VII] from scratch." See *Edelman v. Lynchburg College,* 535 U.S. 106, 114, 122 S.Ct. 1145, 152 L.Ed.2d 188 (2002); see *supra,* at 2166 – 2172.

Ledbetter differently because of sex each pay period, with mounting harm. Allowing employees to challenge discrimination "that extend[s] over long periods of time," into the charge-filing period, we have previously explained, "does not leave employers defenseless" against unreasonable or prejudicial delay. *Morgan*, 536 U.S., at 121, 122 S.Ct. 2061. Employers disadvantaged by such delay may raise various defenses. *Id.*, at 122, 122 S.Ct. 2061. Doctrines such as "waiver, estoppel, and equitable tolling" "allow us to honor Title VII's remedial purpose without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Id.*, at 121, 122 S.Ct. 2061 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982)); see 536 U.S., at 121, 122 S.Ct. 2061 (defense of laches may be invoked to block an employee's suit "if he unreasonably delays in filing [charges] and as a result harms the defendant"); EEOC Brief 15 ("[I]f Ledbetter unreasonably delayed challenging an earlier decision, and that delay significantly impaired Goodyear's ability to defend itself . . . Goodyear can raise a defense of laches . . . .").[7]

In a last-ditch argument, the Court asserts that this dissent would allow a plaintiff to sue on a single decision made [658]20 years ago "even if the employee had full knowledge of all the circumstances relating to the . . . decision at the time it was made." *Ante*, at 2175. It suffices to point out that the defenses just noted would make such a suit foolhardy. No sensible judge would tolerate such inexcusable neglect. See *Morgan*, 536 U.S., at 121, 122 S.Ct. 2061 ("In such cases, the federal courts have the discretionary power . . . to locate a just result in light of the circumstances peculiar to the case." (internal quotation marks omitted)).

Ledbetter, the Court observes, *ante*, at 2176, n. 9, dropped an alternative remedy she could have pursued: Had she persisted in pressing her claim under the Equal Pay Act of 1963 (EPA), 77 Stat. 56, 29 U.S.C. § 206(d), she would not have encountered a time bar.[8] See *ante*, at 2176 ("If Ledbetter had pursued her EPA claim, she would not face the Title VII obstacles that she now confronts."); cf. *Corning Glass Works v. Brennan*, 417 U.S. 188, 208–210, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974). Notably, the EPA provides no relief when the pay discrimination charged is based on race, religion, national origin, age, or disability. Thus, in truncating the Title VII rule this Court announced in *Bazemore*, the Court does not disarm female workers from achieving redress for unequal pay, but it does impede racial and other minorities from gaining similar relief.[9]

7. Further, as the EEOC appropriately recognized in its brief to the Eleventh Circuit, Ledbetter's failure to challenge particular pay raises within the charge-filing period "significantly limit[s] the relief she can seek. By waiting to file a charge, Ledbetter lost her opportunity to seek relief for any discriminatory paychecks she received between 1979 and late 1997." EEOC Brief 14. See also *supra*, at 2184 – 2185.

8. Under the EPA, 29 U.S.C. § 206(d), which is subject to the Fair Labor Standards Act's time prescriptions, a claim charging denial of equal pay accrues anew with each paycheck. 1 B. Lindemann & P. Grossman, Employment Discrimination Law 529 (3d ed.1996); cf. 29 U.S.C. § 255(a) (prescribing a two-year statute of limitations for violations generally, but a three-year limitation period for willful violations).

9. For example, under today's decision, if a black supervisor initially received the same salary as his white colleagues, but annually received smaller raises, there would be no right to sue under Title VII outside the 180–day window following each annual salary change, however strong the cumulative evidence of discrimination might be. The Court

[659]Furthermore, the difference between the EPA's prohibition against paying unequal wages and Title VII's ban on discrimination with regard to compensation is not as large as the Court's opinion might suggest. See *ante,* at 2176. The key distinction is that Title VII requires a showing of intent. In practical effect, "if the trier of fact is in equipoise about whether the wage differential is motivated by gender discrimination," Title VII compels a verdict for the employer, while the EPA compels a verdict for the plaintiff. 2 C. Sullivan, M. Zimmer, & R. White, Employment Discrimination: Law and Practice § 7.08[F][3], p. 532 (3d ed.2002). In this case, Ledbetter carried the burden of persuading the jury that the pay disparity she suffered was attributable to intentional sex discrimination. See *supra,* at 2178; *infra,* at 2187.

III

To show how far the Court has strayed from interpretation of Title VII with fidelity to the Act's core purpose, I return to the evidence Ledbetter presented at trial. Ledbetter proved to the jury the following: She was a member of a protected class; she performed work substantially equal to work of the dominant class (men); she was compensated less for that work; and the disparity was attributable to gender-based discrimination. See *supra,* at 2178.

Specifically, Ledbetter's evidence demonstrated that her current pay was discriminatorily low due to a long series of decisions reflecting Goodyear's pervasive discrimination against women managers in general and Ledbetter in particular. Ledbetter's former supervisor, for example, admitted to the jury that Ledbetter's pay, during a particular one-year period, fell below Goodyear's minimum threshold for her position. App. 93–97. Although Goodyear claimed the pay disparity was due to poor performance, the supervisor acknowledged that Ledbetter received a "Top Performance Award" in 1996. *Id.,* at 90–93. The jury also heard testimony that another supervisor—who evaluated Ledbetter in [660]1997 and whose evaluation led to her most recent raise denial—was openly biased against women. *Id.,* at 46, 77–82. And two women who had previously worked as managers at the plant told the jury they had been subject to pervasive discrimination and were paid less than their male counterparts. One was paid less than the men she supervised. *Id.,* at 51–68. Ledbetter herself testified about the discriminatory animus conveyed to her by plant officials. Toward the end of her career, for instance, the plant manager told Ledbetter that the "plant did not need women, that [women] didn't help it, [and] caused problems." *Id.,* at 36.[10] After weighing all the evidence, the jury found for Ledbetter, concluding that the pay disparity was due to intentional discrimination.

Yet, under the Court's decision, the discrimination Ledbetter proved is not redressable under Title VII. Each and every pay decision she did not immediately challenge wiped the slate clean. Consideration may not be given to the cumulative effect of a series of decisions that, together, set her pay well below that of every male area manager. Knowingly carrying past pay

would thus force plaintiffs, in many cases, to sue too soon to prevail, while cutting them off as time barred once the pay differential is large enough to enable them to mount a winnable case.

10. Given this abundant evidence, the Court cannot tenably maintain that Ledbetter's case "turned principally on the misconduct of a single Goodyear supervisor." See *ante,* at 2171, n. 4.

discrimination forward must be treated as lawful conduct. Ledbetter may not be compensated for the lower pay she was in fact receiving when she complained to the EEOC. Nor, were she still employed by Goodyear, could she gain, on the proof she presented at trial, injunctive relief requiring, prospectively, her receipt of the same compensation men receive for substantially similar work. The Court's approbation of these consequences is totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure. See, *e.g., Teamsters v. United States,* 431 U.S., at 348, 97 S.Ct. 1843 ("The primary purpose of Title VII was to assure equality of employment opportunities and to eliminate ... discriminatory practices[661] and devices ... ." (internal quotation marks omitted)); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) ("It is ... the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.").

This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose. See *supra,* at 2183 – 2184. See also *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (superseded in part by the Civil Rights Act of 1991); *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion) (same); 1 B. Lindemann & P. Grossman, Employment Discrimination Law 2 (3d ed. 1996) ("A spate of Court decisions in the late 1980s drew congressional fire and resulted in demands for legislative change[,]" culminating in the 1991 Civil Rights Act (footnote omitted)). Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.

* * *

For the reasons stated, I would hold that Ledbetter's claim is not time barred and would reverse the Eleventh Circuit's judgment.

551 U.S. 74, 167 L.Ed.2d 1069

Michael W. SOLE, Secretary, Florida Department of Environmental Protection, et al., Petitioners,

v.

T.A. WYNER et al.

No. 06–531.

Argued April 17, 2007.

Decided June 4, 2007.

Background: Organizer of event in which participants were to form peace symbol with their nude bodies at state beach brought § 1983 First Amendment action against state officials, seeking preliminary and permanent injunctions prohibiting state park officials from interfering with event or with future such events. The United States District Court for the Southern District of Florida, 254 F.Supp.2d 1297, Middlebrooks, J., granted preliminary injunction. Following event, the District Court denied motion for permanent injunction, but awarded attorney fees to organizer based on preliminary injunction. The United States Court of Appeals for the Eleventh Circuit, 179 Fed.Appx. 566, affirmed. Certiorari was granted.

Holdings: The United States Supreme Court, Justice Ginsburg, held that:

(1) § 1988 "prevailing party" status does not attend achievement of preliminary injunction that is reversed, dissolved,

KENTUCKY, Petitioner,

v.

Hollis Deshaun KING.

No. 09–1272.

Argued Jan. 12, 2011.

Decided May 16, 2011.

Background: Defendant pleaded guilty in the Circuit Court, Fayette County, James D. Ishmael, J., to trafficking in controlled substance, possession of marijuana, and being a persistent felony offender. Defendant appealed. The Court of Appeals of Kentucky, Thompson, J., 2008 WL 697629, affirmed. Defendant appealed. The Supreme Court of Kentucky, 302 S.W.3d 649, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that:

(1) case was not rendered moot by dismissal of charges against defendant, and

(2) warrantless entry to prevent the destruction of evidence is allowed where police do not create the exigency through actual or threatened Fourth Amendment violation; abrogating *U.S. v. Mowatt*, 513 F.3d 395, *U.S. v. Chambers*, 395 F.3d 563, *U.S. v. Gould*, 364 F.3d 578, *U.S. v. Rengifo*, 858 F.2d 800, *U.S. v. Socey*, 846 F.2d 1439, *Mann v. State,* 357 Ark. 159, 161 S.W.3d 826.

Reversed and remanded.

Justice Ginsburg filed dissenting opinion.

1. Federal Courts ⚿510

Although state trial court had dismissed the charges against defendant after the Kentucky Supreme Court had reversed his conviction, defendant's case was not moot, as would warrant United States Supreme Court's dismissing government's petition for certiorari as improvidently granted, since reversal of the Kentucky Supreme Court's decision by the United States Supreme Court would reinstate the judgment of conviction and the sentence entered by the trial court.

2. Searches and Seizures ⚿23, 113.1, 123.1

The text of the Fourth Amendment expressly imposes two requirements: (1) all searches and seizures must be reasonable, and (2) a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⚿24

Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, a warrant must generally be secured. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⚿25.1

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures ⚿25.1

The presumption that warrantless searches and seizures inside a home are unreasonable may be overcome in some circumstances, because the ultimate touchstone of the Fourth Amendment is reasonableness. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⚿24

The Fourth Amendment's warrant requirement is subject to certain reasonable exceptions. U.S.C.A. Const.Amend. 4.

7. Searches and Seizures ⚿42.1

An exception to the Fourth Amendment's warrant requirement applies when the exigencies of the situation make the

needs of law enforcement so compelling that warrantless search is objectively reasonable under the Fourth Amendment. U.S.C.A. Const.Amend. 4.

8. Searches and Seizures ⚿42.1

Under the emergency aid exception to the Fourth Amendment's warrant requirement, officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. U.S.C.A. Const.Amend. 4.

9. Searches and Seizures ⚿43

Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. U.S.C.A. Const.Amend. 4.

10. Searches and Seizures ⚿45

The need to prevent the imminent destruction of evidence is a sufficient justification for a warrantless search. U.S.C.A. Const.Amend. 4.

11. Searches and Seizures ⚿24

Warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. U.S.C.A. Const.Amend. 4.

12. Searches and Seizures ⚿42.1

The exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable within the meaning of the Fourth Amendment. U.S.C.A. Const. Amend. 4.

13. Searches and Seizures ⚿45

Under the exigent circumstances rule, warrantless entry to prevent the destruction of evidence is reasonable, and thus allowed, where the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment; abrogating *U.S. v. Mowatt*, 513 F.3d 395, *U.S. v. Chambers*, 395 F.3d 563, *U.S. v. Gould*, 364 F.3d 578, *U.S. v. Rengifo*, 858 F.2d 800, *U.S. v. Socey*, 846 F.2d 1439, *Mann v. State,* 357 Ark. 159, 161 S.W.3d 826. U.S.C.A. Const.Amend. 4.

14. Searches and Seizures ⚿47.1

Law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made. U.S.C.A. Const.Amend. 4.

15. Searches and Seizures ⚿47.1

It is an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed; so long as this prerequisite is satisfied, it does not matter that the officer who makes the observation may have gone to the spot from which the evidence was seen with the hope of being able to view and seize the evidence, as the Fourth Amendment requires only that the steps preceding the seizure be lawful. U.S.C.A. Const.Amend. 4.

16. Arrest ⚿60.1(2)

Officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs; if consent is freely given, it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent. U.S.C.A. Const.Amend. 4.

17. Searches and Seizures ⚿42.1

In determining whether a police-created exigency has negated the reasonableness of a warrantless entry based on exigent circumstances, the court considers objective factors, not the subjective intent

of police officers. U.S.C.A. Const.Amend. 4.

18. Searches and Seizures ⚿42.1

In determining whether a police-created exigency has negated the reasonableness of a warrantless entry based on exigent circumstances, the court does not consider whether it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances. U.S.C.A. Const. Amend. 4.

19. Searches and Seizures ⚿23

The calculus of Fourth Amendment reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. U.S.C.A. Const. Amend. 4.

20. Criminal Law ⚿1222.1

Searches and Seizures ⚿121.1

Law enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause, and so faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution. U.S.C.A. Const.Amend. 4.

21. Arrest ⚿60.1(2)

When law enforcement officers who are not armed with a search warrant knock on a door, they do no more than any private citizen might do, and whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. U.S.C.A. Const.Amend. 4.

22. Arrest ⚿60.1(2)

Searches and Seizures ⚿171

When law enforcement officers who are not armed with a search warrant knock on a door, and an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time. U.S.C.A. Const.Amend. 4.

23. Searches and Seizures ⚿42.1

Any warrantless entry based on exigent circumstances must be supported by a genuine exigency. U.S.C.A. Const. Amend. 4.

Syllabus *

Police officers in Lexington, Kentucky, followed a suspected drug dealer to an apartment complex. They smelled marijuana outside an apartment door, knocked loudly, and announced their presence. As soon as the officers began knocking, they heard noises coming from the apartment; the officers believed that these noises were consistent with the destruction of evidence. The officers announced their intent to enter the apartment, kicked in the door, and found respondent and others. They saw drugs in plain view during a protective sweep of the apartment and found additional evidence during a subsequent search. The Circuit Court denied respondent's motion to suppress the evidence, holding that exigent circumstances—the need to prevent destruction of evidence—justified the warrantless entry. Respondent entered a conditional guilty plea, reserving his right to appeal the suppression rul-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

ing, and the Kentucky Court of Appeals affirmed. The Supreme Court of Kentucky reversed. The court assumed that exigent circumstances existed, but it nonetheless invalidated the search. The exigent circumstances rule did not apply, the court held, because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence.

Held:

1. The exigent circumstances rule applies when the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment. Pp. 1856 – 1862.

(a) The Fourth Amendment expressly imposes two requirements: All searches and seizures must be reasonable; and a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. Although " 'searches and seizures inside a home without a warrant are presumptively unreasonable,' " *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650, this presumption may be overcome when " 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment," *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290. One such exigency is the need "to prevent the imminent destruction of evidence." *Brigham City, supra*, at 403, 126 S.Ct. 1943. Pp. 1856 – 1857.

(b) Under the "police-created exigency" doctrine, which lower courts have developed as an exception to the exigent circumstances rule, exigent circumstances do not justify a warrantless search when the exigency was "created" or "manufactured" by the conduct of the police. The lower courts have not agreed, however, on the test for determining when police impermissibly create an exigency. Pp. 1857 – 1858.

(c) The proper test follows from the principle that permits warrantless searches: warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Thus, a warrantless entry based on exigent circumstances is reasonable when the police did not create the exigency by engaging or threatening to engage in conduct violating the Fourth Amendment. A similar approach has been taken in other cases involving warrantless searches. For example, officers may seize evidence in plain view if they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made, see *Horton v. California*, 496 U.S. 128, 136–140, 110 S.Ct. 2301, 110 L.Ed.2d 112; and they may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs, see *INS v. Delgado*, 466 U.S. 210, 217, n. 5, 104 S.Ct. 1758, 80 L.Ed.2d 247. Pp. 1857 – 1859.

(d) Some courts, including the Kentucky Supreme Court, have imposed additional requirements—asking whether officers " 'deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement,' " 302 S.W.3d 649, 656 (case below); reasoning that police may not rely on an exigency if " 'it was reasonably foreseeable that [their] investigative tactics . . . would create the exigent circumstances,' " *ibid.*; faulting officers for knocking on a door when they had sufficient evidence to seek a warrant but did not do so; and finding that officers created or manufactured an exigency when their investigation was contrary to standard or good law enforcement practices. Such requirements are

unsound and are thus rejected. Pp. 1858 – 1861.

(e) Respondent contends that an exigency is impermissibly created when officers engage in conduct that would cause a reasonable person to believe that entry was imminent and inevitable, but that approach is also flawed. The ability of officers to respond to an exigency cannot turn on such subtleties as the officers' tone of voice in announcing their presence and the forcefulness of their knocks. A forceful knock may be necessary to alert the occupants that someone is at the door, and unless officers identify themselves loudly enough, occupants may not know who is at their doorstep. Respondent's test would make it extremely difficult for officers to know how loudly they may announce their presence or how forcefully they may knock without running afoul of the police-created exigency rule. And in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed. P. 1861.

2. Assuming that an exigency existed here, there is no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment. Pp. 1862 – 1864.

(a) Any question about whether an exigency existed here is better addressed by the Kentucky Supreme Court on remand. Pp. 1862 – 1863.

(b) Assuming an exigency did exist, the officers' conduct—banging on the door and announcing their presence—was entirely consistent with the Fourth Amendment. Respondent has pointed to no evidence supporting his argument that the officers made any sort of "demand" to enter the apartment, much less a demand that amounts to a threat to violate the Fourth Amendment. If there is contradictory evidence that has not been brought to this Court's attention, the state court may elect to address that matter on remand. Finally, the record makes clear that the officers' announcement that they were going to enter the apartment was made after the exigency arose. Pp. 1862 – 1864.

302 S.W.3d 649, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, THOMAS, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed a dissenting opinion.

Joshua D. Farley, Frankfort, KY, for petitioner.

Ann O'Connell, Washington, DC, for United States as amicus curiae, by special leave of the Court, supporting the petitioner.

Jamesa J. Drake, Frankfort, KY, for respondent.

Jack Conway, Attorney General of Kentucky, Joshua D. Farley, Counsel of Record, Bryan D. Morrow, Assistant Attorneys General, Frankfort, KY, for Petitioner Commonwealth of Kentucky.

Jeffrey T. Green, Sarah O'Rourke Schrup, Northwestern University, Supreme Court Practicum, Chicago, IL, Jamesa J. Drake, Counsel of Record, Asst. Public Advocate, Kentucky Department of Advocacy, Frankfort, KY, for Respondent Hollis Deshaun King.

For U.S. Supreme Court Briefs, See:

2010 WL 5312676 (Pet.Brief) 2010 WL 4624149 (Pet.Brief) 2010 WL 5133653 (Resp.Brief) 2011 WL 42804 (Reply.Brief)

Justice ALITO delivered the opinion of the Court.

It is well established that "exigent circumstances," including the need to prevent

the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant. In this case, we consider whether this rule applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence. The Kentucky Supreme Court held that the exigent circumstances rule does not apply in the case at hand because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. We reject this interpretation of the exigent circumstances rule. The conduct of the police prior to their entry into the apartment was entirely lawful. They did not violate the Fourth Amendment or threaten to do so. In such a situation, the exigent circumstances rule applies.

I

A

This case concerns the search of an apartment in Lexington, Kentucky. Police officers set up a controlled buy of crack cocaine outside an apartment complex. Undercover Officer Gibbons watched the deal take place from an unmarked car in a nearby parking lot. After the deal occurred, Gibbons radioed uniformed officers to move in on the suspect. He told the officers that the suspect was moving quickly toward the breezeway of an apartment building, and he urged them to "hurry up and get there" before the suspect entered an apartment. App. 20.

In response to the radio alert, the uniformed officers drove into the nearby parking lot, left their vehicles, and ran to the breezeway. Just as they entered the breezeway, they heard a door shut and detected a very strong odor of burnt marijuana. At the end of the breezeway, the officers saw two apartments, one on the left and one on the right, and they did not know which apartment the suspect had entered. Gibbons had radioed that the suspect was running into the apartment on the right, but the officers did not hear this statement because they had already left their vehicles. Because they smelled marijuana smoke emanating from the apartment on the left, they approached the door of that apartment.

Officer Steven Cobb, one of the uniformed officers who approached the door, testified that the officers banged on the left apartment door "as loud as [they] could" and announced, " 'This is the police' " or " 'Police, police, police.' " *Id.*, at 22–23. Cobb said that "[a]s soon as [the officers] started banging on the door," they "could hear people inside moving," and "[i]t sounded as [though] things were being moved inside the apartment." *Id.*, at 24. These noises, Cobb testified, led the officers to believe that drug-related evidence was about to be destroyed.

At that point, the officers announced that they "were going to make entry inside the apartment." *Ibid.* Cobb then kicked in the door, the officers entered the apartment, and they found three people in the front room: respondent Hollis King, respondent's girlfriend, and a guest who was smoking marijuana.[1] The officers performed a protective sweep of the apartment during which they saw marijuana and powder cocaine in plain view. In a subsequent search, they also discovered crack cocaine, cash, and drug paraphernalia.

1. Respondent's girlfriend leased the apartment, but respondent stayed there part of the time, and his child lived there. Based on these facts, Kentucky conceded in state court that respondent has Fourth Amendment standing to challenge the search. See App. to Pet. for Cert. 7a; see also 302 S.W.3d 649, 652 (Ky.2010).

Police eventually entered the apartment on the right. Inside, they found the suspected drug dealer who was the initial target of their investigation.

B

In the Fayette County Circuit Court, a grand jury charged respondent with trafficking in marijuana, first-degree trafficking in a controlled substance, and second-degree persistent felony offender status. Respondent filed a motion to suppress the evidence from the warrantless search, but the Circuit Court denied the motion. The Circuit Court concluded that the officers had probable cause to investigate the marijuana odor and that the officers "properly conducted [the investigation] by initially knocking on the door of the apartment unit and awaiting the response or consensual entry." App. to Pet. for Cert. 9a. Exigent circumstances justified the warrantless entry, the court held, because "there was no response at all to the knocking," and because "Officer Cobb heard movement in the apartment which he reasonably concluded were persons in the act of destroying evidence, particularly narcotics because of the smell." *Ibid.* Respondent then entered a conditional guilty plea, reserving his right to appeal the denial of his suppression motion. The court sentenced respondent to 11 years' imprisonment.

The Kentucky Court of Appeals affirmed. It held that exigent circumstances justified the warrantless entry because the police reasonably believed that evidence would be destroyed. The police did not impermissibly create the exigency, the court explained, because they did not deliberately evade the warrant requirement.

The Supreme Court of Kentucky reversed. 302 S.W.3d 649 (2010). As a preliminary matter, the court observed that there was "certainly some question as to whether the sound of persons moving [inside the apartment] was sufficient to establish that evidence was being destroyed." *Id.*, at 655. But the court did not answer that question. Instead, it "assume[d] for the purpose of argument that exigent circumstances existed." *Ibid.*

To determine whether police impermissibly created the exigency, the Supreme Court of Kentucky announced a two-part test. First, the court held, police cannot "deliberately creat[e] the exigent circumstances with the bad faith intent to avoid the warrant requirement." *Id.*, at 656 (internal quotation marks omitted). Second, even absent bad faith, the court concluded, police may not rely on exigent circumstances if "it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances." *Ibid.* (internal quotation marks omitted). Although the court found no evidence of bad faith, it held that exigent circumstances could not justify the search because it was reasonably foreseeable that the occupants would destroy evidence when the police knocked on the door and announced their presence. *Ibid.*

[1] We granted certiorari. 561 U.S. ——, 131 S.Ct. 61, 177 L.Ed.2d 1150 (2010).[2]

2. After we granted certiorari, respondent filed a motion to dismiss the petition as improvidently granted, which we denied. 562 U.S. ——, 131 S.Ct. 625, 178 L.Ed.2d 432 (2010). Respondent's principal argument was that the case was moot because, after the Kentucky Supreme Court reversed his conviction, the Circuit Court dismissed the charges against him. Respondent's argument is foreclosed by *United States v. Villamonte–Marquez,* 462 U.S. 579, 581, n. 2, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983). As we explained in *Villamonte–Marquez,* our reversal of the Kentucky Supreme Court's decision "would reinstate the judgment of conviction and the sentence entered" by the Circuit Court. *Ibid.* The absence of

II

A

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] The text of the Amendment thus expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. See *Payton v. New York*, 445 U.S. 573, 584, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

[3–6] Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured. "It is a 'basic principle of Fourth Amendment law,' " we have often said, " 'that searches and seizures inside a home without a warrant are presumptively unreasonable.' " *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (quoting *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004)). But we have also recognized that this presumption may be overcome in some circumstances because "[t]he ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Brigham City, supra*, at 403, 126 S.Ct. 1943; see also *Michigan v. Fisher*, 558 U.S. ——, ——, 130 S.Ct. 546, 548, 175 L.Ed.2d 410 (2009) *(per curiam)*. Accordingly, the warrant requirement is subject to certain reasonable exceptions. *Brigham City, supra*, at 403, 126 S.Ct. 1943.

[7] One well-recognized exception applies when " 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); see also *Payton, supra*, at 590, 100 S.Ct. 1371 ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant").

[8–10] This Court has identified several exigencies that may justify a warrantless search of a home. See *Brigham City,* 547 U.S., at 403, 126 S.Ct. 1943. Under the "emergency aid" exception, for example, "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Ibid.;* see also, *e.g., Fisher, supra,* at ——, 130 S.Ct. at 548 (upholding warrantless home entry based on emergency aid exception). Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. See *United States v. Santana*, 427 U.S. 38, 42–43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976). And—what is relevant here—the need "to prevent the imminent destruction of evidence" has long been recognized as a sufficient justification for a warrantless search. *Brigham City, supra,* at 403, 126 S.Ct. 1943; see also *Georgia v. Randolph*, 547 U.S. 103, 116, n. 6, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006);

an indictment does not change matters. See *ibid.* ("Upon respondents' conviction and sentence, the indictment that was returned against them was merged into their convictions and sentences").

Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990).[3]

B

Over the years, lower courts have developed an exception to the exigent circumstances rule, the so-called "police-created exigency" doctrine. Under this doctrine, police may not rely on the need to prevent destruction of evidence when that exigency was "created" or "manufactured" by the conduct of the police. See, *e.g., United States v. Chambers*, 395 F.3d 563, 566 (C.A.6 2005) ("[F]or a warrantless search to stand, law enforcement officers must be responding to an unanticipated exigency rather than simply creating the exigency for themselves"); *United States v. Gould*, 364 F.3d 578, 590 (C.A.5 2004) (en banc) ("[A]lthough exigent circumstances may justify a warrantless probable cause entry into the home, they will not do so if the exigent circumstances were manufactured by the agents" (internal quotation marks omitted)).

In applying this exception for the "creation" or "manufacturing" of an exigency by the police, courts require something more than mere proof that fear of detection by the police caused the destruction of evidence. An additional showing is obviously needed because, as the Eighth Circuit has recognized, "in some sense the police always create the exigent circumstances." *United States v. Duchi*, 906 F.2d 1278, 1284 (C.A.8 1990). That is to say, in the vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, the reason for the destruction is fear that the evidence will fall into the hands of law enforcement. Destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain. Persons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police. Consequently, a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement.

Presumably for the purpose of avoiding such a result, the lower courts have held that the police-created exigency doctrine requires more than simple causation, but the lower courts have not agreed on the test to be applied. Indeed, the petition in this case maintains that "[t]here are currently five different tests being used by the United States Courts of Appeals," Pet. for Cert. 11, and that some state courts have crafted additional tests, *id.*, at 19–20.

III

A

[11–13] Despite the welter of tests devised by the lower courts, the answer to the question presented in this case follows

3. Preventing the destruction of evidence may also justify dispensing with Fourth Amendment requirements in other contexts. See, *e.g., Richards v. Wisconsin*, 520 U.S. 385, 395–396, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997) (failure to comply with the knock-and-announce requirement was justified because "the circumstances . . . show[ed] that the officers had a reasonable suspicion that [a suspect] might destroy evidence if given further opportunity to do so"); *Schmerber v. California*, 384 U.S. 757, 770–771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (warrantless testing for blood-alcohol content was justified based on potential destruction of evidence); cf. *United States v. Banks*, 540 U.S. 31, 37–40, 124 S.Ct. 521, 157 L.Ed.2d 343 (2003) (15 to 20 seconds was a reasonable time for officers to wait after knocking and announcing their presence where there was a risk that suspect would dispose of cocaine).

directly and clearly from the principle that permits warrantless searches in the first place. As previously noted, warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, the answer to the question before us is that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.[4]

[14, 15] We have taken a similar approach in other cases involving warrantless searches. For example, we have held that law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made. See *Horton v. California*, 496 U.S. 128, 136–140, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). As we put it in *Horton*, "[i]t is . . . an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Id.*, at 136, 110 S.Ct. 2301. So long as this prerequisite is satisfied, however, it does not matter that the officer who makes the observation may have gone to the spot from which the evidence was seen with the hope of being able to view and seize the evidence. See *id.*, at 138, 110 S.Ct. 2301 ("The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure"). Instead, the Fourth Amendment requires only that the steps preceding the seizure be lawful. See *id.*, at 136–137, 110 S.Ct. 2301.

[16] Similarly, officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs. See *INS v. Delgado*, 466 U.S. 210, 217, n. 5, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984) (noting that officers who entered into consent-based encounters with employees in a factory building were "lawfully present [in the factory] pursuant to consent or a warrant"). If consent is freely given, it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent. See *id.*, at 216, 104 S.Ct. 1758 ("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response").

B

Some lower courts have adopted a rule that is similar to the one that we recognize today. See *United States v. MacDonald*, 916 F.2d 766, 772 (C.A.2 1990) (en banc) (law enforcement officers "do not impermissibly create exigent circumstances" when they "act in an entirely lawful manner"); *State v. Robinson*, 2010 WI 80, ¶ 32, 327 Wis.2d 302, 326–328, 786 N.W.2d 463, 475–476 (2010). But others, including the Kentucky Supreme Court, have imposed

4. There is a strong argument to be made that, at least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted. In this case, however, no such actual threat was made, and therefore we have no need to reach that question.

additional requirements that are unsound and that we now reject.

Bad faith. Some courts, including the Kentucky Supreme Court, ask whether law enforcement officers " 'deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement.' " 302 S.W.3d, at 656 (quoting *Gould*, 364 F.3d, at 590); see also, *e.g., Chambers*, 395 F.3d, at 566; *United States v. Socey*, 846 F.2d 1439, 1448 (C.A.D.C. 1988); *United States v. Rengifo*, 858 F.2d 800, 804 (C.A.1 1988).

[17] This approach is fundamentally inconsistent with our Fourth Amendment jurisprudence. "Our cases have repeatedly rejected" a subjective approach, asking only whether "the circumstances, viewed *objectively*, justify the action." *'Brigham City*, 547 U.S., at 404, 126 S.Ct. 1943 (alteration and internal quotation marks omitted); see also *Fisher*, 558 U.S., at ——, 130 S.Ct., at 548–49. Indeed, we have never held, outside limited contexts such as an "inventory search or administrative inspection . . ., that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment." *Whren v. United States*, 517 U.S. 806, 812, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); see also *Brigham City, supra*, at 405, 126 S.Ct. 1943.

The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests based on reasonableness are generally objective, and this Court has long taken the view that "even-handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton, supra*, at 138, 110 S.Ct. 2301.

[18] *Reasonable foreseeability.* Some courts, again including the Kentucky Supreme Court, hold that police may not rely on an exigency if " 'it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances.' " 302 S.W.3d, at 656 (quoting *Mann v. State*, 357 Ark. 159, 172, 161 S.W.3d 826, 834 (2004)); see also, *e.g., United States v. Mowatt*, 513 F.3d 395, 402 (C.A.4 2008). Courts applying this test have invalidated warrantless home searches on the ground that it was reasonably foreseeable that police officers, by knocking on the door and announcing their presence, would lead a drug suspect to destroy evidence. See, *e.g., id.*, at 402–403; 302 S.W.3d, at 656.

Contrary to this reasoning, however, we have rejected the notion that police may seize evidence without a warrant only when they come across the evidence by happenstance. In *Horton*, as noted, we held that the police may seize evidence in plain view even though the officers may be "interested in an item of evidence and fully expec[t] to find it in the course of a search." 496 U.S., at 138, 110 S.Ct. 2301.

Adoption of a reasonable foreseeability test would also introduce an unacceptable degree of unpredictability. For example, whenever law enforcement officers knock on the door of premises occupied by a person who may be involved in the drug trade, there is *some* possibility that the occupants may possess drugs and may seek to destroy them. Under a reasonable foreseeability test, it would be necessary to quantify the degree of predictability that must be reached before the police-created exigency doctrine comes into play.

A simple example illustrates the difficulties that such an approach would produce. Suppose that the officers in the present case did not smell marijuana smoke and thus knew only that there was a 50% chance that the fleeing suspect had entered the apartment on the left rather

than the apartment on the right. Under those circumstances, would it have been reasonably foreseeable that the occupants of the apartment on the left would seek to destroy evidence upon learning that the police were at the door? Or suppose that the officers knew only that the suspect had disappeared into one of the apartments on a floor with 3, 5, 10, or even 20 units? If the police chose a door at random and knocked for the purpose of asking the occupants if they knew a person who fit the description of the suspect, would it have been reasonably foreseeable that the occupants would seek to destroy evidence?

[19] We have noted that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor,* 490 U.S. 386, 396–397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The reasonable foreseeability test would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field, as well as for judges who would be required to determine after the fact whether the destruction of evidence in response to a knock on the door was reasonably foreseeable based on what the officers knew at the time.

Probable cause and time to secure a warrant. Some courts, in applying the police-created exigency doctrine, fault law enforcement officers if, after acquiring evidence that is sufficient to establish probable cause to search particular premises, the officers do not seek a warrant but instead knock on the door and seek either to speak with an occupant or to obtain consent to search. See, *e.g., Chambers, supra,* at 569 (citing "[t]he failure to seek a warrant in the face of plentiful probable cause" as a factor indicating that the police deliberately created the exigency).

This approach unjustifiably interferes with legitimate law enforcement strategies. There are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired. Without attempting to provide a comprehensive list of these reasons, we note a few.

First, the police may wish to speak with the occupants of a dwelling before deciding whether it is worthwhile to seek authorization for a search. They may think that a short and simple conversation may obviate the need to apply for and execute a warrant. See *Schneckloth v. Bustamonte,* 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Second, the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant. A consensual search also "may result in considerably less inconvenience" and embarrassment to the occupants than a search conducted pursuant to a warrant. *Ibid.* Third, law enforcement officers may wish to obtain more evidence before submitting what might otherwise be considered a marginal warrant application. Fourth, prosecutors may wish to wait until they acquire evidence that can justify a search that is broader in scope than the search that a judicial officer is likely to authorize based on the evidence then available. And finally, in many cases, law enforcement may not want to execute a search that will disclose the existence of an investigation because doing so may interfere with the acquisition of additional evidence against those already under suspicion or evidence about additional but as yet unknown participants in a criminal scheme.

[20] We have said that "[l]aw enforcement officers are under no constitutional duty to call a halt to criminal investigation

the moment they have the minimum evidence to establish probable cause." *Hoffa v. United States*, 385 U.S. 293, 310, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution.

Standard or good investigative tactics. Finally, some lower court cases suggest that law enforcement officers may be found to have created or manufactured an exigency if the court concludes that the course of their investigation was "contrary to standard or good law enforcement practices (or to the policies or practices of their jurisdictions)." *Gould*, 364 F.3d, at 591. This approach fails to provide clear guidance for law enforcement officers and authorizes courts to make judgments on matters that are the province of those who are responsible for federal and state law enforcement agencies.

C

Respondent argues for a rule that differs from those discussed above, but his rule is also flawed. Respondent contends that law enforcement officers impermissibly create an exigency when they "engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable." Brief for Respondent 24. In respondent's view, relevant factors include the officers' tone of voice in announcing their presence and the forcefulness of their knocks. But the ability of law enforcement officers to respond to an exigency cannot turn on such subtleties.

Police officers may have a very good reason to announce their presence loudly and to knock on the door with some force. A forceful knock may be necessary to alert the occupants that someone is at the door. Cf. *United States v. Banks*, 540 U.S. 31, 33, 124 S.Ct. 521, 157 L.Ed.2d 343 (2003) (Police "rapped hard enough on the door to be heard by officers at the back door" and announced their presence, but defendant "was in the shower and testified that he heard nothing"). Furthermore, unless police officers identify themselves loudly enough, occupants may not know who is at their doorstep. Officers are permitted—indeed, encouraged—to identify themselves to citizens, and "in many circumstances this is cause for assurance, not discomfort." *United States v. Drayton*, 536 U.S. 194, 204, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002). Citizens who are startled by an unexpected knock on the door or by the sight of unknown persons in plain clothes on their doorstep may be relieved to learn that these persons are police officers. Others may appreciate the opportunity to make an informed decision about whether to answer the door to the police.

If respondent's test were adopted, it would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule. And in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed. The Fourth Amendment does not require the nebulous and impractical test that respondent proposes.[5]

5. Contrary to respondent's argument, see Brief for Respondent 13–18, *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948), does not require affirmance in this case. In *Johnson*, officers noticed the smell of burning opium emanating from a hotel room. They then knocked on the door and demanded entry. Upon seeing that Johnson was the only occupant of the room, they placed her under arrest, searched the room, and discovered opium and drug paraphernalia. *Id.*, at 11, 68 S.Ct. 367.

D

For these reasons, we conclude that the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment. This holding provides ample protection for the privacy rights that the Amendment protects.

[21, 22] When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. Cf. *Florida v. Royer,* 460 U.S. 491, 497–498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). ("[H]e may decline to listen to the questions at all and may go on his way"). When the police knock on a door but the occupants choose not to respond or to speak, "the investigation will have reached a conspicuously low point," and the occupants "will have the kind of warning that even the most elaborate security system cannot provide." *Chambers,* 395 F.3d, at 577 (Sutton, J., dissenting). And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.

Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.

IV

We now apply our interpretation of the police-created exigency doctrine to the facts of this case.

A

[23] We need not decide whether exigent circumstances existed in this case. Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency. See *Brigham City,* 547 U.S., at 406, 126 S.Ct. 1943. The trial court and the Kentucky Court of Appeals found that there was a real exigency in this case, but the Kentucky Supreme Court expressed doubt on this issue, observing that there was "certainly some question as to whether the sound of persons moving [inside the apartment] was sufficient to establish that evidence was being destroyed." 302 S.W.3d, at 655. The Kentucky Supreme Court "assum[ed] for the purpose of argument that exigent circumstances existed," *ibid.,* and it held that the police had impermissibly manufactured the exigency.

We, too, assume for purposes of argument that an exigency existed. We decide only the question on which the Kentucky Supreme Court ruled and on which we granted certiorari: Under what circum-

Defending the legality of the search, the Government attempted to justify the warrantless search of the room as a valid search incident to a lawful arrest. See Brief for United States in *Johnson v. United States,* O.T.1947, No. 329, pp. 13, 16, 36. The Government did not contend that the officers entered the room in order to prevent the destruction of evidence. Although the officers said that they heard a " 'shuffling' " noise inside the room after they knocked on the door, 333 U.S., at 12, 68 S.Ct. 367, the Government did not claim that this particular noise was a noise that would have led a reasonable officer to think that evidence was about to be destroyed. Thus, *Johnson* is simply not a case about exigent circumstances. See *id.,* at 14–15, 68 S.Ct. 367 (noting that if "exceptional circumstances" existed—for example, if a "suspect was fleeing or likely to take flight" or if "evidence or contraband was threatened with removal or destruction"—then "it may be contended that a magistrate's warrant for search may be dispensed with").

stances do police impermissibly create an exigency? Any question about whether an exigency actually existed is better addressed by the Kentucky Supreme Court on remand. See *Kirk v. Louisiana,* 536 U.S. 635, 638, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002) *(per curiam)* (reversing state-court judgment that exigent circumstances were not required for warrantless home entry and remanding for state court to determine whether exigent circumstances were present).

B

In this case, we see no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment. Officer Cobb testified without contradiction that the officers "banged on the door as loud as [they] could" and announced either " 'Police, police, police' " or " 'This is the police.' " App. 22–23. This conduct was entirely consistent with the Fourth Amendment, and we are aware of no other evidence that might show that the officers either violated the Fourth Amendment or threatened to do so (for example, by announcing that they would break down the door if the occupants did not open the door voluntarily).

Respondent argues that the officers "demanded" entry to the apartment, but he has not pointed to any evidence in the record that supports this assertion. He relies on a passing statement made by the trial court in its opinion denying respondent's motion to suppress. See App. to Pet. for Cert. 3a–4a. In recounting the events that preceded the search, the judge wrote that the officers "banged on the door of the apartment on the back left of the breezeway identifying themselves as police officers and *demanding* that the door be opened by the persons inside." *Ibid.* (emphasis added and deleted). However, at a later point in this opinion, the judge stated that the officers "initially knock[ed] on the door of the apartment unit and await[ed] the response or consensual entry." *Id.,* at 9a. This later statement is consistent with the testimony at the suppression hearing and with the findings of the state appellate courts. See 302 S.W.3d, at 651 (The officers "knocked loudly on the back left apartment door and announced 'police' "); App. to Pet. for Cert. 14a (The officers "knock[ed] on the door and announc[ed] themselves as police"); App. 22–24. There is no evidence of a "demand" of any sort, much less a demand that amounts to a threat to violate the Fourth Amendment. If there is contradictory evidence that has not been brought to our attention, the state court may elect to address that matter on remand.

Finally, respondent claims that the officers "explained to [the occupants that the officers] were going to make entry inside the apartment," *id.,* at 24, but the record is clear that the officers did not make this statement until after the exigency arose. As Officer Cobb testified, the officers "knew that there was possibly something that was going to be destroyed inside the apartment," and "*[a]t that point,* . . . [they] explained . . . [that they] were going to make entry." *Ibid.* (emphasis added). Given that this announcement was made *after* the exigency arose, it could not have created the exigency.

* * *

Like the court below, we assume for purposes of argument that an exigency existed. Because the officers in this case did not violate or threaten to violate the Fourth Amendment prior to the exigency, we hold that the exigency justified the warrantless search of the apartment.

The judgment of the Kentucky Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice GINSBURG, dissenting.

The Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant. I dissent from the Court's reduction of the Fourth Amendment's force.

The Fourth Amendment guarantees to the people "[t]he right ... to be secure in their ... houses ... against unreasonable searches and seizures." Warrants to search, the Amendment further instructs, shall issue only upon a showing of "probable cause" to believe criminal activity is afoot. These complementary provisions are designed to ensure that police will seek the authorization of a neutral magistrate before undertaking a search or seizure. Exceptions to the warrant requirement, this Court has explained, must be "few in number and carefully delineated," if the main rule is to remain hardy. *United States v. United States Dist. Court for Eastern Dist. of Mich.*, 407 U.S. 297, 318, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); see *Kyllo v. United States*, 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).

This case involves a principal exception to the warrant requirement, the exception applicable in "exigent circumstances." See *ante*, at 6–7. "[C]arefully delineated," the exception should govern only in genuine emergency situations. Circumstances qualify as "exigent" when there is an imminent risk of death or serious injury, or danger that evidence will be immediately destroyed, or that a suspect will escape. *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). The question presented: May police, who could pause to gain the approval of a neutral magistrate, dispense with the need to get a warrant by themselves creating exigent circumstances? I would answer no, as did the Kentucky Supreme Court. The urgency must exist, I would rule, when the police come on the scene, not subsequent to their arrival, prompted by their own conduct.

I

Two pillars of our Fourth Amendment jurisprudence should have controlled the Court's ruling: First, "whenever practical, [the police must] obtain advance judicial approval of searches and seizures through the warrant procedure," *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); second, unwarranted "searches and seizures inside a home" bear heightened scrutiny, *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). The warrant requirement, Justice Jackson observed, ranks among the "fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." *Johnson v. United States*, 333 U.S. 10, 17, 68 S.Ct. 367, 92 L.Ed. 436 (1948). The Court has accordingly declared warrantless searches, in the main, "*per se* unreasonable." *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); see also *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). "[T]he police bear a heavy burden," the Court has cautioned, "when attempting to demonstrate an urgent need that might justify warrantless searches." *Welsh v. Wisconsin*, 466 U.S. 740, 749–750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

That heavy burden has not been carried here. There was little risk that drug-related evidence would have been destroyed had the police delayed the search pending a magistrate's authorization. As the Court recognizes, "[p]ersons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police." *Ante,* at 1857. Nothing in the record shows that, prior to the knock at the apartment door, the occupants were apprehensive about police proximity.

In no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space which, for centuries, has been regarded as " 'entitled to special protection.' " *Georgia v. Randolph,* 547 U.S. 103, 115, and n. 4, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006); *Minnesota v. Carter,* 525 U.S. 83, 99, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (KENNEDY, J., concurring). Home intrusions, the Court has said, are indeed "the chief evil against which ... the Fourth Amendment is directed." *Payton,* 445 U.S., at 585, 100 S.Ct. 1371 (internal quotation marks omitted); see *Silverman v. United States,* 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961) ("At [the Fourth Amendment's] very core stands the right of a man to retreat to his own home and there be free from unreasonable governmental intrusion."). " '[S]earches and seizures inside a home without a warrant are [therefore] presumptively unreasonable.' " *Brigham City,* 547 U.S., at 403, 126 S.Ct. 1943 (quoting *Groh,* 540 U.S., at 559, 124 S.Ct. 1284). How "secure" do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity?

II

As above noted, to justify the police activity in this case, Kentucky invoked the once-guarded exception for emergencies "in which the delay necessary to obtain a warrant ... threaten[s] 'the destruction of evidence.' " *Schmerber v. California,* 384 U.S. 757, 770, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (quoting *Preston v. United States,* 376 U.S. 364, 367, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964)). To fit within this exception, "police action literally must be [taken] 'now or never' to preserve the evidence of the crime." *Roaden v. Kentucky,* 413 U.S. 496, 505, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973).

The existence of a genuine emergency depends not only on the state of necessity at the time of the warrantless search; it depends, first and foremost, on "actions taken by the police *preceding* the warrantless search." *United States v. Coles,* 437 F.3d 361, 367 (C.A.3 2006). See also *United States v. Chambers,* 395 F.3d 563, 565 (C.A.6 2005) ("[O]fficers must seek a warrant based on probable cause when they believe in advance they will find contraband or evidence of a crime."). "[W]asting a clear opportunity to obtain a warrant," therefore, "disentitles the officer from relying on subsequent exigent circumstances." S. Saltzburg & D. Capra, American Criminal Procedure 376 (8th ed.2007).

Under an appropriately reined-in "emergency" or "exigent circumstances" exception, the result in this case should not be in doubt. The target of the investigation's entry into the building, and the smell of marijuana seeping under the apartment door into the hallway, the Kentucky Supreme Court rightly determined, gave the police "probable cause ... sufficient ... to obtain a warrant to search the ... apartment." 302 S.W.3d 649, 653 (2010). As that court observed, nothing made it impracticable for the police to post officers on the premises while proceeding to obtain a warrant authorizing their entry. *Id.*, at

654. Before this Court, Kentucky does not urge otherwise. See Brief for Petitioner 35, n. 13 (asserting "[i]t should be of no importance whether police could have obtained a warrant").

In *Johnson*, the Court confronted this scenario: standing outside a hotel room, the police smelled burning opium and heard "some shuffling or noise" coming from the room. 333 U.S., at 12, 68 S.Ct. 367 (internal quotation marks omitted). Could the police enter the room without a warrant? The Court answered no. Explaining why, the Court said:

> "The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not a policeman. . . .
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> * * * * * *
>
> "If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of [any] case in which [a warrant] should be required." *Id.*, at 14–15, 68 S.Ct. 367.

I agree, and would not allow an expedient knock to override the warrant requirement.[1] Instead, I would accord that core requirement of the Fourth Amendment full respect. When possible, "a warrant must generally be secured," the Court acknowledges. *Ante*, at 1856. There is every reason to conclude that securing a warrant was entirely feasible in this case, and no reason to contract the Fourth Amendment's dominion.

1. The Court in *Johnson* was informed that "when [the officer] knocked on [Johnson's] door the 'first thing that naturally struck [her]' was to conceal the opium and the equipment for smoking it." See Brief for United States in *Johnson v. United States*, O.T.1947, No. 329, p. 17, n. 6. Had the Government in *Johnson* urged that the "shuffling or noise" indicated evidence was at risk, would the result have changed? Justice Jackson's recognition of the primacy of the warrant requirement suggests not. But see *ante*, at 1861 – 1862, n. 5 (distinguishing *Johnson* on the ground that the Government did not contend "that the officers entered the room in order to prevent the destruction of evidence").

CIGNA CORPORATION, et al., Petitioners,

v.

Janice C. AMARA et al., individually and on behalf of all others similarly situated.

No. 09–804.

Argued Nov. 30, 2010.

Decided May 16, 2011.

Background: Employees filed putative class action against employer and pension plan challenging employer's conversion from traditional defined benefit pension plan to "cash balance" retirement plan under Employee Retirement Income Security Act (ERISA) and seeking equitable relief for alleged failure to comply with ERISA's nonforfeiture and age discrimination provisions. The United States District Court for the District of Connecticut, Dominic J. Squatrito, J., certified case as class action and, 2004 WL 2381733, denied defendants' motion to decertify class. Following a bench trial, the United States District Court for the District of Connecticut, Mark R. Kravitz, J., 534 F.Supp.2d 288, entered judgment partially in favor of

otherwise) that the interpretation of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, adopted by the majority in *Massachusetts v. EPA,* 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), is correct.

WAL–MART STORES, INC., Petitioner,

v.

DUKES et al.

No. 10–277.

Argued March 29, 2011.

Decided June 20, 2011.

Background: Female employees of retail store chain brought Title VII against employer alleging sex discrimination and seeking injunctive and declaratory relief, back pay, and punitive damages. The United States District Court for the Northern District of California, Martin J. Jenkins, J., 222 F.R.D. 137, granted in part and denied in part plaintiffs' motion for class certification, and the Ninth Circuit Court of Appeals, Pregerson, Circuit Judge, 509 F.3d 1168, affirmed. On rehearing en banc, the Court of Appeals, Michael Daly Hawkins, Circuit Judge, 603 F.3d 571, affirmed in part and remanded in part. Certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

(1) evidence presented by members of putative class did not rise to level of significant proof that company operated under general policy of discrimination, as required to satisfy commonality requirement and to permit certification of plaintiff class;

(2) certification of plaintiff class upon theory that defendant has acted, or refused to act, on grounds that apply generally to class, thereby making final injunctive or declaratory relief appropriate with respect to class as whole, is not appropriate with respect to claims for monetary relief, at least where monetary relief is not incidental to injunctive or declaratory relief; and

(3) necessity of litigation to resolve employer's statutory defenses to claims for backpay asserted by individual members of putative employee class prevented court from treating these backpay claims as "incidental" to claims for declaratory or injunctive relief.

Reversed.

Justice Ginsburg concurred in part and dissented in part and filed opinion, in which Justices Breyer, Sotomayor, and Kagan joined.

1. Federal Civil Procedure ⚿161

Class action is exception to the usual rule that litigation is conducted by and on behalf of individual named parties only. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

2. Federal Civil Procedure ⚿164

In order to justify a departure from usual rule that litigation is conducted by and on behalf of individual named parties only, class representative must be part of class and possess same interest and suffer same injury as class members. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

3. Federal Civil Procedure ⚿163, 164, 165

Numerosity, commonality, typicality, and adequate representation requirements of Federal Rule of Civil Procedure governing class actions ensure that the named plaintiffs are appropriate representatives

of class whose claims they wish to litigate by effectively limiting the class claims to those fairly encompassed by named plaintiffs' claims. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

4. Federal Civil Procedure ⚿165

Commonality requirement for class certification obligates the named plaintiff to demonstrate that class members have suffered the "same injury," not merely that they have all suffered violation of same provision of law; claims must depend upon a common contention, and that common contention must be of such a nature that it is capable of classwide resolution, meaning that determination of its truth or falsity will resolve issue that is central to validity of each one of the claims in one stroke. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

5. Federal Civil Procedure ⚿165

What matters to class certification is not the raising of common questions, even in droves, but rather the capacity of classwide proceeding to generate common answers apt to drive resolution of litigation. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

6. Federal Civil Procedure ⚿161.1, 163

Federal Rule of Civil Procedure governing class actions does not set forth mere pleading standard; party seeking class certification must affirmatively demonstrate his compliance with Rule, that is, he must be prepared to prove that there are in fact sufficiently numerous parties, and that other requirements of the Rule are met. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

7. Federal Civil Procedure ⚿174

Class determination generally involves considerations that are enmeshed in factual and legal issues comprising plaintiff's cause of action. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

8. Civil Rights ⚿1118

Crux of court's inquiry in resolving an individual's Title VII claim is reason for particular employment decision. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Federal Civil Procedure ⚿184.10

Conceptually, there is wide gap between an individual employee's claim that he or she has been denied promotion on discriminatory grounds and employee's otherwise unsupported allegation, in moving for certification of employee class, that company has policy of discrimination, a conceptual gap that may be bridged by showing that employer used a biased testing procedure, or by presenting significant proof that employer operated under general policy of discrimination; such proof could conceivably justify a class of both applicants and employees if discrimination manifested itself in hiring and promotion practices in same general fashion, such as through entirely subjective decisionmaking processes. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed. Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

10. Federal Civil Procedure ⚿184.15

Evidence presented by members of putative class, consisting of testimony of sociological expert that employer's corporate culture made it "vulnerable" to gender bias, but without being able to definitively say whether 0.5 percent or 95 percent of employment decisions in company were based on stereotypical thinking, statistical evidence that employer's policy of according discretion to local supervisors over pay and promotion matters had resulted in an overall, sex-based disparity among employees at company's 3,400 stores, and anecdotal evidence of allegedly discriminatory employment de-

cisions did not rise to level of significant proof that company operated under general policy of discrimination, as required to satisfy commonality requirement and to permit certification of plaintiff class, especially given that company's announced policy was to forbid sex discrimination, and that company imposed penalties for denial of equal employment opportunities. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

11. Civil Rights ⚿1140

Federal Civil Procedure ⚿184.10

In appropriate cases, giving discretion to lower-level supervisors can be basis of Title VII liability under disparate-impact theory, since employer's undisciplined system of subjective decisionmaking can have precisely the same effects as system pervaded by impermissible intentional discrimination; however, recognition that this type of Title VII claim "can" exist does not lead to conclusion that every employee in company using such a system of discretion has such a claim in common, for purposes of certifying employee class. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

12. Declaratory Judgment ⚿305

Federal Civil Procedure ⚿165

Certification of plaintiff class upon theory that defendant has acted, or refused to act, on grounds that apply generally to class, thereby making final injunctive or declaratory relief appropriate with respect to class as whole, is not appropriate with respect to claims for monetary relief, at least where monetary relief is not incidental to injunctive or declaratory relief. Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

13. Declaratory Judgment ⚿305

Federal Civil Procedure ⚿165

Certification of plaintiff class upon theory that defendant has acted, or refused to act, on grounds that apply generally to class, thereby making final injunctive or declaratory relief appropriate with respect to class as whole, is appropriate only when single injunction or declaratory judgment would provide relief to each member of class; certification is not authorized when each individual class member would be entitled to different injunction or declaratory judgment against defendant, or when each class member would be entitled to individualized award of monetary damages. Fed.Rules Civ. Proc.Rule 23(b)(2), 28 U.S.C.A.

14. Declaratory Judgment ⚿305

Federal Civil Procedure ⚿184.10

Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of circumstances under which certification of plaintiff class may be warranted on ground that defendant has acted, or refused to act, on grounds that apply generally to class, thereby making final injunctive or declaratory relief appropriate with respect to class as whole. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

15. Declaratory Judgment ⚿305

Federal Civil Procedure ⚿184.15

Even assuming that "incidental" monetary relief can be awarded to class certified upon theory that defendant has acted, or refused to act, on grounds generally applicable to class, thereby making final injunctive or declaratory relief appropriate with respect to class as whole, necessity of litigation to resolve employer's statutory defenses to claims for backpay asserted by individual members of putative employee

class, who were allegedly victims of employer's, or potential employer's, gender-based discrimination, prevented court from treating these backpay claims as "incidental" to claims for declaratory or injunctive relief. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed. Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

16. Civil Rights ⚿1536, 1560

When plaintiff in employment discrimination case seeks individual relief such as reinstatement or backpay after establishing pattern or practice of discrimination, district court must usually conduct additional proceedings to determine scope of individual relief, and at that phase, burden of proof will shift to employer, but it will have right to raise any individual affirmative defenses that it may have and to demonstrate that individual employee was denied employment opportunity for lawful reasons. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

17. Federal Civil Procedure ⚿184.15

Because the Rules Enabling Act forbade interpretation of Federal Rule of Civil Procedure that governs class actions so as to abridge, enlarge or modify any substantive right, employee class could not be certified in employment discrimination action on premise that employer would not be entitled to litigate its statutory defenses to class members' claims for backpay. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 28 U.S.C.A. § 2072(b); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Syllabus *

Respondents, current or former employees of petitioner Wal–Mart, sought judgment against the company for injunctive and declaratory relief, punitive damages, and backpay, on behalf of themselves and a nationwide class of some 1.5 million female employees, because of Wal–Mart's alleged discrimination against women in violation of Title VII of the Civil Rights Act of 1964. They claim that local managers exercise their discretion over pay and promotions disproportionately in favor of men, which has an unlawful disparate impact on female employees; and that Wal–Mart's refusal to cabin its managers' authority amounts to disparate treatment. The District Court certified the class, finding that respondents satisfied Federal Rule of Civil Procedure 23(a), and Rule 23(b)(2)'s requirement of showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The Ninth Circuit substantially affirmed, concluding, *inter alia*, that respondents met Rule 23(a)(2)'s commonality requirement and that their backpay claims could be certified as part of a (b)(2) class because those claims did not predominate over the declaratory and injunctive relief requests. It also ruled that the class action could be manageably tried without depriving Wal–Mart of its right to present its statutory defenses if the District Court selected a random set of claims for valuation and then extrapolated the validity and value of the untested claims from the sample set.

Held:

1. The certification of the plaintiff class was not consistent with Rule 23(a). Pp. 2550 – 2557.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

(a) Rule 23(a)(2) requires a party seeking class certification to prove that the class has common "questions of law or fact." Their claims must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Here, proof of commonality necessarily overlaps with respondents' merits contention that Wal–Mart engages in a pattern or practice of discrimination. The crux of a Title VII inquiry is "the reason for a particular employment decision," *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 876, 104 S.Ct. 2794, 81 L.Ed.2d 718, and respondents wish to sue for millions of employment decisions at once. Without some glue holding together the alleged reasons for those decisions, it will be impossible to say that examination of all the class members' claims will produce a common answer to the crucial discrimination question. Pp. 2550 – 2553.

(b) *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740, describes the proper approach to commonality. On the facts of this case, the conceptual gap between an individual's discrimination claim and "the existence of a class of persons who have suffered the same injury," *id.,* at 157–158, 102 S.Ct. 2364, must be bridged by "[s]ignificant proof that an employer operated under a general policy of discrimination," *id.,* at 159, n. 15, 102 S.Ct. 2364. Such proof is absent here. Wal–Mart's announced policy forbids sex discrimination, and the company has penalties for denials of equal opportunity. Respondents' only evidence of a general discrimination policy was a sociologist's analysis asserting that Wal–Mart's corporate culture made it vulnerable to gender bias. But because he could not estimate what percent of Wal–Mart employment decisions might be determined by stereotypical thinking, his testimony was worlds away from "significant proof" that Wal–Mart "operated under a general policy of discrimination." Pp. 2553 – 2554.

(c) The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal–Mart's "policy" of giving local supervisors discretion over employment matters. While such a policy could be the basis of a Title VII disparate-impact claim, recognizing that a claim "can" exist does not mean that every employee in a company with that policy has a common claim. In a company of Wal–Mart's size and geographical scope, it is unlikely that all managers would exercise their discretion in a common way without some common direction. Respondents' attempt to show such direction by means of statistical and anecdotal evidence falls well short. Pp. 2554 – 2557.

2. Respondents' backpay claims were improperly certified under Rule 23(b)(2). Pp. 2557 – 2561.

(a) Claims for monetary relief may not be certified under Rule 23(b)(2), at least where the monetary relief is not incidental to the requested injunctive or declaratory relief. It is unnecessary to decide whether monetary claims can ever be certified under the Rule because, at a minimum, claims for individualized relief, like backpay, are excluded. Rule 23(b)(2) applies only when a single, indivisible remedy would provide relief to each class member. The Rule's history and structure indicate that individualized monetary claims belong instead in Rule 23(b)(3), with its procedural protections of predominance, superiority, mandatory notice, and the right to opt out. Pp. 2557 – 2559.

(b) Respondents nonetheless argue that their backpay claims were appropri-

ately certified under Rule 23(b)(2) because those claims do not "predominate" over their injunctive and declaratory relief requests. That interpretation has no basis in the Rule's text and does obvious violence to the Rule's structural features. The mere "predominance" of a proper (b)(2) injunctive claim does nothing to justify eliminating Rule 23(b)(3)'s procedural protections, and creates incentives for class representatives to place at risk potentially valid monetary relief claims. Moreover, a district court would have to reevaluate the roster of class members continuously to excise those who leave their employment and become ineligible for classwide injunctive or declaratory relief. By contrast, in a properly certified (b)(3) class action for backpay, it would be irrelevant whether the plaintiffs are still employed at Wal–Mart. It follows that backpay claims should not be certified under Rule 23(b)(2). Pp. 2559 – 2561.

(c) It is unnecessary to decide whether there are any forms of "incidental" monetary relief that are consistent with the above interpretation of Rule 23(b)(2) and the Due Process Clause because respondents' backpay claims are not incidental to their requested injunction. Wal–Mart is entitled to individualized determinations of each employee's eligibility for backpay. Once a plaintiff establishes a pattern or practice of discrimination, a district court must usually conduct "additional proceedings . . . to determine the scope of individual relief." *Teamsters v. United States*, 431 U.S. 324, 361, 97 S.Ct. 1843, 52 L.Ed.2d 396. The company can then raise individual affirmative defenses and demonstrate that its action was lawful. *Id.*, at 362, 97 S.Ct. 1843. The Ninth Circuit erred in trying to replace such proceedings with Trial by Formula. Because Rule 23 cannot be interpreted to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims. P. 2561.

603 F.3d 571, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined as to Parts I and III. Ginsburg, J., filed an opinion concurring in part and dissenting in part, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

Theodore B. Olson, Mark A. Perry, Amir C. Tayrani, Gibson, Dunn & Crutcher LLP, Washington, DC, Theodore J. Boutrous, Jr., Counsel of Record, Rachel S. Brass, Theane Evangelis Kapur, Gibson, Dunn & Crutcher LLP, Los Angeles, CA, for Petitioner.

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Theodore B. Olson, Mark A. Perry, Amir C. Tayrani, Gibson, Dunn & Crutcher LLP, Washington, D.C., Theodore J. Boutrous, Jr., Counsel of Record, Rachel S. Brass, Theane Evangelis Kapur, Gibson, Dunn & Crutcher LLP, Los Angeles, CA, for Petitioner.

For U.S. Supreme Court briefs, See:

2011 WL 201045 (Pet. Brief)

2011 WL 686407 (Resp. Brief)

2011 WL 970341 (Reply.Brief)

Justice SCALIA delivered the opinion of the Court.

We are presented with one of the most expansive class actions ever. The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal–Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women. In addition to injunctive and declaratory relief, the plaintiffs seek an award of backpay. We consider whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2).

I

A

Petitioner Wal–Mart is the Nation's largest private employer. It operates four types of retail stores throughout the country: Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs. Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal–Mart operates approximately 3,400 stores and employs more than one million people.

Pay and promotion decisions at Wal–Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." 222 F.R.D. 137, 145 (N.D.Cal.2004). Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

Promotions work in a similar fashion. Wal–Mart permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to Wal–Mart's management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year's tenure in the applicant's current position, and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.,* assistant manager, comanager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.

B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal–Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e–1 *et seq.*[1]

Betty Dukes began working at a Pittsburgh, California, Wal–Mart in 1994. She started as a cashier, but later sought and

1. The complaint included seven named plaintiffs, but only three remain part of the certified class as narrowed by the Court of Appeals.

received a promotion to customer service manager. After a series of disciplinary violations, however, Dukes was demoted back to cashier and then to greeter. Dukes concedes she violated company policy, but contends that the disciplinary actions were in fact retaliation for invoking internal complaint procedures and that male employees have not been disciplined for similar infractions. Dukes also claims two male greeters in the Pittsburgh store are paid more than she is.

Christine Kwapnoski has worked at Sam's Club stores in Missouri and California for most of her adult life. She has held a number of positions, including a supervisory position. She claims that a male manager yelled at her frequently and screamed at female employees, but not at men. The manager in question "told her to 'doll up,' to wear some makeup, and to dress a little better." App. 1003a.

The final named plaintiff, Edith Arana, worked at a Wal–Mart store in Duarte, California, from 1995 to 2001. In 2000, she approached the store manager on more than one occasion about management training, but was brushed off. Arana concluded she was being denied opportunity for advancement because of her sex. She initiated internal complaint procedures, whereupon she was told to apply directly to the district manager if she thought her store manager was being unfair. Arana, however, decided against that and never applied for management training again. In 2001, she was fired for failure to comply with Wal–Mart's timekeeping policy.

These plaintiffs, respondents here, do not allege that Wal–Mart has any express corporate policy against the advancement of women. Rather, they claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees, see 42 U.S.C. § 2000e–2(k). And, respondents say, because Wal–Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment, see § 2000e–2(a). Their complaint seeks injunctive and declaratory relief, punitive damages, and backpay. It does not ask for compensatory damages.

Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all* Wal–Mart's female employees. The basic theory of their case is that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal–Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal–Mart's stores in a nationwide class action.

C

Class certification is governed by Federal Rule of Civil Procedure 23. Under Rule 23(a), the party seeking certification must demonstrate, first, that:

> "(1) the class is so numerous that joinder of all members is impracticable,
>
> "(2) there are questions of law or fact common to the class,
>
> "(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
>
> "(4) the representative parties will fairly and adequately protect the interests of the class" (paragraph breaks added).

Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Respondents rely on Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to

act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." [2]

Invoking these provisions, respondents moved the District Court to certify a plaintiff class consisting of " '[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal–Mart's challenged pay and management track promotions policies and practices.' " 222 F.R.D., at 141–142 (quoting Plaintiff 's Motion for Class Certification in case No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 37). As evidence that there were indeed "questions of law or fact common to" all the women of Wal–Mart, as Rule 23(a)(2) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal–Mart's female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a "social framework analysis" of Wal–Mart's "culture" and personnel practices, and concluded that the company was "vulnerable" to gender discrimination. 603 F.3d 571, 601 (C.A.9 2010) (en banc).

Wal–Mart unsuccessfully moved to strike much of this evidence. It also offered its own countervailing statistical and other proof in an effort to defeat Rule 23(a)'s requirements of commonality, typicality, and adequate representation. Wal–Mart further contended that respondents' monetary claims for backpay could not be certified under Rule 23(b)(2), first because that Rule refers only to injunctive and declaratory relief, and second because the backpay claims could not be manageably tried as a class without depriving Wal–Mart of its right to present certain statutory defenses. With one limitation not relevant here, the District Court granted respondents' motion and certified their proposed class.[3]

D

A divided en banc Court of Appeals substantially affirmed the District Court's certification order. 603 F.3d 571. The majority concluded that respondents' evidence of commonality was sufficient to "raise the common question whether Wal–Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII." *Id.,* at 612 (emphasis deleted). It also agreed with the District Court that the named plaintiffs' claims were sufficiently typical of the class

2. Rule 23(b)(1) allows a class to be maintained where "prosecuting separate actions by or against individual class members would create a risk of" either "(A) inconsistent or varying adjudications," or "(B) adjudications . . . that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impeded their ability to protect their interests." Rule 23(b)(3) states that a class may be maintained where "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." The applicability of these provisions to the plaintiff class is not before us.

3. The District Court excluded backpay claims based on promotion opportunities that had not been publicly posted, for the reason that no applicant data could exist for such positions. 222 F.R.D. 137, 182 (N.D.Cal.2004). It also decided to afford class members notice of the action and the right to opt-out of the class with respect to respondents' punitive-damages claim. *Id.,* at 173.

as a whole to satisfy Rule 23(a)(3), and that they could serve as adequate class representatives, see Rule 23(a)(4). *Id.,* at 614–615. With respect to the Rule 23(b)(2) question, the Ninth Circuit held that respondents' backpay claims could be certified as part of a (b)(2) class because they did not "predominat[e]" over the requests for declaratory and injunctive relief, meaning they were not "superior in strength, influence, or authority" to the nonmonetary claims. *Id.,* at 616 (internal quotation marks omitted).[4]

Finally, the Court of Appeals determined that the action could be manageably tried as a class action because the District Court could adopt the approach the Ninth Circuit approved in *Hilao v. Estate of Marcos,* 103 F.3d 767, 782–787 (1996). There compensatory damages for some 9,541 class members were calculated by selecting 137 claims at random, referring those claims to a special master for valuation, and then extrapolating the validity and value of the untested claims from the sample set. See 603 F.3d, at 625–626. The Court of Appeals "s[aw] no reason why a similar procedure to that used in *Hilao* could not be employed in this case." *Id.,* at 627. It would allow Wal–Mart "to present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something other than gender discrimination." *Ibid.,* n. 56 (emphasis deleted).

We granted certiorari. 562 U.S. ——, 131 S.Ct. 795, 178 L.Ed.2d 530 (2010).

II

[1–3] The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki,* 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—"effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.' " *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (quoting *General Telephone Co. of Northwest v. EEOC,* 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980)).

A

[4, 5] The crux of this case is commonality—the rule requiring a plaintiff to show that "there are questions of law or fact

4. To enable that result, the Court of Appeals trimmed the (b)(2) class in two ways: First, it remanded that part of the certification order which included respondents' punitive-damages claim in the (b)(2) class, so that the District Court might consider whether that might cause the monetary relief to predominate. 603 F.3d, at 621. Second, it accepted in part Wal–Mart's argument that since class members whom it no longer employed had no standing to seek injunctive or declaratory relief, as to them monetary claims must predominate. It excluded from the certified class "those putative class members who were no longer Wal–Mart employees *at the time Plaintiffs' complaint was filed,*" *id.,* at 623 (emphasis added).

common to the class." Rule 23(a)(2).[5] That language is easy to misread, since "[a]ny competently crafted class complaint literally raises common 'questions.' " Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L.Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal–Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury," *Falcon*, *supra*, at 157, 102 S.Ct. 2364. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

> "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." Nagareda, *supra*, at 132.

[6, 7] Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," 457 U.S., at 160, 102 S.Ct. 2364, and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," *id.*, at 161, 102 S.Ct. 2364; see *id.*, at 160, 102 S.Ct. 2364 ("[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable"). Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. " '[T]he

5. We have previously stated in this context that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157–158, n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a).

class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Falcon, supra,* at 160, 102 S.Ct. 2364 (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978); some internal quotation marks omitted).[6] Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.,* jurisdiction and venue, is a familiar feature of litigation. See *Szabo v. Bridgeport Machines, Inc.,* 249 F.3d 672, 676–677 (C.A.7 2001) (Easterbrook, J.).

[8] In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal–Mart engages in a *pattern or practice* of discrimination.[7] That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is "the reason for a particular employment decision," *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 876, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984). Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*

B

[9] This Court's opinion in *Falcon* describes how the commonality issue must be

6. A statement in one of our prior cases, *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), is sometimes mistakenly cited to the contrary: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." But in that case, the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety of certification under Rules 23(a) and (b) (he had already done that, see *id.,* at 165, 94 S.Ct. 2140), but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants. To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.

Perhaps the most common example of considering a merits question at the Rule 23 stage arises in class-action suits for securities fraud. Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members" would often be an insuperable barrier to class certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation. But the problem dissipates if the plaintiffs can establish the applicability of the so-called "fraud on the market" presumption, which says that all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements. To invoke this presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, *Erica P. John Fund, Inc. v. Halliburton Co.,* 563 U.S. ——, ——, 131 S.Ct. 2179, 2185, 180 L.Ed.2d 24, 2011 WL 2175208 (2011), an issue they will surely have to prove *again* at trial in order to make out their case on the merits.

7. In a pattern-or-practice case, the plaintiff tries to "establish by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice." *Teamsters v. United States,* 431 U.S. 324, 358, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); see also *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 772, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). If he succeeds, that showing will support a rebuttable inference that all class members were victims of the discriminatory practice, and will justify "an award of prospective relief," such as "an injunctive order against the continuation of the discriminatory practice." *Teamsters, supra,* at 361, 97 S.Ct. 1843.

approached. There an employee who claimed that he was deliberately denied a promotion on account of race obtained certification of a class comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs. 457 U.S., at 152, 102 S.Ct. 2364. We rejected that composite class for lack of commonality and typicality, explaining:

> "Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims." *Id.,* at 157–158, 102 S.Ct. 2364.

Falcon suggested two ways in which that conceptual gap might be bridged. First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." *Id.,* at 159, n. 15, 102 S.Ct. 2364. Second, "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Ibid.* We think that statement precisely describes respondents' burden in this case. The first manner of bridging the gap obviously has no application here; Wal–Mart has no testing procedure or other companywide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

[10] The second manner of bridging the gap requires "significant proof" that Wal–Mart "operated under a general policy of discrimination." That is entirely absent here. Wal–Mart's announced policy forbids sex discrimination, see App. 1567a–1596a, and as the District Court recognized the company imposes penalties for denials of equal employment opportunity, 222 F.R.D., at 154. The only evidence of a "general policy of discrimination" respondents produced was the testimony of Dr. William Bielby, their sociological expert. Relying on "social framework" analysis, Bielby testified that Wal–Mart has a "strong corporate culture," that makes it "'vulnerable'" to "gender bias." *Id.,* at 152. He could not, however, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal–Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking." 222 F.R.D. 189, 192 (N.D.Cal.2004). The parties dispute whether Bielby's testimony even met the standards for the admission of expert testimony under Federal Rule of Civil Procedure 702 and our *Daubert* case, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).[8] The District Court concluded

8. Bielby's conclusions in this case have elicited criticism from the very scholars on whose conclusions he relies for his social-framework analysis. See Monahan, Walker, & Mitchell, Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frame-

that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. 222 F.R.D., at 191. We doubt that is so, but even if properly considered, Bielby's testimony does nothing to advance respondents' case. "[W]hether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking" is the essential question on which respondents' theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds away from "significant proof" that Wal–Mart "operated under a general policy of discrimination."

C

The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal–Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said "should itself raise no inference of discriminatory conduct," *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 990, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

[11] To be sure, we have recognized that, "in appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since "an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination." *Id.,* at 990–991, 108 S.Ct. 2777. But the recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements, see *Griggs v. Duke Power Co.,* 401 U.S. 424, 431–432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.

Respondents have not identified a common mode of exercising discretion that

works,'' 94 Va. L.Rev. 1715, 1747 (2008) (''[Bielby's] research into conditions and behavior at Wal–Mart did not meet the standards expected of social scientific research into stereotyping and discrimination''); *id.,* at 1745, 1747 (''[A] social framework necessarily contains only general statements about reliable patterns of relations among variables . . . and goes no further . . . . Dr. Bielby claimed to present a social framework, but he testified about social facts specific to Wal–Mart''); *id.,* at 1747–1748 (''Dr. Bielby's report provides no verifiable method for measuring and testing any of the variables that were crucial to his conclusions and reflects nothing more than Dr. Bielby's 'expert judgment' about how general stereotyping research applied to all managers across all of Wal–Mart's stores nationwide for the multi-year class period'').

pervades the entire company—aside from their reliance on Dr. Bielby's social frameworks analysis that we have rejected. In a company of Wal–Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

The statistical evidence consists primarily of regression analyses performed by Dr. Richard Drogin, a statistician, and Dr. Marc Bendick, a labor economist. Drogin conducted his analysis region-by-region, comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers. After considering regional and national data, Drogin concluded that "there are statistically significant disparities between men and women at Wal–Mart . . . [and] these disparities . . . can be explained only by gender discrimination." 603 F.3d, at 604 (internal quotation marks omitted). Bendick compared work-force data from Wal–Mart and competitive retailers and concluded that Wal–Mart "promotes a lower percentage of women than its competitors." *Ibid.*

Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis. In *Falcon*, we held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." 457 U.S., at 158, 102 S.Ct. 2364. A similar failure of inference arises here. As Judge Ikuta observed in her dissent, "[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." 603 F.3d, at 637. A regional pay disparity, for example, may be attributable to only a small set of Wal–Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.

There is another, more fundamental, respect in which respondents' statistical proof fails. Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal–Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store. In the landmark case of ours which held that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory, the plurality opinion *conditioned* that holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity *is not enough*. "[T]he plaintiff must begin by identifying the specific employment practice that is challenged." *Watson*, 487 U.S., at 994, 108 S.Ct. 2777; accord, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (approving that statement), superseded by statute on other grounds, 42 U.S.C. § 2000e–2(k). That is all the more necessary when a class of plaintiffs is sought to be certified. Other than the bare existence of delegated discretion, respondents have identified no "specific employment practice"—much less one that ties all their 1.5 million claims

together. Merely showing that Wal–Mart's policy of discretion has produced an overall sex-based disparity does not suffice.

Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory. In *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), in addition to substantial statistical evidence of companywide discrimination, the Government (as plaintiff) produced about 40 specific accounts of racial discrimination from particular individuals. See *id.,* at 338, 97 S.Ct. 1843. That number was significant because the company involved had only 6,472 employees, of whom 571 were minorities, *id.,* at 337, 97 S.Ct. 1843, and the class itself consisted of around 334 persons, *United States v. T.I.M.E.-D.C., Inc.,* 517 F.2d 299, 308 (C.A.5 1975), overruled on other grounds, *Teamsters, supra.* The 40 anecdotes thus represented roughly one account for every eight members of the class. Moreover, the Court of Appeals noted that the anecdotes came from individuals "spread throughout" the company who "for the most part" worked at the company's operational centers that employed the largest numbers of the class members. 517 F.2d, at 315, and n. 30. Here, by contrast, respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal–Mart's 3,400 stores. 603 F.3d, at 634 (Ikuta, J., dissenting). More than half of these reports are concentrated in only six States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal–Mart's operations at all. *Id.,* at 634–635, and n. 10. Even if every single one of these accounts is true, that would not demonstrate that the entire company "operate[s] under a general policy of discrimination," *Falcon, supra,* at 159, n. 15, 102 S.Ct. 2364, which is what respondents must show to certify a companywide class.[9]

The dissent misunderstands the nature of the foregoing analysis. It criticizes our focus on the dissimilarities between the putative class members on the ground that we have "blend[ed]" Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s inquiry into whether common questions "predominate" over individual ones. See *post,* at 2550 – 2552 (GINSBURG, J., concurring in part and dissenting in part). That is not so. We quite agree that for purposes of Rule 23(a)(2) " '[e]ven a single [common] question' " will do, *post,* at 2566, n. 9 (quoting Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L.Rev. 149, 176, n. 110 (2003)). We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate,* but in order to determine (as Rule 23(a)(2) requires) whether there *is* "[e]ven a single [common] question." And there is not here. Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have

9. The dissent says that we have adopted "a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class." *Post,* at 2563, n. 4 (GINSBURG, J., concurring in part and dissenting in part). That is not quite accurate. A discrimination claimant is free to supply as few anecdotes as he wishes. But when the claim is that a company operates under a general policy of discrimination, a few anecdotes selected from literally millions of employment decisions prove nothing at all.

not established the existence of any common question.[10]

In sum, we agree with Chief Judge Kozinski that the members of the class:

> "held a multitude of different jobs, at different levels of Wal–Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed .... Some thrived while others did poorly. They have little in common but their sex and this lawsuit." 603 F.3d, at 652 (dissenting opinion).

III

[12] We also conclude that respondents' claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our opinion in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994) *(per curiam)* expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

A

[13] Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." One possible reading of this provision is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Nagareda, 84 N.Y.U.L.Rev., at 132. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

[14] That interpretation accords with the history of the Rule. Because Rule 23 "stems from equity practice" that predated its codification, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), in determining its meaning we have previously looked to the historical models on which the Rule was based, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841–845, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). As we observed in *Amchem*, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of what (b)(2) is meant to capture. 521 U.S., at 614, 117

10. For this reason, there is no force to the dissent's attempt to distinguish *Falcon* on the ground that in that case there were " 'no common questions of law or fact' between the claims of the lead plaintiff and the applicant class" *post,* at 2565 – 2566, n. 7 (quoting *Falcon,* 457 U.S., at 162, 102 S.Ct. 2364 (BURGER, C.J., concurring in part and dissenting in part)). Here also there is nothing to unite all of the plaintiffs' claims, since (contrary to the dissent's contention, *post,* at 2565 – 2566, n. 7), the same employment practices do not

S.Ct. 2231. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction. See Advisory Committee's Note, 39 F.R.D. 69, 102 (1966) (citing cases); *e.g., Potts v. Flax,* 313 F.2d 284, 289, n. 5 (C.A.5 1963); *Brunson v. Board of Trustees of Univ. of School Dist. No. 1, Clarendon Cty.,* 311 F.2d 107, 109 (C.A.4 1962) *(per curiam)*; *Frasier v. Board of Trustees of N.C.,* 134 F.Supp. 589, 593 (NC 1955) (three-judge court), aff'd, 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956).

Permitting the combination of individualized and classwide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a(b)(1) class,[11] or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an "adventuresome innovation" of the 1966 amendments, *Amchem,* 521 U.S., at 614, 117 S.Ct. 2231 (internal quotation marks omitted), framed for situations "in which 'class-action treatment is not as clearly called for'," *id.,* at 615, 117 S.Ct. 2231 (quoting Advisory Committee's Notes, 28 U.S.C.App., p. 697 (1994 ed.)). It allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3). And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive "the best notice that is practicable under the circumstances" and to withdraw from the class at their option. See Rule 23(c)(2)(B).

Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class.* When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so—which

"touch and concern all members of the class."

11. Rule 23(b)(1) applies where separate actions by or against individual class members would create a risk of "establish[ing] incompatible standards of conduct for the party opposing the class," Rule 23(b)(1)(A), such as "where the party is obliged by law to treat the members of the class alike," *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), or where individual adjudications "as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests," Rule 23(b)(1)(B), such as in " 'limited fund' cases, ... in which numerous persons make claims against a fund insufficient to satisfy all claims," *Amchem, supra,* at 614, 117 S.Ct. 2231.

is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. See *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.

B

Against that conclusion, respondents argue that their claims for backpay were appropriately certified as part of a class under Rule 23(b)(2) because those claims do not "predominate" over their requests for injunctive and declaratory relief. They rely upon the Advisory Committee's statement that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages." 39 F.R.D., at 102 (emphasis added). The negative implication, they argue, is that it *does* extend to cases in which the appropriate final relief relates only partially and nonpredominantly to money damages. Of course it is the Rule itself, not the Advisory Committee's description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text, and that does obvious violence to the Rule's structural features. The mere "predominance" of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a "predominating request"—for an injunction.

Respondents' predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not "predominate." But it also created the possibility (if the predominance test were correct) that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have.

The predominance test would also require the District Court to reevaluate the roster of class members continually. The Ninth Circuit recognized the necessity for this when it concluded that those plaintiffs

no longer employed by Wal–Mart lack standing to seek injunctive or declaratory relief against its employment practices. The Court of Appeals' response to that difficulty, however, was not to eliminate *all* former employees from the certified class, but to eliminate only those who had left the company's employ by the date the complaint was filed. That solution has no logical connection to the problem, since those who have left their Wal–Mart jobs *since* the complaint was filed have no more need for prospective relief than those who left beforehand. As a consequence, even though the validity of a (b)(2) class depends on whether "final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole,*" Rule 23(b)(2) (emphasis added), about half the members of the class approved by the Ninth Circuit have no claim for injunctive or declaratory relief at all. Of course, the alternative (and logical) solution of excising plaintiffs from the class as they leave their employment may have struck the Court of Appeals as wasteful of the District Court's time. Which indeed it is, since if a backpay action were properly certified for class treatment under *(b)(3),* the ability to litigate a plaintiff's backpay claim as part of the class would not turn on the irrelevant question whether she is still employed at Wal–Mart. What follows from this, however, is not that some arbitrary limitation on class membership should be imposed but that the backpay claims should not be certified under Rule 23(b)(2) at all.

Finally, respondents argue that their backpay claims are appropriate for a (b)(2) class action because a backpay award is equitable in nature. The latter may be true, but it is irrelevant. The Rule does not speak of "equitable" remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither. See 42 U.S.C. § 2000e–5(g)(2)(B)(i) and (ii) (distinguishing between declaratory and injunctive relief and the payment of "backpay," see § 2000e–5(g)(2)(A)).

C

[15] In *Allison v. Citgo Petroleum Corp.,* 151 F.3d 402, 415 (C.A.5 1998), the Fifth Circuit held that a (b)(2) class would permit the certification of monetary relief that is "incidental to requested injunctive or declaratory relief," which it defined as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." In that court's view, such "incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations." *Ibid.* We need not decide in this case whether there are any forms of "incidental" monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause. Respondents do not argue that they can satisfy this standard, and in any event they cannot.

Contrary to the Ninth Circuit's view, Wal–Mart is entitled to individualized determinations of each employee's eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate." § 2000e–5(g)(1). But if the employer can show that it took an adverse employment action against an employee for any

reason other than discrimination, the court cannot order the "hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay." § 2000e–5(g)(2)(A).

[16] We have established a procedure for trying pattern-or-practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings ... to determine the scope of individual relief." *Teamsters,* 431 U.S., at 361, 97 S.Ct. 1843. At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.,* at 362, 97 S.Ct. 1843.

[17] The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. 603 F.3d, at 625–627. We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b); see *Ortiz,* 527 U.S., at 845, 119 S.Ct. 2295, a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being "incidental" to the classwide injunction, respondents' class could not be certified even assuming, *arguendo,* that "incidental" monetary relief can be awarded to a 23(b)(2) class.

* * *

The judgment of the Court of Appeals is *Reversed.*

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, concurring in part and dissenting in part.

The class in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2). The plaintiffs, alleging discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq.,* seek monetary relief that is not merely incidental to any injunctive or declaratory relief that might be available. See *ante,* at 2557 – 2561. A putative class of this type may be certifiable under Rule 23(b)(3), if the plaintiffs show that common class questions "predominate" over issues affecting individuals—*e.g.,* qualification for, and the amount of, backpay or compensatory damages—and that a class action is "superior" to other modes of adjudication.

Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand.[1] The Court,

1. The plaintiffs requested Rule 23(b)(3) certification as an alternative, should their request for (b)(2) certification fail. Plaintiffs' Motion for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 47.

however, disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the "commonality" line set by Rule 23(a)(2). In so ruling, the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.

I

A

Rule 23(a)(2) establishes a preliminary requirement for maintaining a class action: "[T]here are questions of law or fact common to the class." [2] The Rule "does not require that all questions of law or fact raised in the litigation be common," 1 H. Newberg & A. Conte, Newberg on Class Actions § 3.10, pp. 3–48 to 3–49 (3d ed.1992); indeed, "[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement," Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L.Rev. 149, 176, n. 110 (2003). See Advisory Committee's 1937 Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 138 (citing with approval cases in which "there was only a question of law or fact common to" the class members).

A "question" is ordinarily understood to be "[a] subject or point open to controversy." American Heritage Dictionary 1483 (3d ed.1992). See also Black's Law Dictionary 1366 (9th ed.2009) (defining "question of fact" as "[a] disputed issue to be resolved . . . [at] trial" and "question of law" as "[a]n issue to be decided by the judge"). Thus, a "question" "common to the class" must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims.[3]

B

The District Court, recognizing that "one significant issue common to the class may be sufficient to warrant certification," 222 F.R.D. 137, 145 (N.D.Cal.2004), found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality. See *Califano v. Yamasaki*, 442 U.S. 682, 703, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) ("[M]ost issues arising under Rule 23 . . . [are] committed in the first instance to the discretion of the district court.").

The District Court certified a class of "[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998." 222 F.R.D., at 141–143 (internal quotation marks omitted). The named plaintiffs, led by Betty Dukes, propose to litigate, on behalf of the class, allegations that Wal–Mart discriminates on the basis of gender in pay and promotions.

2. Rule 23(a) lists three other threshold requirements for class-action certification: "(1) the class is so numerous that joinder of all members is impracticable"; "(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." The numerosity requirement is clearly met and Wal–Mart does not contend otherwise. As the Court does not reach the typicality and adequacy requirements, *ante*, at 2551, n. 5, I will not discuss them either, but will simply record my agreement with the District Court's resolution of those issues.

3. The Court suggests Rule 23(a)(2) must mean more than it says. See *ante*, at 2550 – 2552. If the word "questions" were taken literally, the majority asserts, plaintiffs could pass the Rule 23(a)(2) bar by "[r]eciting . . . questions" like "Do all of us plaintiffs indeed work for Wal–Mart?" *Ante*, at 2551. Sensibly read, however, the word "questions" means disputed issues, not any utterance crafted in the grammatical form of a question.

They allege that the company "[r]eli[es] on gender stereotypes in making employment decisions such as ... promotion[s][and] pay." App. 55a. Wal–Mart permits those prejudices to infect personnel decisions, the plaintiffs contend, by leaving pay and promotions in the hands of "a nearly all male managerial workforce" using "arbitrary and subjective criteria." *Ibid.* Further alleged barriers to the advancement of female employees include the company's requirement, "as a condition of promotion to management jobs, that employees be willing to relocate." *Id.*, at 56a. Absent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men. See Dept. of Labor, Federal Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital 151 (1995).

Women fill 70 percent of the hourly jobs in the retailer's stores but make up only "33 percent of management employees." 222 F.R.D., at 146. "[T]he higher one looks in the organization the lower the percentage of women." *Id.*, at 155. The plaintiffs' "largely uncontested descriptive statistics" also show that women working in the company's stores "are paid less than men in every region" and "that the salary gap widens over time even for men and women hired into the same jobs at the same time." *Ibid.*; cf. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007) (GINSBURG, J., dissenting).

The District Court identified "systems for ... promoting in-store employees" that were "sufficiently similar across regions and stores" to conclude that "the manner in which these systems affect the class raises issues that are common to all class members." 222 F.R.D., at 149. The selection of employees for promotion to in-store management "is fairly characterized as a 'tap on the shoulder' process," in which managers have discretion about whose shoulders to tap. *Id.*, at 148. Vacancies are not regularly posted; from among those employees satisfying minimum qualifications, managers choose whom to promote on the basis of their own subjective impressions. *Ibid.*

Wal–Mart's compensation policies also operate uniformly across stores, the District Court found. The retailer leaves open a $2 band for every position's hourly pay rate. Wal–Mart provides no standards or criteria for setting wages within that band, and thus does nothing to counter unconscious bias on the part of supervisors. See *id.*, at 146–147.

Wal–Mart's supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means Wal–Mart used to maintain a "carefully constructed ... corporate culture," such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores "on a close and constant basis," and "Wal–Mart TV," "broadcas[t] ... into all stores." *Id.*, at 151–153 (internal quotation marks omitted).

The plaintiffs' evidence, including class members' tales of their own experiences,[4] suggests that gender bias suffused Wal–Mart's company culture. Among illustra-

4. The majority purports to derive from *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class. *Ante*, at 17–18. *Teamsters*, the Court acknowledges, see *ante*, at 2556, n. 9, instructs that statistical evidence alone may suffice, 431 U.S., at 339, 97 S.Ct. 1843; that decision can hardly be said to establish a numerical floor before anecdotal evidence can be taken into account.

tions, senior management often refer to female associates as "little Janie Qs." Plaintiffs' Motion for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 13 (internal quotation marks omitted). One manager told an employee that "[m]en are here to make a career and women aren't." 222 F.R.D., at 166 (internal quotation marks omitted). A committee of female Wal–Mart executives concluded that "[s]tereotypes limit the opportunities offered to women." Plaintiffs' Motion for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, at 16 (internal quotation marks omitted).

Finally, the plaintiffs presented an expert's appraisal to show that the pay and promotions disparities at Wal–Mart "can be explained only by gender discrimination and not by ... neutral variables." 222 F.R.D., at 155. Using regression analyses, their expert, Richard Drogin, controlled for factors including, *inter alia*, job performance, length of time with the company, and the store where an employee worked. *Id.*, at 159.[5] The results, the District Court found, were sufficient to raise an "inference of discrimination." *Id.*, at 155–160.

C

The District Court's identification of a common question, whether Wal–Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware.[6] The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

The plaintiffs' allegations resemble those in one of the prototypical cases in this area, *Leisner v. New York Tel. Co.*, 358 F.Supp. 359, 364–365 (S.D.N.Y.1973). In deciding on promotions, supervisors in that case were to start with objective measures; but ultimately, they were to "look at the individual as a total individual." *Id.*, at 365 (internal quotation marks omitted). The final question they were to ask and answer: "Is this person going to be successful in our business?" *Ibid.* (internal quotation marks omitted). It is hardly surprising that for many managers, the ideal candidate was someone with characteristics similar to their own.

We have held that "discretionary employment practices" can give rise to Title

5. The Court asserts that Drogin showed only average differences at the "regional and national level" between male and female employees. *Ante,* at 2555 (internal quotation marks omitted). In fact, his regression analyses showed there were disparities *within* stores. The majority's contention to the contrary reflects only an arcane disagreement about statistical method—which the District Court resolved in the plaintiffs' favor. 222 F.R.D. 137, 157 (N.D.Cal.2004). Appellate review is no occasion to disturb a trial court's handling of factual disputes of this order.

6. An example vividly illustrates how subjective decisionmaking can be a vehicle for discrimination. Performing in symphony orchestras was long a male preserve. Goldin and Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, 90 Am. Econ. Rev. 715, 715–716 (2000). In the 1970's orchestras began hiring musicians through auditions open to all comers. *Id.,* at 716. Reviewers were to judge applicants solely on their musical abilities, yet subconscious bias led some reviewers to disfavor women. Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens. *Id.,* at 738.

VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. See *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 988, 991, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). But see *ante,* at 2555 ("[P]roving that [a] discretionary system has produced a . . . disparity *is not enough.*"). In *Watson,* as here, an employer had given its managers large authority over promotions. An employee sued the bank under Title VII, alleging that the "discretionary promotion system" caused a discriminatory effect based on race. 487 U.S., at 984, 108 S.Ct. 2777 (internal quotation marks omitted). Four different supervisors had declined, on separate occasions, to promote the employee. *Id.,* at 982, 108 S.Ct. 2777. Their reasons were subjective and unknown. The employer, we noted "had not developed precise and formal criteria for evaluating candidates"; "[i]t relied instead on the subjective judgment of supervisors." *Ibid.*

Aware of "the problem of subconscious stereotypes and prejudices," we held that the employer's "undisciplined system of subjective decisionmaking" was an "employment practic[e]" that "may be analyzed under the disparate impact approach." *Id.,* at 990–991, 108 S.Ct. 2777. See also *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 657, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (recognizing "the use of 'subjective decision making' " as an "employment practic[e]" subject to disparate-impact attack).

The plaintiffs' allegations state claims of gender discrimination in the form of biased decisionmaking in both pay and promotions. The evidence reviewed by the District Court adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal–Mart's stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for class-action certification, demands nothing further.

II

A

The Court gives no credence to the key dispute common to the class: whether Wal–Mart's discretionary pay and promotion policies are discriminatory. See *ante,* at 2551 ("Reciting" questions like "Is [giving managers discretion over pay] an unlawful employment practice?" "is not sufficient to obtain class certification."). "What matters," the Court asserts, "is not the raising of common 'questions,' " but whether there are "[d]issimilarities within the proposed class" that "have the potential to impede the generation of common answers." *Ante,* at 2551 (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L.Rev. 97, 132 (2009); some internal quotation marks omitted).

The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer "easily satisfied," 5 J. Moore et al., Moore's Federal Practice § 23.23[2], p. 23–72 (3d ed.2011).[7] Rule 23(b)(3) certifica-

7. The Court places considerable weight on *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). *Ante,* at 2553. That case has little relevance to the question before the Court today. The lead plaintiff in *Falcon* alleged discrimination evidenced by the company's failure to promote him and other Mexican–American employees and failure to hire Mexican–American applicants. There were *"no* common questions of law or fact" between the claims of the lead plaintiff and the appli-

tion requires, in addition to the four 23(a) findings, determinations that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for . . . adjudicating the controversy." [8]

The Court's emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions "predominate" over individual issues. And by asking whether the individual differences "impede" common adjudication, *ante*, at 2551 – 2552 (internal quotation marks omitted), the Court duplicates 23(b)(3)'s question whether "a class action is superior" to other modes of adjudication. Indeed, Professor Nagareda, whose "dissimilarities" inquiry the Court endorses, developed his position in the context of Rule 23(b)(3). See 84 N.Y.U.L.Rev., at 131 (Rule 23(b)(3) requires "some decisive degree of similarity across the proposed class" because it "speaks of common 'questions' that 'predominate' over individual ones").[9] "The Rule 23(b)(3) predominance inquiry" is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). If courts must conduct a "dissimilarities" analysis at the Rule 23(a)(2) stage, no mission remains for Rule 23(b)(3).

Because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court's "dissimilarities" position is far reaching. Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met. See *Amchem Products*, 521 U.S., at 623, n. 19, 117 S.Ct. 2231 (Rule 23(b)(1)(B) "does not have a predominance requirement"); *Yamasaki*, 442 U.S., at 701, 99 S.Ct. 2545 (Rule 23(b)(2) action in which the Court noted that "[i]t is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue"). For example, in *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), a Rule 23(b)(2) class of African–American truckdrivers complained that the defendant had

cant class. 457 U.S., at 162, 102 S.Ct. 2364 (Burger, C. J., concurring in part and dissenting in part) (emphasis added). The plaintiff-employee alleged that the defendant-employer had discriminated against him intentionally. The applicant class claims, by contrast, were "advanced under the 'adverse impact' theory," *ibid.*, appropriate for facially neutral practices. "[T]he only commonality [wa]s that respondent is a Mexican–American and he seeks to represent a class of Mexican–Americans." *Ibid.* Here the same practices touch and concern all members of the class.

8. "A class action may be maintained if Rule 23(a) is satisfied and if:

"(1) prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications . . . [or] adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members . . .;

"(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole; or

"(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. Rule Civ. Proc. 23(b) (paragraph breaks added).

9. Cf. *supra*, at 2545 (Rule 23(a) commonality prerequisite satisfied by "[e]ven a single question . . . common to the members of the class" (quoting Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L.Rev. 149, 176, n. 110 (2003).

discriminatorily refused to hire black applicants. We recognized that the "qualification[s] and performance" of individual class members might vary. *Id.*, at 772, 96 S.Ct. 1251 (internal quotation marks omitted). "Generalizations concerning such individually applicable evidence," we cautioned, "cannot serve as a justification for the denial of [injunctive] relief to the entire class." *Ibid.*

B

The "dissimilarities" approach leads the Court to train its attention on what distinguishes individual class members, rather than on what unites them. Given the lack of standards for pay and promotions, the majority says, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Ante,* at 2554.

Wal–Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion, *Watson* held, is a practice actionable under Title VII when it produces discriminatory outcomes. 487 U.S., at 990–991, 108 S.Ct. 2777; see *supra,* at 2564 – 2565. A finding that Wal–Mart's pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for company-wide discrimination. *Teamsters v. United States,* 431 U.S. 324, 359, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); see *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 415–423, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). That each individual employee's unique circumstances will ultimately determine whether she is entitled to backpay or damages, § 2000e–5(g)(2)(A) (barring backpay if a plaintiff "was refused ... advancement ... for any reason other than discrimination"), should not factor into the Rule 23(a)(2) determination.

* * *

The Court errs in importing a "dissimilarities" notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry. I therefore cannot join Part II of the Court's opinion.

PLIVA, INC., et al., Petitioners,

v.

Gladys MENSING.

Actavis Elizabeth, LLC, Petitioner,

v.

Gladys Mensing.

Actavis, Inc., Petitioner,

v.

Julie Demahy.

Nos. 09–993, 09–1039, 09–1501.

Argued March 30, 2011.

Decided June 23, 2011.

Background: Consumer brought action in state court against generic drug manufacturer, alleging that long-term metoclopramide use caused her tardive dyskinesia and that the manufacturer was liable under the Louisiana Products Liability Act (LPLA). Following removal, the United States District Court for the Eastern District of Louisiana, Carl J. Barbier, J., 586 F.Supp.2d 642, granted in part and denied in part manufacturer's motion to dismiss. Manufacturer appealed. The United States Court of Appeals for the Fifth Circuit,

Abigail Noel FISHER, Petitioner

v.

UNIVERSITY OF TEXAS AT AUSTIN et al.

No. 11–345.

Argued Oct. 10, 2012.

Decided June 24, 2013.

Background: Caucasian applicant who was denied admission to state university brought suit alleging that university's consideration of race in its admissions process violated her right to equal protection. The United States District Court for the Western District of Texas, Sam Sparks, J., 645 F.Supp.2d 587, granted university summary judgment. Applicant appealed. The United States Court of Appeals for the Fifth Circuit, Patrick E. Higginbotham, Circuit Judge, 631 F.3d 213, affirmed. Certiorari was granted.

Holding: The Supreme Court, Justice Kennedy, held that Court of Appeals did not apply correct standard of strict scrutiny.

Vacated and remanded.

Justices Scalia and Thomas filed concurring opinions.

Justice Ginsburg filed dissenting opinion.

Justice Kagan took no part in consideration or decision of the case.

1. Constitutional Law ⚿2972

Any official action that treats person differently on account of his race or ethnic origin is inherently suspect.

2. Constitutional Law ⚿1040, 3078

Strict scrutiny of racial classification under Equal Protection Clause is searching examination, and government bears burden to prove that reasons for the classification are clearly identified and unquestionably legitimate. U.S.C.A. Const. Amend. 14.

3. Constitutional Law ⚿3078

Racial classifications are constitutional under Equal Protection Clause only if they are narrowly tailored to further compelling governmental interests. U.S.C.A. Const. Amend. 14.

4. Constitutional Law ⚿3280(3)

Strict equal protection scrutiny must be applied to any university admissions program using racial categories or classifications. U.S.C.A. Const.Amend. 14.

5. Constitutional Law ⚿3280(3)

Equal Protection Clause does not permit university to define diversity for admissions purposes as some specified percentage of particular group merely because of its race or ethnic origin; that would amount to outright racial balancing, which is patently unconstitutional, and racial balancing is not transformed from patently unconstitutional to compelling state interest simply by relabeling it racial diversity. U.S.C.A. Const.Amend. 14.

6. Constitutional Law ⚿3280(3)

Once university has established that its goal of racial diversity is consistent with strict scrutiny, under Equal Protection Clause, there must still be further judicial determination that admissions process meets strict scrutiny in its implementation; university must prove that means it has chosen to attain diversity are narrowly tailored to that goal. U.S.C.A. Const. Amend. 14.

7. Constitutional Law ⚿3280(3)

University receives no judicial deference in its choice of means to attain its goal of racial diversity in admissions, rather, it is for courts to ensure that means chosen are specifically and narrowly framed to accomplish university's asserted

purpose, as required by Equal Protection Clause. U.S.C.A. Const.Amend. 14.

8. Constitutional Law ⚿3280(3)

In reviewing, under Equal Protection Clause, university's choice of means to attain its goal of diversity, court can take account of university's experience and expertise in adopting or rejecting certain admissions processes, but it remains at all times the university's obligation to demonstrate, and the judiciary's obligation to determine, that admissions processes ensure that each applicant is evaluated as individual and not in way that makes applicant's race or ethnicity the defining feature of his or her application. U.S.C.A. Const. Amend. 14.

9. Constitutional Law ⚿3280(3)

In determining whether means chosen by university to attain diversity in admissions are narrowly tailored to that goal, as required by Equal Protection Clause, reviewing court must verify that it is necessary for university to use race to achieve educational benefits of diversity; this involves careful judicial inquiry into whether university could achieve sufficient diversity without using racial classifications. U.S.C.A. Const.Amend. 14.

10. Constitutional Law ⚿3280(3)

Although requirement, under Equal Protection Clause, that means chosen by university to attain diversity in admissions are narrowly tailored to that goal, does not require exhaustion of every conceivable race-neutral alternative, strict scrutiny does require court to examine with care, and not defer to, university's serious, good faith consideration of workable race-neutral alternatives. U.S.C.A. Const.Amend. 14.

11. Constitutional Law ⚿3280(3)

Consideration by university of workable race-neutral alternatives to use of race in admissions to attain educational benefits of diversity is necessary to survive strict scrutiny under Equal Protection Clause, but it is not sufficient; reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce educational benefits of diversity, and if nonracial approach could promote the substantial interest about as well and at tolerable administrative expense, then university may not consider race. U.S.C.A. Const.Amend. 14.

12. Constitutional Law ⚿3280(3)
Education ⚿1168

Lower courts too narrowly confined strict equal protection scrutiny of state university's use of racial classifications in admissions, by deferring to university's good faith. U.S.C.A. Const.Amend. 14.

13. Constitutional Law ⚿3250

Mere recitation of benign or legitimate purpose for racial classification is entitled to little or no weight under equal protection analysis. U.S.C.A. Const. Amend. 14.

14. Constitutional Law ⚿3280(3)

Strict equal protection scrutiny does not permit court to accept school's assertion that its admissions process uses race in permissible way without court giving close analysis to evidence of how process works in practice. U.S.C.A. Const.Amend. 14.

Syllabus *

The University of Texas at Austin considers race as one of various factors in

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

its undergraduate admissions process. The University, which is committed to increasing racial minority enrollment, adopted its current program after this Court decided *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304, upholding the use of race as one of many "plus factors" in an admissions program that considered the overall individual contribution of each candidate, and decided *Gratz v. Bollinger,* 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, holding unconstitutional an admissions program that automatically awarded points to applicants from certain racial minorities.

Petitioner, who is Caucasian, was rejected for admission to the University's 2008 entering class. She sued the University and school officials, alleging that the University's consideration of race in admissions violated the Equal Protection Clause. The District Court granted summary judgment to the University. Affirming, the Fifth Circuit held that *Grutter* required courts to give substantial deference to the University, both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. Applying that standard, the court upheld the University's admissions plan.

Held: Because the Fifth Circuit did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, its decision affirming the District Court's grant of summary judgment to the University was incorrect. Pp. 2417 – 2422.

(a) *Bakke, Gratz,* and *Grutter*, which directly address the question considered here, are taken as given for purposes of deciding this case. In *Bakke*'s principal opinion, Justice Powell recognized that state university "decisions based on race or ethnic origin . . . are reviewable under the Fourteenth Amendment," 438 U.S., at 287, 98 S.Ct. 2733, using a strict scrutiny standard, *id.,* at 299, 98 S.Ct. 2733. He identified as a compelling interest that could justify the consideration of race the interest in the educational benefits that flow from a diverse student body, but noted that this interest is complex, encompassing a broad array "of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.,* at 315, 98 S.Ct. 2733

In *Gratz* and *Grutter,* the Court endorsed these precepts, observing that an admissions process with such an interest is subject to judicial review and must withstand strict scrutiny, *Gratz, supra,* at 275, 123 S.Ct. 2411, *i.e.,* a university must clearly demonstrate that its " 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose,' " *Bakke, supra,* at 305, 98 S.Ct. 2733 Additional guidance may be found in the Court's broader equal protection jurisprudence. See, *e.g., Rice v. Cayetano,* 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007; *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 505, 109 S.Ct. 706, 102 L.Ed.2d 854. Strict scrutiny is a searching examination, and the government bears the burden to prove " 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.' " *Ibid.* Pp. 2417 – 2419.

(b) Under *Grutter*, strict scrutiny must be applied to any admissions program using racial categories or classifications. A court may give some deference to a university's "judgment that such diversity is essential to its educational mission," 539 U.S., at 328, 123 S.Ct. 2325, provided that diversity is not defined as

mere racial balancing and there is a reasoned, principled explanation for the academic decision. On this point, the courts below were correct in finding that *Grutter* calls for deference to the University's experience and expertise about its educational mission. However, once the University has established that its goal of diversity is consistent with strict scrutiny, the University must prove that the means it chose to attain that diversity are narrowly tailored to its goal. On this point, the University receives no deference. *Id.*, at 333, 123 S.Ct. 2325. It is at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.*, at 337, 123 S.Ct. 2325. Narrow tailoring also requires a reviewing court to verify that it is "necessary" for the university to use race to achieve the educational benefits of diversity. *Bakke, supra,* at 305, 98 S.Ct. 2733 The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.

Rather than perform this searching examination, the Fifth Circuit held petitioner could challenge only whether the University's decision to use race as an admissions factor "was made in good faith." It presumed that the school had acted in good faith and gave petitioner the burden of rebutting that presumption. It thus undertook the narrow-tailoring requirement with a "degree of deference" to the school. These expressions of the controlling standard are at odds with *Grutter*'s command that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' " 539 U.S., at 326, 123 S.Ct. 2325. Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without closely examining how the process works in practice, yet that is what the District Court and Fifth Circuit did here. The Court vacates the Fifth Circuit's judgment. But fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis. In determining whether summary judgment in the University's favor was appropriate, the Fifth Circuit must assess whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity. Pp. 2419 – 2422.

631 F.3d 213, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, THOMAS, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., and THOMAS, J., filed concurring opinions. GINSBURG, J., filed a dissenting opinion. KAGAN, J., took no part in the consideration or decision of the case.

Bert W. Rein, Washington, DC, Petitioner.

Gregory G. Garre, Washington, DC, for Respondents.

Donald B. Verilli, Jr., for the United States as amicus curiae, by special leave of the Court, supporting the Respondents.

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For U.S. Supreme Court Briefs, See:

2012 WL 1882759 (Pet.Brief)

2012 WL 3245488 (Resp.Brief)

2012 WL 3875237 (Reply.Brief)

Justice KENNEDY delivered the opinion of the Court.

The University of Texas at Austin considers race as one of various factors in its undergraduate admissions process. Race is not itself assigned a numerical value for each applicant, but the University has committed itself to increasing racial minority enrollment on campus. It refers to this goal as a "critical mass." Petitioner, who is Caucasian, sued the University after her application was rejected. She contends that the University's use of race in the admissions process violated the Equal Protection Clause of the Fourteenth Amendment.

The parties asked the Court to review whether the judgment below was consistent with "this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003)." Pet. for Cert. i. The Court concludes that the Court of Appeals did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 305, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). Because the Court of Appeals did not apply the correct standard of strict scrutiny, its decision affirming the District Court's grant of summary judgment to the University was incorrect. That decision is vacated, and the case is remanded for further proceedings.

I

A

Located in Austin, Texas, on the most renowned campus of the Texas state university system, the University is one of the leading institutions of higher education in the Nation. Admission is prized and competitive. In 2008, when petitioner sought admission to the University's entering class, she was 1 of 29,501 applicants. From this group 12,843 were admitted, and 6,715 accepted and enrolled. Petitioner was denied admission.

In recent years the University has used three different programs to evaluate candidates for admission. The first is the program it used for some years before 1997, when the University considered two factors: a numerical score reflecting an applicant's test scores and academic performance in high school (Academic Index or AI), and the applicant's race. In 1996, this system was held unconstitutional by the United States Court of Appeals for the Fifth Circuit. It ruled the University's consideration of race violated the Equal Protection Clause because it did not further any compelling government interest. *Hopwood v. Texas,* 78 F.3d 932, 955 (1996).

The second program was adopted to comply with the *Hopwood* decision. The University stopped considering race in admissions and substituted instead a new holistic metric of a candidate's potential contribution to the University, to be used in conjunction with the Academic Index. This "Personal Achievement Index" (PAI) measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a stu-

dent's background. These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family. Seeking to address the decline in minority enrollment after *Hopwood*, the University also expanded its outreach programs.

The Texas State Legislature also responded to the *Hopwood* decision. It enacted a measure known as the Top Ten Percent Law, codified at Tex. Educ.Code Ann. § 51.803 (West 2009). Also referred to as H.B. 588, the Top Ten Percent Law grants automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards.

The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University. Before the admissions program at issue in this case, in the last year under the post-*Hopwood* AI/PAI system that did not consider race, the entering class was 4.5% African–American and 16.9% Hispanic. This is in contrast with the 1996 pre-*Hopwood* and Top Ten Percent regime, when race was explicitly considered, and the University's entering freshman class was 4.1% African–American and 14.5% Hispanic.

Following this Court's decisions in *Grutter v. Bollinger, supra*, and *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), the University adopted a third admissions program, the 2004 program in which the University reverted to explicit consideration of race. This is the program here at issue. In *Grutter*, the Court upheld the use of race as one of many "plus factors" in an admissions program that considered the overall individual contribution of each candidate. In *Gratz*, by contrast, the Court held unconstitutional Michigan's undergraduate admissions program, which automatically awarded points to applicants from certain racial minorities.

The University's plan to resume race-conscious admissions was given formal expression in June 2004 in an internal document entitled Proposal to Consider Race and Ethnicity in Admissions (Proposal). Supp. App. 1a. The Proposal relied in substantial part on a study of a subset of undergraduate classes containing between 5 and 24 students. It showed that few of these classes had significant enrollment by members of racial minorities. In addition the Proposal relied on what it called "anecdotal" reports from students regarding their "interaction in the classroom." The Proposal concluded that the University lacked a "critical mass" of minority students and that to remedy the deficiency it was necessary to give explicit consideration to race in the undergraduate admissions program.

To implement the Proposal the University included a student's race as a component of the PAI score, beginning with applicants in the fall of 2004. The University asks students to classify themselves from among five predefined racial categories on the application. Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.

Once applications have been scored, they are plotted on a grid with the Academic Index on the x-axis and the Personal Achievement Index on the y-axis. On that grid students are assigned to so-called cells based on their individual scores. All students in the cells falling above a certain line are admitted. All students below the line are not. Each college—such as Liberal Arts or Engineering—admits students separately. So a student is considered

initially for her first-choice college, then for her second choice, and finally for general admission as an undeclared major.

Petitioner applied for admission to the University's 2008 entering class and was rejected. She sued the University and various University officials in the United States District Court for the Western District of Texas. She alleged that the University's consideration of race in admissions violated the Equal Protection Clause. The parties cross-moved for summary judgment. The District Court granted summary judgment to the University. The United States Court of Appeals for the Fifth Circuit affirmed. It held that *Grutter* required courts to give substantial deference to the University, both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. Applying that standard, the court upheld the University's admissions plan. 631 F.3d 213, 217–218 (2011).

Over the dissent of seven judges, the Court of Appeals denied petitioner's request for rehearing en banc. See 644 F.3d 301, 303 (C.A.5 2011) (*per curiam*). Petitioner sought a writ of certiorari. The writ was granted. 565 U.S. ——, 132 S.Ct. 1536, 182 L.Ed.2d 160 (2012).

B

Among the Court's cases involving racial classifications in education, there are three decisions that directly address the question of considering racial minority status as a positive or favorable factor in a university's admissions process, with the goal of achieving the educational benefits of a more diverse student body: *Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750; *Gratz, supra*; and *Grutter,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304. We take those cases as given for purposes of deciding this case.

We begin with the principal opinion authored by Justice Powell in *Bakke, supra.* In *Bakke,* the Court considered a system used by the medical school of the University of California at Davis. From an entering class of 100 students the school had set aside 16 seats for minority applicants. In holding this program impermissible under the Equal Protection Clause Justice Powell's opinion stated certain basic premises. First, "decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment." *Id.,* at 287, 98 S.Ct. 2733 (separate opinion). The principle of equal protection admits no "artificial line of a 'two-class theory' " that "permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Id.,* at 295, 98 S.Ct. 2733. It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny, for when government decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.,* at 299, 98 S.Ct. 2733.

Next, Justice Powell identified one compelling interest that could justify the consideration of race: the interest in the educational benefits that flow from a diverse student body. Redressing past discrimination could not serve as a compelling interest, because a university's "broad mission [of] education" is incompatible with making the "judicial, legislative, or administrative findings of constitutional or statutory violations" necessary to justify remedial racial classification. *Id.,* at 307–309, 98 S.Ct. 2733.

The attainment of a diverse student body, by contrast, serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes. The academic mission of a university is "a special concern of the First Amendment." *Id.,* at 312, 98 S.Ct. 2733. Part of " 'the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation,' " and this in turn leads to the question of " 'who may be admitted to study.' " *Sweezy v. New Hampshire,* 354 U.S. 234, 263, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring in judgment).

Justice Powell's central point, however, was that this interest in securing diversity's benefits, although a permissible objective, is complex. "It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke,* 438 U.S., at 315, 98 S.Ct. 2733 (separate opinion).

In *Gratz,* 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, and *Grutter, supra,* the Court endorsed the precepts stated by Justice Powell. In *Grutter,* the Court reaffirmed his conclusion that obtaining the educational benefits of "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.,* at 325, 123 S.Ct. 2325.

As *Gratz* and *Grutter* observed, however, this follows only if a clear precondition is met: The particular admissions process used for this objective is subject to judicial review. Race may not be considered unless the admissions process can withstand strict scrutiny. "Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis." *Gratz, supra,* at 275, 123 S.Ct. 2411. "To be narrowly tailored, a race-conscious admissions program cannot use a quota system," *Grutter,* 539 U.S., at 334, 123 S.Ct. 2325, but instead must "remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application," *id.,* at 337, 123 S.Ct. 2325. Strict scrutiny requires the university to demonstrate with clarity that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose." *Bakke,* 438 U.S., at 305, 98 S.Ct. 2733 (opinion of Powell, J.) (internal quotation marks omitted).

While these are the cases that most specifically address the central issue in this case, additional guidance may be found in the Court's broader equal protection jurisprudence which applies in this context. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people," *Rice v. Cayetano,* 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) (internal quotation marks omitted), and therefore "are contrary to our traditions and hence constitutionally suspect," *Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954). " '[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment,' " *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 505, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 533–534, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980)

(Stevens, J., dissenting)), "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.' " *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

[1, 2] To implement these canons, judicial review must begin from the position that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect." *Fullilove, supra*, at 523, 100 S.Ct. 2758 (Stewart, J., dissenting); *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964). Strict scrutiny is a searching examination, and it is the government that bears the burden to prove " 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate,' " *Croson, supra*, at 505, 109 S.Ct. 706 (quoting *Fullilove, supra*, 448 U.S., at 533–535, 100 S.Ct. 2758 (Stevens, J., dissenting)).

II

[3, 4] *Grutter* made clear that racial "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." 539 U.S., at 326, 123 S.Ct. 2325. And *Grutter* endorsed Justice Powell's conclusion in *Bakke* that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education." 438 U.S., at 311–312, 98 S.Ct. 2733 (separate opinion). Thus, under *Grutter*, strict scrutiny must be applied to any admissions program using racial categories or classifications.

According to *Grutter*, a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer." 539 U.S., at 328, 123 S.Ct. 2325. *Grutter* concluded that the decision to pursue "the educational benefits that flow from student body diversity," *id.*, at 330, 123 S.Ct. 2325, that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*. A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision. On this point, the District Court and Court of Appeals were correct in finding that *Grutter* calls for deference to the University's conclusion, " 'based on its experience and expertise,' " 631 F.3d, at 230 (quoting 645 F.Supp.2d 587, 603 (W.D.Tex.2009)), that a diverse student body would serve its educational goals. There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity. See *post*, at 2422 (SCALIA, J., concurring); *post*, at 2423 – 2424 (THOMAS, J., concurring); *post*, at 2432 – 2433 (GINSBURG, J., dissenting). But the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding.

[5] A university is not permitted to define diversity as "some specified percentage of a particular group merely because of its race or ethnic origin." *Bakke, supra*, at 307, 98 S.Ct. 2733 (opinion of Powell, J.). "That would amount to outright racial balancing, which is patently unconstitutional." *Grutter, supra*, at 330, 123 S.Ct. 2325. "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.' " *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 732, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007).

[6–8] Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets

strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. *Grutter* made clear that it is for the courts, not for university administrators, to ensure that "[t]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." 539 U.S., at 333, 123 S.Ct. 2325 (internal quotation marks omitted). True, a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in *Grutter,* it remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.*, at 337, 123 S.Ct. 2325.

[9–11] Narrow tailoring also requires that the reviewing court verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity. *Bakke, supra,* at 305, 98 S.Ct. 2733 This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative," strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives." See *Grutter,* 539 U.S., at 339–340, 123 S.Ct. 2325 (emphasis added). Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If " 'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,' " *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (quoting Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum. L.Rev. 559, 578–579 (1975)), then the university may not consider race. A plaintiff, of course, bears the burden of placing the validity of a university's adoption of an affirmative action plan in issue. But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.

[12] Rather than perform this searching examination, however, the Court of Appeals held petitioner could challenge only "whether [the University's] decision to reintroduce race as a factor in admissions was made in good faith." 631 F.3d, at 236. And in considering such a challenge, the court would "presume the University acted in good faith" and place on petitioner the burden of rebutting that presumption. *Id.,* at 231–232. The Court of Appeals held that to "second-guess the merits" of this aspect of the University's decision was a task it was "ill-equipped to perform" and that it would attempt only to "ensure that [the University's] decision to adopt a race-conscious admissions policy followed from [a process of] good faith consideration." *Id.,* at 231. The Court of Appeals thus concluded that "the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the Universit[y]." *Id.,* at 232. Because "the efforts of the University have been studied, serious, and of high purpose," the Court of Appeals held that the use of race in the admissions

program fell within "a constitutionally protected zone of discretion." *Id.*, at 231.

These expressions of the controlling standard are at odds with *Grutter*'s command that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' " 539 U.S., at 326, 123 S.Ct. 2325 (quoting *Adarand Constructors, Inc. v. Penã*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). In *Grutter*, the Court approved the plan at issue upon concluding that it was not a quota, was sufficiently flexible, was limited in time, and followed "serious, good faith consideration of workable race-neutral alternatives." 539 U.S., at 339, 123 S.Ct. 2325. As noted above, see *supra*, at 2415, the parties do not challenge, and the Court therefore does not consider, the correctness of that determination.

[13, 14] *Grutter* did not hold that good faith would forgive an impermissible consideration of race. It must be remembered that "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight." *Croson*, 488 U.S., at 500, 109 S.Ct. 706. Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.

The higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts. "[T]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable.... While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, n. 9, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982).

The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications and affirming the grant of summary judgment on that basis. The Court vacates that judgment, but fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis. See *Adarand*, *supra*, at 237, 115 S.Ct. 2097. Unlike *Grutter*, which was decided after trial, this case arises from cross-motions for summary judgment. In this case, as in similar cases, in determining whether summary judgment in favor of the University would be appropriate, the Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity. Whether this record—and not "simple ... assurances of good intention," *Croson*, *supra*, at 500, 109 S.Ct. 706—is sufficient is a question for the Court of Appeals in the first instance.

* * *

Strict scrutiny must not be " 'strict in theory, but fatal in fact,' " *Adarand*, *supra*, at 237, 115 S.Ct. 2097; see also *Grutter*, *supra*, at 326, 123 S.Ct. 2325. But the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact. In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that "encompasses a ... broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S., at 315, 98 S.Ct. 2733

(opinion of Powell, J.). The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KAGAN took no part in the consideration or decision of this case.

Justice SCALIA, concurring.

I adhere to the view I expressed in *Grutter v. Bollinger*: "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." 539 U.S. 306, 349, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (opinion concurring in part and dissenting in part). The petitioner in this case did not ask us to overrule *Grutter*'s holding that a "compelling interest" in the educational benefits of diversity can justify racial preferences in university admissions. Tr. of Oral Arg. 8–9. I therefore join the Court's opinion in full.

Justice THOMAS, concurring.

I join the Court's opinion because I agree that the Court of Appeals did not apply strict scrutiny to the University of Texas at Austin's (University) use of racial discrimination in admissions decisions. *Ante,* at 2415. I write separately to explain that I would overrule *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.

I

A

The Fourteenth Amendment provides that no State shall "deny to any person . . . the equal protection of the laws." The Equal Protection Clause guarantees every person the right to be treated equally by the State, without regard to race. "At the heart of this [guarantee] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups." *Missouri v. Jenkins,* 515 U.S. 70, 120–121, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (THOMAS, J., concurring). "It is for this reason that we must subject all racial classifications to the strictest of scrutiny." *Id.,* at 121, 115 S.Ct. 2038.

Under strict scrutiny, all racial classifications are categorically prohibited unless they are " 'necessary to further a compelling governmental interest' " and "narrowly tailored to that end." *Johnson v. California,* 543 U.S. 499, 514, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) (quoting *Grutter, supra,* at 327, 123 S.Ct. 2325). This most exacting standard "has proven automatically fatal" in almost every case. *Jenkins, supra,* at 121, 115 S.Ct. 2038 (THOMAS, J., concurring). And rightly so. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors, Inc. v. Penã,* 515 U.S. 200, 240, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (THOMAS, J., concurring in part and concurring in judgment). "The Constitution abhors classifications based on race" because "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter, supra,* at 353, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part).

B

1

The Court first articulated the strict-scrutiny standard in *Korematsu v. United*

States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). There, we held that "[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." *Id.,* at 216, 65 S.Ct. 193.[1] Aside from *Grutter,* the Court has recognized only two instances in which a "[p]ressing public necessity" may justify racial discrimination by the government. First, in *Korematsu,* the Court recognized that protecting national security may satisfy this exacting standard. In that case, the Court upheld an evacuation order directed at "all persons of Japanese ancestry" on the grounds that the Nation was at war with Japan and that the order had "a definite and close relationship to the prevention of espionage and sabotage." 323 U.S., at 217–218, 65 S.Ct. 193. Second, the Court has recognized that the government has a compelling interest in remedying past discrimination for which it is responsible, but we have stressed that a government wishing to use race must provide "a 'strong basis in evidence for its conclusion that remedial action [is] necessary.'" *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500, 504, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (quoting *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 277, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion)).

In contrast to these compelling interests that may, in a narrow set of circumstances, justify racial discrimination, the Court has frequently found other asserted interests insufficient. For example, in *Palmore v. Sidoti,* 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), the Court flatly rejected a claim that the best interests of a child justified the government's racial discrimination. In that case, a state court awarded custody to a child's father because the mother was in a mixed-race marriage. The state court believed the child might be stigmatized by living in a mixed-race household and sought to avoid this perceived problem in its custody determination. We acknowledged the possibility of stigma but nevertheless concluded that "the reality of private biases and the possible injury they might inflict" do not justify racial discrimination. *Id.,* at 433, 104 S.Ct. 1879. As we explained, "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Ibid.*

Two years later, in *Wygant, supra,* the Court held that even asserted interests in remedying societal discrimination and in providing role models for minority students could not justify governmentally imposed racial discrimination. In that case, a collective-bargaining agreement between a school board and a teacher's union favored teachers who were " 'Black, American Indian, Oriental, or of Spanish descendancy.' " *Id.,* at 270–271, and n. 2, 106 S.Ct. 1842 (plurality opinion). We rejected the interest in remedying societal discrimination because it had no logical stopping point. *Id.,* at 276, 106 S.Ct. 1842. We similarly rebuffed as inadequate the interest in providing role models to minority students and added that the notion that "black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)." *Ibid.*

2

Grutter was a radical departure from our strict-scrutiny precedents. In *Grutter,* the University of Michigan Law School (Law School) claimed that it had a compelling reason to discriminate based on race.

1. The standard of "pressing public necessity" is more frequently called a "compelling governmental interest." I use the terms interchangeably.

The reason it advanced did not concern protecting national security or remedying its own past discrimination. Instead, the Law School argued that it needed to discriminate in admissions decisions in order to obtain the "educational benefits that flow from a diverse student body." 539 U.S., at 317, 123 S.Ct. 2325. Contrary to the very meaning of strict scrutiny, the Court *deferred* to the Law School's determination that this interest was sufficiently compelling to justify racial discrimination. *Id.,* at 325, 123 S.Ct. 2325.

I dissented from that part of the Court's decision. I explained that "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity' " sufficient to satisfy strict scrutiny. *Id.*, at 353, 123 S.Ct. 2325. Cf. *Lee v. Washington*, 390 U.S. 333, 334, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (Black, J., concurring) (protecting prisoners from violence might justify narrowly tailored discrimination); *J.A. Croson*, *supra*, at 521, 109 S.Ct. 706 (SCALIA, J., concurring in judgment) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify [racial discrimination]"). I adhere to that view today. As should be obvious, there is nothing "pressing" or "necessary" about obtaining whatever educational benefits may flow from racial diversity.

II

A

The University claims that the District Court found that it has a compelling interest in attaining "a diverse student body and the educational benefits flowing from such diversity." Brief for Respondents 18. The use of the conjunction, "and," implies that the University believes its discrimination furthers two distinct interests. The first is an interest in attaining diversity for its own sake. The second is an interest in attaining educational benefits that allegedly flow from diversity.

Attaining diversity for its own sake is a nonstarter. As even *Grutter* recognized, the pursuit of diversity as an end is nothing more than impermissible "racial balancing." 539 U.S., at 329–330, 123 S.Ct. 2325 ("The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.' That would amount to outright racial balancing, which is patently unconstitutional" (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); citation omitted)); see also *id.*, at 307, 98 S.Ct. 2733 ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids"). Rather, diversity can only be the *means* by which the University obtains educational benefits; it cannot be an end pursued for its own sake. Therefore, the *educational benefits* allegedly produced by diversity must rise to the level of a compelling state interest in order for the program to survive strict scrutiny.

Unfortunately for the University, the educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest. Indeed, the argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950's, but emphatically rejected by this Court. And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, see *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the alleged educational benefits of diversi-

ty cannot justify racial discrimination today.

1

Our desegregation cases establish that the Constitution prohibits public schools from discriminating based on race, even if discrimination is necessary to the schools' survival. In *Davis v. School Bd. of Prince Edward Cty.*, decided with *Brown*, *supra*, the school board argued that if the Court found segregation unconstitutional, white students would migrate to private schools, funding for public schools would decrease, and public schools would either decline in quality or cease to exist altogether. Brief for Appellees in *Davis v. School Bd. of Prince Edward Cty.*, O.T. 1952, No. 191, p. 30 (hereinafter Brief for Appellees in *Davis*) ("Virginians ... would no longer permit sizeable appropriations for schools on either the State or local level; private segregated schools would be greatly increased in number and the masses of our people, both white and Negro, would suffer terribly.... [M]any white parents would withdraw their children from the public schools and, as a result, the program of providing better schools would be abandoned" (internal quotation marks omitted)). The true victims of desegregation, the school board asserted, would be black students, who would be unable to afford private school. See *id.*, at 31 ("[W]ith the demise of segregation, education in Virginia would receive a serious setback. Those who would suffer most would be the Negroes who, by and large, would be economically less able to afford the private school"); Tr. of Oral Arg. in *Davis v. School Bd. of Prince Edward Cty.*, O.T. 1954, No. 3, p. 208 ("What is worst of all, in our opinion, you impair the public school system of Virginia and the victims will be the children of both races, we think the Negro race worse than the white race, because the Negro race needs it more by virtue of these disadvantages under which they have labored. We are up against the proposition: What does the Negro profit if he procures an immediate detailed decree from this Court now and then impairs or mars or destroys the public school system in Prince Edward County").[2]

Unmoved by this sky-is-falling argument, we held that segregation violates the principle of equality enshrined in the Fourteenth Amendment. See *Brown*, *supra*, at 495, 74 S.Ct. 686 ("[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"); see also *Allen v. School Bd. of Prince Edward Cty.*, 249 F.2d 462, 465 (C.A.4 1957) (*per curiam*) ("The fact that the schools might be closed if the order were enforced is no reason for not enforcing it. A person may not be denied enforcement of rights to

2. Similar arguments were advanced unsuccessfully in other cases as well. See, *e.g.*, Brief for Respondents in *Sweatt v. Painter*, O.T. 1949, No. 44, pp. 94–95 (hereinafter Brief for Respondents in *Sweatt*) ("[I]f the power to separate the students were terminated, ... it would be as a bonanza to the private white schools of the State, and it would mean the migration out of the schools and the turning away from the public schools of the influence and support of a large number of children and of the parents of those children ... who are the largest contributors to the cause of public education, and whose financial support is necessary for the continued progress of public education.... Should the State be required to mix the public schools, there is no question but that a very large group of students would transfer, or be moved by their parents, to private schools with a resultant deterioration of the public schools" (internal quotation marks omitted)); Brief for Appellees in *Briggs v. Elliott*, O.T. 1952, No. 101, p. 27 (hereinafter Brief for Appellees in *Briggs*) ("[I]t would be impossible to have sufficient acceptance of the idea of mixed groups attending the same schools to have public education on that basis at all.... [I]t would eliminate the public schools in most, if not all, of the communities in the State").

which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights"). Within a matter of years, the warning became reality: After being ordered to desegregate, Prince Edward County closed its public schools from the summer of 1959 until the fall of 1964. See R. Sarratt, The Ordeal of Desegregation 237 (1966). Despite this fact, the Court never backed down from its rigid enforcement of the Equal Protection Clause's antidiscrimination principle.

In this case, of course, Texas has not alleged that the University will close if it is prohibited from discriminating based on race. But even if it had, the foregoing cases make clear that even that consequence would not justify its use of racial discrimination. It follows, *a fortiori*, that the putative educational benefits of student body diversity cannot justify racial discrimination: If a State does not have a compelling interest in the *existence* of a university, it certainly cannot have a compelling interest in the supposed benefits that might accrue to that university from racial discrimination. See *Grutter*, 539 U.S., at 361, 123 S.Ct. 2325 (opinion of THOMAS, J.) ("[A] marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest either in its existence or in its current educational and admissions policies"). If the Court were actually applying strict scrutiny, it would require Texas either to close the University or to stop discriminating against applicants based on their race. The Court has put other schools to that choice, and there is no reason to treat the University differently.

2

It is also noteworthy that, in our desegregation cases, we rejected arguments that are virtually identical to those advanced by the University today. The University asserts, for instance, that the diversity obtained through its discriminatory admissions program prepares its students to become leaders in a diverse society. See, *e.g.,* Brief for Respondents 6 (arguing that student body diversity "prepares students to become the next generation of leaders in an increasingly diverse society"). The segregationists likewise defended segregation on the ground that it provided more leadership opportunities for blacks. See, *e.g.,* Brief for Respondents in *Sweatt* 96 ("[A] very large group of Northern Negroes [comes] South to attend separate colleges, suggesting that the Negro does not secure as well-rounded a college life at a mixed college, and that the separate college offers him positive advantages; that there is a more normal social life for the Negro in a separate college; that there is a greater opportunity for full participation and for the development of leadership; that the Negro is inwardly more 'secure' at a college of his own people"); Brief for Appellees in *Davis* 25–26 ("The Negro child gets an opportunity to participate in segregated schools that I have never seen accorded to him in non-segregated schools. He is important, he holds offices, he is accepted by his fellows, he is on athletic teams, he has a full place there" (internal quotation marks omitted)). This argument was unavailing. It is irrelevant under the Fourteenth Amendment whether segregated or mixed schools produce better leaders. Indeed, no court today would accept the suggestion that segregation is permissible because historically black colleges produced Booker T. Washington, Thurgood Marshall, Martin Luther King, Jr., and other prominent leaders. Likewise, the University's racial discrimination cannot be justified on the ground that it will produce better leaders.

The University also asserts that student body diversity improves interracial relations. See, *e.g.,* Brief for Respondents 6 (arguing that student body diversity promotes "cross-racial understanding" and breaks down racial and ethnic stereotypes). In this argument, too, the University repeats arguments once marshaled in support of segregation. See, *e.g.,* Brief for Appellees in *Davis* 17 ("Virginia has established segregation in certain fields as a part of her public policy to prevent violence and reduce resentment. The result, in the view of an overwhelming Virginia majority, has been to improve the relationship between the different races"); *id.,* at 25 ("If segregation be stricken down, the general welfare will be definitely harmed . . . there would be more friction developed" (internal quotation marks omitted)); Brief for Respondents in *Sweatt* 93 ("Texas has had no serious breaches of the peace in recent years in connection with its schools. The separation of the races has kept the conflicts at a minimum"); *id.,* at 97–98 ("The legislative acts are based not only on the belief that it is the best way to provide education for both races, and the knowledge that separate schools are necessary to keep public support for the public schools, but upon the necessity to maintain the public peace, harmony, and welfare"); Brief for Appellees in *Briggs* 32 ("The southern Negro, by and large, does not want an end to segregation in itself any more than does the southern white man. The Negro in the South knows that discriminations, and worse, can and would multiply in such event" (internal quotation marks omitted)). We flatly rejected this line of arguments in *McLaurin v. Oklahoma State Regents for Higher Ed.,* 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950), where we held that segregation would be unconstitutional even if white students never tolerated blacks. *Id.,* at 641, 70 S.Ct. 851 ("It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar"). It is, thus, entirely irrelevant whether the University's racial discrimination increases or decreases tolerance.

Finally, while the University admits that racial discrimination in admissions is not ideal, it asserts that it is a temporary necessity because of the enduring race consciousness of our society. See Brief for Respondents 53–54 ("Certainly all aspire for a colorblind society in which race does not matter. . . . But in Texas, as in America, 'our highest aspirations are yet unfulfilled' "). Yet again, the University echoes the hollow justifications advanced by the segregationists. See, *e.g.,* Brief for State of Kansas on Reargument in *Brown v. Board of Education,* O.T. 1953, No. 1, p. 56 ("We grant that segregation may not be the ethical or political ideal. At the same time we recognize that practical considerations may prevent realization of the ideal"); Brief for Respondents in *Sweatt* 94 ("The racial consciousness and feeling which exists today in the minds of many people may be regrettable and unjustified. Yet they are a reality which must be dealt with by the State if it is to preserve harmony and peace and at the same time furnish equal education to both groups"); *id.,* at 96 (" '[T]he *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions' "); Brief for Appellees in *Briggs* 26–27 ("[I]t would be unwise in administrative practice . . . to mix the two races in the same schools at the present

time and under present conditions"); Brief for Appellees on Reargument in *Briggs v. Elliott*, O.T. 1953, No. 2, p. 79 ("It is not 'racism' to be cognizant of the fact that mankind has struggled with race problems and racial tensions for upwards of sixty centuries"). But these arguments too were unavailing. The Fourteenth Amendment views racial bigotry as an evil to be stamped out, not as an excuse for perpetual racial tinkering by the State. See *DeFunis v. Odegaard*, 416 U.S. 312, 342, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (Douglas, J., dissenting) ("The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized"). The University's arguments to this effect are similarly insufficient to justify discrimination.[3]

3

The University's arguments today are no more persuasive than they were 60 years ago. Nevertheless, despite rejecting identical arguments in *Brown*, the Court in *Grutter* deferred to the University's determination that the diversity obtained by racial discrimination would yield educational benefits. There is no principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' assertion that segregation yielded those same benefits. See *Grutter*, 539 U.S., at 365–366, 123 S.Ct. 2325 (opinion of THOMAS, J.) ("Contained within today's majority opinion is the seed of a new constitutional justification for a concept I thought long and rightly rejected—racial segregation"). Educational benefits are a far cry from the truly compelling state interests that we previously required to justify use of racial classifications.

B

My view of the Constitution is the one advanced by the plaintiffs in *Brown*: "[N]o 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 v. Board of Education*, O.T. 1952, No. 8, p. 7; see also Juris. Statement in *Davis v. School Bd. of Prince Edward Cty.*, O.T. 1952, No. 191, p. 8 ("[W]e take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action"); Brief for Appellants in *Brown v. Board of Education*, O.T. 1952, No. 8, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone"); Brief for Appellants in Nos. 1, 2, and 4, and for Respondents in No. 10 on Reargument in *Brown v. Board of Education*, O.T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief"). The Constitution does not pander to faddish theories about whether race mixing is in the public interest. The Equal Protection Clause strips States of all authority to use race as a factor in providing education. All appli-

3. While the arguments advanced by the University in defense of discrimination are the same as those advanced by the segregationists, one obvious difference is that the segregationists argued that it was *segregation* that was necessary to obtain the alleged benefits, whereas the University argues that *diversity* is the key. Today, the segregationists' arguments would never be given serious consideration. But see M. Plocienniczak, Pennsylvania School Experiments with 'Segregation,' CNN (Jan. 27, 2011), http://www.cnn.com/2011/US/01/27/pennsylvania.segregation/index.html?_s=PM:US (as visited June 21, 2013, and available in Clerk of Court's case file). We should be equally hostile to the University's repackaged version of the same arguments in support of its favored form of racial discrimination.

cants must be treated equally under the law, and no benefit in the eye of the beholder can justify racial discrimination.

This principle is neither new nor difficult to understand. In 1868, decades before *Plessy*, the Iowa Supreme Court held that schools may not discriminate against applicants based on their skin color. In *Clark v. Board of Directors,* 24 Iowa 266 (1868), a school denied admission to a student because she was black, and "public sentiment [was] opposed to the intermingling of white and colored children in the same schools." *Id.,* at 269. The Iowa Supreme Court rejected that flimsy justification, holding that "all the youths are equal before the law, and there is no discretion vested in the board ... or elsewhere, to interfere with or disturb that equality." *Id.,* at 277. "For the courts to sustain a board of school directors ... in limiting the rights and privileges of persons by reason of their [race], would be to sanction a plain violation of the spirit of our laws not only, but would tend to perpetuate the national differences of our people and stimulate a constant strife, if not a war of races." *Id.,* at 276. This simple, yet fundamental, truth was lost on the Court in *Plessy* and *Grutter*.

I would overrule *Grutter* and hold that the University's admissions program violates the Equal Protection Clause because the University has not put forward a compelling interest that could possibly justify racial discrimination.

III

While I find the theory advanced by the University to justify racial discrimination facially inadequate, I also believe that its use of race has little to do with the alleged educational benefits of diversity. I suspect that the University's program is instead based on the benighted notion that it is possible to tell when discrimination helps, rather than hurts, racial minorities. See *post,* at 2433 – 2434 (GINSBURG, J., dissenting) ("[G]overnment actors, including state universities, need not be blind to the lingering effects of 'an overtly discriminatory past,' the legacy of 'centuries of law-sanctioned inequality' "). But "[h]istory should teach greater humility." *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 609, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting). The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities.

A

Slaveholders argued that slavery was a "positive good" that civilized blacks and elevated them in every dimension of life. See, *e.g.,* Calhoun, Speech in the U.S. Senate, 1837, in P. Finkelman, Defending Slavery 54, 58–59 (2003) ("Never before has the black race of Central Africa, from the dawn of history to the present day, attained a condition so civilized and so improved, not only physically, but morally and intellectually.... [T]he relation now existing in the slaveholding States between the two [races], is, instead of an evil, a good—a positive good"); Harper, Memoir on Slavery, in The Ideology of Slavery 78, 115–116 (D. Faust ed. 1981) ("Slavery, as it is said in an eloquent article published in a Southern periodical work ... 'has done more to elevate a degraded race in the scale of humanity; to tame the savage; to civilize the barbarous; to soften the ferocious; to enlighten the ignorant, and to spread the blessings of [C]hristianity among the heathen, than all the missionaries that philanthropy and religion have ever sent forth' "); Hammond, The Mudsill Speech, 1858, in Defending Slavery, *supra,* at 80, 87 ("They are elevated from the

condition in which God first created them, by being made our slaves").

A century later, segregationists similarly asserted that segregation was not only benign, but good for black students. They argued, for example, that separate schools protected black children from racist white students and teachers. See, *e.g.,* Brief for Appellees in *Briggs* 33–34 (" 'I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their child to "fight" this thing out,—but, dear God, at what a cost! ... We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated' " (quoting DuBois, Does the Negro Need Separate Schools? 4 J. of Negro Educ. 328, 330–331 (1935))); Tr. of Oral Arg. in *Bolling v. Sharpe,* O.T. 1952, No. 413, p. 56 ("There was behind these [a]cts a kindly feeling [and] an intention to help these people who had been in bondage. And there was and there still is an intention by the Congress to see that these children shall be educated in a healthful atmosphere, in a wholesome atmosphere, in a place where they are wanted, in a place where they will not be looked upon with hostility, in a place where there will be a receptive atmosphere for learning for both races without the hostility that undoubtedly Congress thought might creep into these situations"). And they even appealed to the fact that many blacks agreed that separate schools were in the "best interests" of both races. See, *e.g.,* Brief for Appellees in *Davis* 24–25 (" 'It has been my experience, in working with the people of Virginia, including both white and Negro, that the customs and the habits and the traditions of Virginia citizens are such that they believe for the best interests of both the white and the Negro that the separate school is best' ").

Following in these inauspicious footsteps, the University would have us believe that its discrimination is likewise benign. I think the lesson of history is clear enough: Racial discrimination is never benign. " '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." See *Metro Broadcasting,* 497 U.S., at 610, 110 S.Ct. 2997 (O'Connor, J., dissenting). It is for this reason that the Court has repeatedly held that strict scrutiny applies to *all* racial classifications, regardless of whether the government has benevolent motives. See, *e.g., Johnson,* 543 U.S., at 505, 125 S.Ct. 1141 ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny"); *J.A. Croson,* 488 U.S., at 500, 109 S.Ct. 706 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice"). The University's professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.

B

While it does not, for constitutional purposes, matter whether the University's racial discrimination is benign, I note that

racial engineering does in fact have insidious consequences. There can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race. But I believe the injury to those admitted under the University's discriminatory admissions program is even more harmful.

Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates. In the University's entering class of 2009, for example, among the students admitted outside the Top Ten Percent plan, blacks scored at the 52d percentile of 2009 SAT takers nationwide, while Asians scored at the 93d percentile. Brief for Richard Sander et al. as *Amici Curiae* 3–4, and n. 4. Blacks had a mean GPA of 2.57 and a mean SAT score of 1524; Hispanics had a mean GPA of 2.83 and a mean SAT score of 1794; whites had a mean GPA of 3.04 and a mean SAT score of 1914; and Asians had a mean GPA of 3.07 and a mean SAT score of 1991.[4] *Ibid.*

Tellingly, neither the University nor any of the 73 *amici* briefs in support of racial discrimination has presented a shred of evidence that black and Hispanic students are able to close this substantial gap during their time at the University. Cf. Thernstrom & Thernstrom, Reflections on the Shape of the River, 46 UCLA L.Rev. 1583, 1605–1608 (1999) (discussing the failure of defenders of racial discrimination in admissions to consider the fact that its "beneficiaries" are underperforming in the classroom). "It is a fact that in virtually all selective schools . . . where racial preferences in admission is practiced, the majority of [black] students end up in the lower quarter of their class." S. Cole & E. Barber, Increasing Faculty Diversity: The Occupational Choices of High–Achieving Minority Students 124 (2003). There is no reason to believe this is not the case at the University. The University and its dozens of *amici* are deafeningly silent on this point.

Furthermore, the University's discrimination does nothing to increase the number of blacks and Hispanics who have access to a college education generally. Instead, the University's discrimination has a pervasive shifting effect. See T. Sowell, Affirmative Action Around the World 145–146 (2004). The University admits minorities who otherwise would have attended less selective colleges where they would have been more evenly matched. But, as a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete. Setting aside the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.

The Court of Appeals believed that the University needed to enroll more blacks and Hispanics because they remained "clustered in certain programs." 631 F.3d 213, 240 (C.A.5 2011) ("[N]early a quarter of the undergraduate students in [the University's] College of Social Work are Hispanic, and more than 10% are [black]. In the College of Education, 22.4% of students are Hispanic and 10.1% are [black]"). But racial discrimination may be the cause of, not the solution to, this clustering. There is some evidence that students ad-

4. The lowest possible score on the SAT is 600, and the highest possible score is 2400.

mitted as a result of racial discrimination are more likely to abandon their initial aspirations to become scientists and engineers than are students with similar qualifications who attend less selective schools. See, *e.g.,* Elliott, Strenta, Adair, Matier, & Scott, The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions, 37 Research in Higher Educ. 681, 699–701 (1996).[5] These students may well drift towards less competitive majors because the mismatch caused by racial discrimination in admissions makes it difficult for them to compete in more rigorous majors.

Moreover, the University's discrimination "stamp[s] [blacks and Hispanics] with a badge of inferiority." *Adarand,* 515 U.S., at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.). It taints the accomplishments of all those who are admitted as a result of racial discrimination. Cf. J. McWhorter, Losing the Race: Self–Sabotage in Black America 248 (2000) ("I was never able to be as proud of getting into Stanford as my classmates could be.... [H]ow much of an achievement can I truly say it was to have been a good enough *black* person to be admitted, while my colleagues had been considered good enough *people* to be admitted"). And, it taints the accomplishments of all those who are the same race as those admitted as a result of racial discrimination. In this case, for example, most blacks and Hispanics attending the University were admitted without discrimination under the Top Ten Percent plan, but no one can distinguish those students from the ones whose race played a role in their admission. "When blacks [and Hispanics] take positions in the highest places of government, industry, or academia, it is an open question ... whether their skin color played a part in their advancement." See *Grutter,* 539 U.S., at 373, 123 S.Ct. 2325 (opinion of THOMAS, J.). "The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those ... who would succeed without discrimination." *Ibid.* Although cloaked in good intentions, the University's racial tinkering harms the very people it claims to be helping.

* * *

For the foregoing reasons, I would overrule *Grutter.* However, because the Court correctly concludes that the Court of Appeals did not apply strict scrutiny, I join its opinion.

Justice GINSBURG, dissenting.

The University of Texas at Austin (University) is candid about what it is endeavoring to do: It seeks to achieve student-body diversity through an admissions policy patterned after the Harvard plan referenced as exemplary in Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 316–317, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). The University has steered clear of a quota system

5. The success of historically black colleges at producing graduates who go on to earn graduate degrees in science and engineering is well documented. See, *e.g.,* National Science Foundation, J. Burrelli & A. Rapoport, InfoBrief, Role of HBCUs as Baccalaureate–Origin Institutions of Black S & E Doctorate Recipients 6 (2008) (Table 2) (showing that, from 1997–2006, Howard University had more black students who went on to earn science and engineering doctorates than any other undergraduate institution, and that 7 other historically black colleges ranked in the top 10); American Association of Medical Colleges, Diversity in Medical Education: Facts & Figures 86 (2012) (Table 19) (showing that, in 2011, Xavier University had more black students who went on to earn medical degrees than any other undergraduate institution and that Howard University was second).

like the one struck down in *Bakke,* which excluded all nonminority candidates from competition for a fixed number of seats. See *id.,* at 272–275, 315, 319–320, 98 S.Ct. 2733 (opinion of Powell, J.). See also *Gratz v. Bollinger,* 539 U.S. 244, 293, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (Souter, J., dissenting) ("Justice Powell's opinion in [*Bakke*] rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class."). And, like so many educational institutions across the Nation,[1] the University has taken care to follow the model approved by the Court in *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). See 645 F.Supp.2d 587, 609 (W.D.Tex.2009) ("[T]he parties agree [that the University's] policy was based on the [admissions] policy [upheld in *Grutter*].").

Petitioner urges that Texas' Top Ten Percent Law and race-blind holistic review of each application achieve significant diversity, so the University must be content with those alternatives. I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious. See *Gratz,* 539 U.S., at 303–304, n. 10, 123 S.Ct. 2411 (dissenting opinion). As Justice Souter observed, the vaunted alternatives suffer from "the disadvantage of deliberate obfuscation." *Id.,* at 297–298, 123 S.Ct. 2411 (dissenting opinion).

Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. See House Research Organization, Bill Analysis, HB 588, pp. 4–5 (Apr. 15, 1997) ("Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority students was admitted to Texas universities."). It is race consciousness, not blindness to race, that drives such plans.[2] As for holistic review, if universities cannot explicitly include race as a factor, many may "resort to camouflage" to "maintain their minority enrollment." *Gratz,* 539 U.S., at 304, 123 S.Ct. 2411 (GINSBURG, J., dissenting).

I have several times explained why government actors, including state universities, need not be blind to the lingering effects of "an overtly discriminatory past," the legacy of "centuries of law-sanctioned inequality." *Id.,* at 298, 123 S.Ct. 2411 (dissenting opinion). See also *Adarand Constructors, Inc. v. Penã,* 515 U.S. 200, 272–274, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (dissenting opinion). Among constitutionally permissible options, I remain convinced, "those that candidly disclose their consideration of race [are] preferable to those that conceal it." *Gratz,* 539 U.S.,

1. See Brief for Amherst College et al. as *Amici Curiae* 33–35; Brief for Association of American Law Schools as *Amicus Curiae* 6; Brief for Association of American Medical Colleges et al. as *Amici Curiae* 30–32; Brief for Brown University et al. as *Amici Curiae* 2–3, 13; Brief for Robert Post et al. as *Amici Curiae* 24–27; Brief for Fordham University et al. as *Amici Curiae* 5–6; Brief for University of Delaware et al. as *Amici Curiae* 16–21.

2. The notion that Texas' Top Ten Percent Law is race neutral calls to mind Professor Thomas Reed Powell's famous statement: "If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind." T. Arnold, The Symbols of Government 101 (1935) (internal quotation marks omitted). Only that kind of legal mind could conclude that an admissions plan specifically designed to produce racial diversity is not race conscious.

at 305, n. 11, 123 S.Ct. 2411 (dissenting opinion).

Accordingly, I would not return this case for a second look. As the thorough opinions below show, 631 F.3d 213 (C.A.5 2011); 645 F.Supp.2d 587, the University's admissions policy flexibly considers race only as a "factor of a factor of a factor of a factor" in the calculus, *id.*, at 608; followed a yearlong review through which the University reached the reasonable, good-faith judgment that supposedly race-neutral initiatives were insufficient to achieve, in appropriate measure, the educational benefits of student-body diversity, see 631 F.3d, at 225–226; and is subject to periodic review to ensure that the consideration of race remains necessary and proper to achieve the University's educational objectives, see *id.*, at 226.[3] Justice Powell's opinion in *Bakke* and the Court's decision in *Grutter* require no further determinations. See *Grutter*, 539 U.S., at 333–343, 123 S.Ct. 2325; *Bakke*, 438 U.S., at 315–320, 98 S.Ct. 2733.

The Court rightly declines to cast off the equal protection framework settled in *Grutter*. See *ante*, at 2417. Yet it stops short of reaching the conclusion that framework warrants. Instead, the Court vacates the Court of Appeals' judgment and remands for the Court of Appeals to "assess whether the University has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Ante*, at 2421. As I see it, the Court of Appeals has already completed that inquiry, and its judgment, trained on this Court's *Bakke* and *Grutter* pathmarkers, merits our approbation.[4]

* * *

For the reasons stated, I would affirm the judgment of the Court of Appeals.

Maetta VANCE, Petitioner

v.

BALL STATE UNIVERSITY.

No. 11–556.

Argued Nov. 26, 2012.

Decided June 24, 2013.

Background: African–American state university employee brought action against

3. As the Court said in *Grutter v. Bollinger*, 539 U.S. 306, 339, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), "[n]arrow tailoring ... require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." But, *Grutter* also explained, it does not "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups." *Ibid.* I do not read the Court to say otherwise. See *ante*, at 2420 (acknowledging that, in determining whether a race-conscious admissions policy satisfies *Grutter*'s narrow-tailoring requirement, "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes").

4. Because the University's admissions policy, in my view, is constitutional under *Grutter*, there is no need for the Court in this case "to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review." 539 U.S., at 346, n., 123 S.Ct. 2325 (GINSBURG, J., concurring). See also *Gratz v. Bollinger*, 539 U.S. 244, 301, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (GINSBURG, J., dissenting) ("Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.").

claim predicated on the Takings Clause. And that question is one of state law, which we usually do well to leave to state courts.

But as I look to the Florida statute here, I cannot help but see yet another reason why the Florida Supreme Court got this case right. That statute authorizes damages only for "an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. § 373.617 (2010); see *ante*, at 2597. In what legal universe could a law authorizing damages only for a "taking" also provide damages when (as all agree) no taking has occurred? I doubt that inside-out, upside-down universe is the State of Florida. Certainly, none of the Florida courts in this case suggested that the majority's hypothesized remedy actually exists; rather, the trial and appellate courts imposed a damages remedy on the mistaken theory that there *had* been a taking (although of exactly what neither was clear). See App. to Pet. for Cert. C–2; 5 So.3d 8, 8 (2009). So I would, once more, affirm the Florida Supreme Court, not make it say again what it has already said—that Koontz is not entitled to money damages.

III

Nollan and *Dolan* are important decisions, designed to curb governments from using their power over land-use permitting to extract for free what the Takings Clause would otherwise require them to pay for. But for no fewer than three independent reasons, this case does not present that problem. First and foremost, the government commits a taking only when it appropriates a specific property interest, not when it requires a person to pay or spend money. Here, the District never took or threatened such an interest; it tried to extract from Koontz solely a commitment to spend money to repair public wetlands. Second, *Nollan* and *Dolan* can operate only when the government makes a demand of the permit applicant; the decisions' prerequisite, in other words, is a condition. Here, the District never made such a demand: It informed Koontz that his applications did not meet legal requirements; it offered suggestions for bringing those applications into compliance; and it solicited further proposals from Koontz to achieve the same end. That is not the stuff of which an unconstitutional condition is made. And third, the Florida statute at issue here does not, in any event, offer a damages remedy for imposing such a condition. It provides relief only for a consummated taking, which did not occur here.

The majority's errors here are consequential. The majority turns a broad array of local land-use regulations into federal constitutional questions. It deprives state and local governments of the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development. It places courts smack in the middle of the most everyday local government activity. As those consequences play out across the country, I believe the Court will rue today's decision. I respectfully dissent.

SHELBY COUNTY, ALABAMA,
Petitioner

v.

Eric H. HOLDER, Jr., Attorney General, et al.
No. 12–96.

Argued Feb. 27, 2013.

Decided June 25, 2013.

Background: County brought declaratory judgment action against United States At-

torney General, seeking determination that Voting Rights Act's coverage formula and preclearance requirement, under which covered jurisdictions were required to demonstrate that proposed voting law changes were not discriminatory, was unconstitutional. United States and civil rights organization intervened. After intervenors' motion for additional discovery was denied, 270 F.R.D. 16, parties cross-moved for summary judgment. The United States District Court for the District of Columbia, John D. Bates, J., 811 F.Supp.2d 424, entered summary judgment for Attorney General. County appealed. The United States Court of Appeals for the District of Columbia Circuit, Tatel, Circuit Judge, 679 F.3d 848, affirmed. Certiorari was granted.

Holding: The Supreme Court, Chief Justice Roberts, held that Voting Rights Act provision setting forth coverage formula was unconstitutional, abrogating *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769; *Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472; *City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119; *Lopez v. Monterey County*, 525 U.S. 266, 119 S.Ct. 693, 142 L.Ed.2d 728.

Reversed.

Justice Thomas filed concurring opinion.

Justice Ginsburg filed dissenting opinion in which Justices Breyer, Sotomayor, and Kagan joined.

1. Statutes ⚿1511

Exceptional conditions can justify legislative measures not otherwise appropriate.

2. Election Law ⚿590

The Voting Rights Act imposes current burdens and must be justified by current needs. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

3. States ⚿5(1)

A departure from the fundamental principle of states' equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.

4. Constitutional Law ⚿502

States ⚿18.1

Although the Constitution and laws of the United States are the supreme law of the land, and state legislation may not contravene federal law, the Federal Government does not have a general right to review and veto state enactments before they go into effect. U.S.C.A. Const. Art. 6, cl. 2.

5. States ⚿4, 18.1

Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. U.S.C.A. Const. Art. 6, cl. 2.

6. States ⚿4

The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.

7. States ⚿4

The federal balance is not just an end in itself; rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

8. Election Law ⚿45

States ⚿4.4(3)

Although the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections, the Federal Government retains significant control over federal elections. U.S.C.A. Const.Amend. 10.

9. Election Law ⚿55

States have broad powers to determine the conditions under which the right of suffrage may be exercised.

10. Election Law ⚿47

States ⚿48

Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.

11. United States ⚿10

Drawing lines for congressional districts is primarily the duty and responsibility of the State.

12. States ⚿5(1)

Not only do States retain sovereignty under the Constitution, there is also a fundamental principle of equal sovereignty among the States.

13. States ⚿5(1)

Our Nation was and is a union of States, equal in power, dignity, and authority, and, indeed, the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.

14. States ⚿5(1)

The fundamental principle of equal sovereignty among the States remains highly pertinent in assessing disparate treatment of States subsequent to their admission.

15. Constitutional Law ⚿1482

The Fifteenth Amendment, which commands that the right to vote shall not be denied or abridged on account of race or color, and gives Congress the power to enforce that command, is not designed to punish for the past; its purpose is to ensure a better future. U.S.C.A. Const. Amend. 15.

16. Constitutional Law ⚿1482

To serve the Fifteenth Amendment's purpose to ensure a better future, Congress, if it is to divide the States, must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions; it cannot rely simply on the past. U.S.C.A. Const.Amend. 15.

17. Constitutional Law ⚿2478

Statutes ⚿1512

Striking down an Act of Congress is the gravest and most delicate duty that the Supreme Court is called on to perform, and it does not do so lightly.

18. Election Law ⚿621

Voting Rights Act provision setting forth coverage formula used to determine which states and political subdivisions were subject to preclearance was unconstitutional, and thus could no longer be used as basis for subjecting jurisdictions to preclearance; although formula at time of Act's passage had met test that current burdens were required to be justified by current needs and that disparate geographic coverage was required to be sufficiently related to the problem that it targeted, formula no longer met that test; abrogating *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769; *Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472; *City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119; *Lopez v. Monterey County*, 525 U.S. 266, 119 S.Ct. 693, 142 L.Ed.2d 728. U.S.C.A. Const. Art. 6, cl. 2; U.S.C.A. Const.Amends. 14, 15; Voting Rights Act of 1965, § 4(b), 42 U.S.C.A. § 1973b(b).

19. Election Law ⚿595

While any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

West Codenotes

Held Unconstitutional

Voting Rights Act of 1965, § 4(b), 42 U.S.C.A. § 1973b(b)

Syllabus *

The Voting Rights Act of 1965 was enacted to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769. Section 2 of the Act, which bans any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color," 42 U.S.C. § 1973(a), applies nationwide, is permanent, and is not at issue in this case. Other sections apply only to some parts of the country. Section 4 of the Act provides the "coverage formula," defining the "covered jurisdictions" as States or political subdivisions that maintained tests or devices as prerequisites to voting, and had low voter registration or turnout, in the 1960s and early 1970s. § 1973b(b). In those covered jurisdictions, § 5 of the Act provides that no change in voting procedures can take effect until approved by specified federal authorities in Washington, D.C. § 1973c(a). Such approval is known as "preclearance."

The coverage formula and preclearance requirement were initially set to expire after five years, but the Act has been reauthorized several times. In 2006, the Act was reauthorized for an additional 25 years, but the coverage formula was not changed. Coverage still turned on whether a jurisdiction had a voting test in the 1960s or 1970s, and had low voter registration or turnout at that time. Shortly after the 2006 reauthorization, a Texas utility district sought to bail out from the Act's coverage and, in the alternative, challenged the Act's constitutionality. This Court resolved the challenge on statutory grounds, but expressed serious doubts about the Act's continued constitutionality. See *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 129 S.Ct. 2504, 174 L.Ed.2d 140.

Petitioner Shelby County, in the covered jurisdiction of Alabama, sued the Attorney General in Federal District Court in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5 are facially unconstitutional, as well as a permanent injunction against their enforcement. The District Court upheld the Act, finding that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing § 4(b)'s coverage formula. The D.C. Circuit affirmed. After surveying the evidence in the record, that court accepted Congress's conclusion that § 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, that § 5 was therefore still necessary, and that the coverage formula continued to pass constitutional muster.

Held: Section 4 of the Voting Rights Act is unconstitutional; its formula can no longer be used as a basis for subjecting jurisdictions to preclearance. Pp. 2622 – 2628.

(a) In *Northwest Austin*, this Court noted that the Voting Rights Act "imposes current burdens and must be justified by current needs" and concluded that "a de-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

parture from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 557 U.S., at 203, 129 S.Ct. 2504. These basic principles guide review of the question presented here. Pp. 2622 – 2627.

(1) State legislation may not contravene federal law. States retain broad autonomy, however, in structuring their governments and pursuing legislative objectives. Indeed, the Tenth Amendment reserves to the States all powers not specifically granted to the Federal Government, including "the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461–462, 111 S.Ct. 2395, 115 L.Ed.2d 410. There is also a "fundamental principle of equal sovereignty" among the States, which is highly pertinent in assessing disparate treatment of States. *Northwest Austin*, *supra*, at 203, 129 S.Ct. 2504.

The Voting Rights Act sharply departs from these basic principles. It requires States to beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own. And despite the tradition of equal sovereignty, the Act applies to only nine States (and additional counties). That is why, in 1966, this Court described the Act as "stringent" and "potent," *Katzenbach*, 383 U.S., at 308, 315, 337, 86 S.Ct. 803. The Court nonetheless upheld the Act, concluding that such an "uncommon exercise of congressional power" could be justified by "exceptional conditions." *Id.*, at 334, 86 S.Ct. 803. Pp. 2622 – 2625.

(2) In 1966, these departures were justified by the "blight of racial discrimination in voting" that had "infected the electoral process in parts of our country for nearly a century," *Katzenbach*, 383 U.S., at 308, 86 S.Ct. 803. At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. The Act was limited to areas where Congress found "evidence of actual voting discrimination," and the covered jurisdictions shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." *Id.*, at 330, 86 S.Ct. 803. The Court explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Ibid.* The Court therefore concluded that "the coverage formula [was] rational in both practice and theory." *Ibid.* Pp. 2624 – 2625.

(3) Nearly 50 years later, things have changed dramatically. Largely because of the Voting Rights Act, "[v]oter turnout and registration rates" in covered jurisdictions "now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin*, *supra*, at 202, 129 S.Ct. 2504. The tests and devices that blocked ballot access have been forbidden nationwide for over 40 years. Yet the Act has not eased § 5's restrictions or narrowed the scope of § 4's coverage formula along the way. Instead those extraordinary and unprecedented features have been reauthorized as if nothing has changed, and they have grown even stronger. Because § 5 applies only to those jurisdictions singled out by § 4, the Court turns to consider that provision. Pp. 2625 – 2627.

(b) Section 4's formula is unconstitutional in light of current conditions. Pp. 2627 – 2631.

(1) In 1966, the coverage formula was "rational in both practice and theory." *Katzenbach*, *supra*, at 330, 86 S.Ct. 803. It looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both. By 2009, however, the "coverage formula raise[d] serious constitutional questions." *Northwest Austin*, *supra*, at 204, 129 S.Ct. 2504. Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned for over 40 years. And voter registration and turnout numbers in covered States have risen dramatically. In 1965, the States could be divided into those with a recent history of voting tests and low voter registration and turnout and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were. Pp. 2627 – 2628.

(2) The Government attempts to defend the formula on grounds that it is "reverse-engineered"—Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. *Katzenbach* did not sanction such an approach, reasoning instead that the coverage formula was rational because the "formula ... was relevant to the problem." 383 U.S., at 329, 330, 86 S.Ct. 803. The Government has a fallback argument—because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States identified in 1965. But this does not look to "current political conditions," *Northwest Austin*, *supra*, at 203, 129 S.Ct. 2504, instead relying on a comparison between the States in 1965. But history did not end in 1965. In assessing the "current need[ ]" for a preclearance system treating States differently from one another today, history since 1965 cannot be ignored. The Fifteenth Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. Pp. 2627 – 2629.

(3) Respondents also rely heavily on data from the record compiled by Congress before reauthorizing the Act. Regardless of how one looks at that record, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that clearly distinguished the covered jurisdictions from the rest of the Nation in 1965. *Katzenbach*, *supra*, at 308, 315, 331, 86 S.Ct. 803. But a more fundamental problem remains: Congress did not use that record to fashion a coverage formula grounded in current conditions. It instead re-enacted a formula based on 40–year–old facts having no logical relation to the present day. Pp. 2629 – 2630.

679 F.3d 848, reversed.

ROBERTS, C.J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

Bert W. Rein, for Petitioner.

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Debo P. Adegbile, for Respondents Bobby Pierson, et al.

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For U.S. Supreme Court Briefs, See:

2013 WL 823229 (Pet.Brief)

2013 WL 325379 (Resp.Brief)

2013 WL 315241 (Resp.Brief)

2013 WL 315242 (Resp.Brief)

2013 WL 325378 (Resp.Brief)

2012 WL 6755130 (Pet.Brief)

Chief Justice ROBERTS delivered the opinion of the Court.

[1] The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.*, at 334, 86 S.Ct. 803. Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. See Voting Rights Act of 1965, § 4(a), 79 Stat. 438.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally

covered by § 5 than it [was] nationwide." *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 203–204, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009). Since that time, Census Bureau data indicate that African–American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b).

[2] At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504.

I

A

The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and it gives Congress the "power to enforce this article by appropriate legislation."

"The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure." *Id.,* at 197, 129 S.Ct. 2504. In the 1890s, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began to enact literacy tests for voter registration and to employ other methods designed to prevent African–Americans from voting. *Katzenbach,* 383 U.S., at 310, 86 S.Ct. 803. Congress passed statutes outlawing some of these practices and facilitating litigation against them, but litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down. Voter registration of African–Americans barely improved. *Id.,* at 313–314, 86 S.Ct. 803.

Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any "standard, practice, or procedure ... imposed or applied ... to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437. The current version forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Both the Federal Government and individuals have sued to enforce § 2, see, *e.g., Johnson v. De Grandy,* 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994), and injunctive relief is available in appropriate cases to block voting laws from going into effect, see 42 U.S.C. § 1973j(d). Section 2 is permanent, applies nationwide, and is not at issue in this case.

Other sections targeted only some parts of the country. At the time of the Act's passage, these "covered" jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. § 4(b), 79 Stat. 438. Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. § 4(c), *id.*, at 438–439. A

covered jurisdiction could "bail out" of coverage if it had not used a test or device in the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." § 4(a), *id.,* at 438. In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona. See 28 C.F.R. pt. 51, App. (2012).

In those jurisdictions, § 4 of the Act banned all such tests or devices. § 4(a), 79 Stat. 438. Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges. *Id.,* at 439. A jurisdiction could obtain such "preclearance" only by proving that the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color." *Ibid.*

Sections 4 and 5 were intended to be temporary; they were set to expire after five years. See § 4(a), *id.,* at 438; *Northwest Austin, supra,* at 199, 129 S.Ct. 2504. In *South Carolina v. Katzenbach,* we upheld the 1965 Act against constitutional challenge, explaining that it was justified to address "voting discrimination where it persists on a pervasive scale." 383 U.S., at 308, 86 S.Ct. 803.

In 1970, Congress reauthorized the Act for another five years, and extended the coverage formula in § 4(b) to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. Voting Rights Act Amendments of 1970, §§ 3–4, 84 Stat. 315. That swept in several counties in California, New Hampshire, and New York. See 28 C.F.R. pt. 51, App. Congress also extended the ban in § 4(a) on tests and devices nationwide. § 6, 84 Stat. 315.

In 1975, Congress reauthorized the Act for seven more years, and extended its coverage to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972. Voting Rights Act Amendments of 1975, §§ 101, 202, 89 Stat. 400, 401. Congress also amended the definition of "test or device" to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English. § 203, *id.,* at 401–402. As a result of these amendments, the States of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota, became covered jurisdictions. See 28 C.F.R. pt. 51, App. Congress correspondingly amended sections 2 and 5 to forbid voting discrimination on the basis of membership in a language minority group, in addition to discrimination on the basis of race or color. §§ 203, 206, 89 Stat. 401, 402. Finally, Congress made the nationwide ban on tests and devices permanent. § 102, *id.*, at 400.

In 1982, Congress reauthorized the Act for 25 years, but did not alter its coverage formula. See Voting Rights Act Amendments, 96 Stat. 131. Congress did, however, amend the bailout provisions, allowing political subdivisions of covered jurisdictions to bail out. Among other prerequisites for bailout, jurisdictions and their subdivisions must not have used a forbidden test or device, failed to receive preclearance, or lost a § 2 suit, in the ten years prior to seeking bailout. § 2, *id.,* at 131–133.

We upheld each of these reauthorizations against constitutional challenge. See *Georgia v. United States,* 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973); *City of*

Rome v. United States, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980); *Lopez v. Monterey County*, 525 U.S. 266, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999).

In 2006, Congress again reauthorized the Voting Rights Act for 25 years, again without change to its coverage formula. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, 120 Stat. 577. Congress also amended § 5 to prohibit more conduct than before. § 5, *id.*, at 580–581; see *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 341, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000) (*Bossier II*); *Georgia v. Ashcroft*, 539 U.S. 461, 479, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003). Section 5 now forbids voting changes with "any discriminatory purpose" as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, "to elect their preferred candidates of choice." 42 U.S.C. §§ 1973c(b)-(d).

Shortly after this reauthorization, a Texas utility district brought suit, seeking to bail out from the Act's coverage and, in the alternative, challenging the Act's constitutionality. See *Northwest Austin*, 557 U.S., at 200–201, 129 S.Ct. 2504. A three-judge District Court explained that only a State or political subdivision was eligible to seek bailout under the statute, and concluded that the utility district was not a political subdivision, a term that encompassed only "counties, parishes, and voter-registering subunits." *Northwest Austin Municipal Util. Dist. No. One v. Mukasey*, 573 F.Supp.2d 221, 232 (D.D.C.2008). The District Court also rejected the constitutional challenge. *Id.*, at 283.

We reversed. We explained that " 'normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.' " *Northwest Austin*, *supra*, at 205, 129 S.Ct. 2504 (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (*per curiam*)). Concluding that "underlying constitutional concerns," among other things, "compel[led] a broader reading of the bailout provision," we construed the statute to allow the utility district to seek bailout. *Northwest Austin*, 557 U.S., at 207, 129 S.Ct. 2504. In doing so we expressed serious doubts about the Act's continued constitutionality.

We explained that § 5 "imposes substantial federalism costs" and "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.*, at 202, 203, 129 S.Ct. 2504 (internal quotation marks omitted). We also noted that "[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Id.*, at 202, 129 S.Ct. 2504. Finally, we questioned whether the problems that § 5 meant to address were still "concentrated in the jurisdictions singled out for preclearance." *Id.*, at 203, 129 S.Ct. 2504.

Eight Members of the Court subscribed to these views, and the remaining Member would have held the Act unconstitutional. Ultimately, however, the Court's construction of the bailout provision left the constitutional issues for another day.

B

Shelby County is located in Alabama, a covered jurisdiction. It has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county. See App. 87a–92a. Instead, in 2010, the county sued the Attorney General in Federal District Court in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5

of the Voting Rights Act are facially unconstitutional, as well as a permanent injunction against their enforcement. The District Court ruled against the county and upheld the Act. 811 F.Supp.2d 424, 508 (2011). The court found that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing the § 4(b) coverage formula.

The Court of Appeals for the D.C. Circuit affirmed. In assessing § 5, the D.C. Circuit considered six primary categories of evidence: Attorney General objections to voting changes, Attorney General requests for more information regarding voting changes, successful § 2 suits in covered jurisdictions, the dispatching of federal observers to monitor elections in covered jurisdictions, § 5 preclearance suits involving covered jurisdictions, and the deterrent effect of § 5. See 679 F.3d 848, 862–863 (2012). After extensive analysis of the record, the court accepted Congress's conclusion that § 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, and that § 5 was therefore still necessary. *Id.,* at 873.

Turning to § 4, the D.C. Circuit noted that the evidence for singling out the covered jurisdictions was "less robust" and that the issue presented "a close question." *Id.,* at 879. But the court looked to data comparing the number of successful § 2 suits in the different parts of the country. Coupling that evidence with the deterrent effect of § 5, the court concluded that the statute continued "to single out the jurisdictions in which discrimination is concentrated," and thus held that the coverage formula passed constitutional muster. *Id.,* at 883.

Judge Williams dissented. He found "no positive correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout." *Id.,* at 891. Rather, to the extent there was any correlation, it actually went the other way: "condemnation under § 4(b) is a marker of *higher* black registration and turnout." *Ibid.* (emphasis added). Judge Williams also found that "[c]overed jurisdictions have *far more* black officeholders as a proportion of the black population than do uncovered ones." *Id.,* at 892. As to the evidence of successful § 2 suits, Judge Williams disaggregated the reported cases by State, and concluded that "[t]he five worst uncovered jurisdictions ... have worse records than eight of the covered jurisdictions." *Id.,* at 897. He also noted that two covered jurisdictions—Arizona and Alaska—had not had any successful reported § 2 suit brought against them during the entire 24 years covered by the data. *Ibid.* Judge Williams would have held the coverage formula of § 4(b) "irrational" and unconstitutional. *Id.,* at 885.

We granted certiorari. 568 U.S. ——, 133 S.Ct. 594, 184 L.Ed.2d 389 (2012).

II

[3] In *Northwest Austin,* we stated that "the Act imposes current burdens and must be justified by current needs." 557 U.S., at 203, 129 S.Ct. 2504. And we concluded that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Ibid.* These basic principles guide our review of the question before us.[1]

1. Both the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin,* see Juris. Statement i, and Brief for Federal Appellee 29–30, in *Northwest Austin Municipal Util. Dist. No. One v. Holder,* O.T. 2008, No. 08–322, and accordingly *Northwest Austin* guides our review under both Amendments in this case.

A

[4] The Constitution and laws of the United States are "the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to "negative" state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause. See 1 Records of the Federal Convention of 1787, pp. 21, 164–168 (M. Farrand ed. 1911); 2 *id.*, at 27–29, 390–392.

[5–7] Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 564 U.S. ——, ——, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011). But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Ibid.* (internal quotation marks omitted).

[8–11] More specifically, " 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.' " *Gregory v. Ashcroft*, 501 U.S. 452, 461–462, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); some internal quotation marks omitted). Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. Art. I, § 4, cl. 1; see also *Arizona v. Inter Tribal Council of Ariz., Inc.*, —— U.S., at ——–——, 133 S.Ct., at 2253 – 2254. But States have "broad powers to determine the conditions under which the right of suffrage may be exercised." *Carrington v. Rash*, 380 U.S. 89, 91, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) (internal quotation marks omitted); see also *Arizona*, *ante*, at —— U.S., at ——–——, 133 S.Ct., at 2257 – 2259. And "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161, 12 S.Ct. 375, 36 L.Ed. 103 (1892). Drawing lines for congressional districts is likewise "primarily the duty and responsibility of the State." *Perry v. Perez*, 565 U.S. ——, ——, 132 S.Ct. 934, 940, 181 L.Ed.2d 900 (2012) (*per curiam*) (internal quotation marks omitted).

[12–14] Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of *equal* sovereignty" among the States. *Northwest Austin*, *supra*, at 203, 129 S.Ct. 2504 (citing *United States v. Louisiana*, 363 U.S. 1, 16, 80 S.Ct. 961, 4 L.Ed.2d 1025 (1960); *Lessee of Pollard v. Hagan*, 3 How. 212, 223, 11 L.Ed. 565 (1845); and *Texas v. White*, 7 Wall. 700, 725–726, 19 L.Ed. 227 (1869); emphasis added). Over a hundred years ago, this Court explained that our Nation "was and is a union of States, equal in power, dignity and authority." *Coyle v. Smith*, 221 U.S. 559, 567, 31 S.Ct. 688, 55 L.Ed. 853 (1911). Indeed, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Id.*, at 580, 31 S.Ct. 688. *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle

operated as a *bar* on differential treatment outside that context. 383 U.S., at 328–329, 86 S.Ct. 803. At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States. 557 U.S., at 203, 129 S.Ct. 2504.

The Voting Rights Act sharply departs from these basic principles. It suspends "*all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Id.*, at 202, 129 S.Ct. 2504. States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a § 2 action. The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. See 28 C.F.R. §§ 51.9, 51.37. If a State seeks preclearance from a three-judge court, the process can take years.

And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding "not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation." 679 F.3d, at 884 (Williams, J., dissenting) (case below).

All this explains why, when we first upheld the Act in 1966, we described it as "stringent" and "potent." *Katzenbach*, 383 U.S., at 308, 315, 337, 86 S.Ct. 803. We recognized that it "may have been an uncommon exercise of congressional power," but concluded that "legislative measures not otherwise appropriate" could be justified by "exceptional conditions." *Id.*, at 334, 86 S.Ct. 803. We have since noted that the Act "authorizes federal intrusion into sensitive areas of state and local policymaking," *Lopez*, 525 U.S., at 282, 119 S.Ct. 693, and represents an "extraordinary departure from the traditional course of relations between the States and the Federal Government," *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500–501, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992). As we reiterated in *Northwest Austin*, the Act constitutes "extraordinary legislation otherwise unfamiliar to our federal system." 557 U.S., at 211, 129 S.Ct. 2504.

B

In 1966, we found these departures from the basic features of our system of government justified. The "blight of racial discrimination in voting" had "infected the electoral process in parts of our country for nearly a century." *Katzenbach*, 383 U.S., at 308, 86 S.Ct. 803. Several States had enacted a variety of requirements and tests "specifically designed to prevent" African–Americans from voting. *Id.*, at 310, 86 S.Ct. 803. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States "merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," or simply "defied and evaded court orders." *Id.*, at 314, 86 S.Ct. 803. Shortly before enactment of the Voting Rights Act, only 19.4 percent of African–Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. *Id.*, at 313, 86 S.Ct. 803. Those figures were roughly

50 percentage points or more below the figures for whites. *Ibid.*

In short, we concluded that "[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner." *Id.,* at 334, 335, 86 S.Ct. 803. We also noted then and have emphasized since that this extraordinary legislation was intended to be temporary, set to expire after five years. *Id.,* at 333, 86 S.Ct. 803; *Northwest Austin, supra,* at 199, 129 S.Ct. 2504.

At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. We found that "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." *Katzenbach,* 383 U.S., at 328, 86 S.Ct. 803. The areas where Congress found "evidence of actual voting discrimination" shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." *Id.,* at 330, 86 S.Ct. 803. We explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Ibid.* We therefore concluded that "the coverage formula [was] rational in both practice and theory." *Ibid.* It accurately reflected those jurisdictions uniquely characterized by voting discrimination "on a pervasive scale," linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. *Id.,* at 308, 86 S.Ct. 803. The formula ensured that the "stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant." *Id.,* at 315, 86 S.Ct. 803.

C

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin,* 557 U.S., at 202, 129 S.Ct. 2504. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years. See § 6, 84 Stat. 315; § 102, 89 Stat. 400.

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." § 2(b)(1), 120 Stat. 577. The House Report elaborated that "the number of African–Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982," and noted that "[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters." H.R.Rep. 109–478, at 12 (2006), 2006 U.S.C.C.A.N. 618, 627. That Report also explained that there have been "significant increases in the number of African–Americans serving in elected offices"; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African–American elected officials in the six States originally covered by the Voting Rights Act. *Id.,* at 18.

The following chart, compiled from the Senate and House Reports, compares voter registration numbers from 1965 to those from 2004 in the six originally covered States. These are the numbers that were before Congress when it reauthorized the Act in 2006:

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

See S.Rep. No. 109–295, p. 11 (2006); H.R.Rep. No. 109–478, at 12. The 2004 figures come from the Census Bureau. Census Bureau data from the most recent election indicate that African–American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Table 4b). The preclearance statistics are also illuminating. In the first decade after enactment of § 5, the Attorney General objected to 14.2 percent of proposed voting changes. H. R Rep. No. 109–478, at 22. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent. S.Rep. No. 109–295, at 13.

There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process. See § 2(b)(1), 120 Stat. 577. During the "Freedom Summer" of 1964, in Philadelphia, Mississippi, three men were murdered while working in the area to register African–American voters. See *United States v. Price,* 383 U.S. 787, 790, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). On "Bloody Sunday" in 1965, in Selma, Alabama, police beat and used tear gas against hundreds marching in support of African–American enfranchisement. See *Northwest Austin, supra,* at 220, n. 3, 129 S.Ct. 2504 (THOMAS, J., concurring in judgment in part and dissenting in part). Today both of those towns are governed by African–American mayors. Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.

Yet the Act has not eased the restrictions in § 5 or narrowed the scope of the coverage formula in § 4(b) along the way. Those extraordinary and unprecedented features were reauthorized—as if nothing had changed. In fact, the Act's unusual remedies have grown even stronger. When Congress reauthorized the Act in 2006, it did so for another 25 years on top of the previous 40—a far cry from the initial five-year period. See 42 U.S.C. § 1973b(a)(8). Congress also expanded the prohibitions in § 5. We had previously interpreted § 5 to prohibit only those redistricting plans that would have the purpose or effect of worsening the position of minority groups. See *Bossier II,* 528 U.S., at 324, 335–336, 120 S.Ct. 866. In 2006, Congress amended § 5 to prohibit laws that could have favored such groups

but did not do so because of a discriminatory purpose, see 42 U.S.C. § 1973c(c), even though we had stated that such broadening of § 5 coverage would "exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality," *Bossier II, supra*, at 336, 120 S.Ct. 866 (citation and internal quotation marks omitted). In addition, Congress expanded § 5 to prohibit any voting law "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." § 1973c(b). In light of those two amendments, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved.

We have also previously highlighted the concern that "the preclearance requirements in one State [might] be unconstitutional in another." *Northwest Austin*, 557 U.S., at 203, 129 S.Ct. 2504; see *Georgia v. Ashcroft*, 539 U.S., at 491, 123 S.Ct. 2498 (KENNEDY, J., concurring) ("considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5"). Nothing has happened since to alleviate this troubling concern about the current application of § 5.

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of § 5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should § 5 be struck down. Under this theory, however, § 5 would be effectively immune from scrutiny; no matter how "clean" the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

The provisions of § 5 apply only to those jurisdictions singled out by § 4. We now consider whether that coverage formula is constitutional in light of current conditions.

III

A

When upholding the constitutionality of the coverage formula in 1966, we concluded that it was "rational in both practice and theory." *Katzenbach*, 383 U.S., at 330, 86 S.Ct. 803. The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.

By 2009, however, we concluded that the "coverage formula raise[d] serious constitutional questions." *Northwest Austin*, 557 U.S., at 204, 129 S.Ct. 2504. As we explained, a statute's "current burdens" must be justified by "current needs," and any "disparate geographic coverage" must be "sufficiently related to the problem that it targets." *Id.*, at 203, 129 S.Ct. 2504. The coverage formula met that test in 1965, but no longer does so.

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. § 6, 84 Stat. 315; § 102, 89 Stat. 400. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. H.R.Rep. No. 109–478, at 12. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. See, *e.g.*, *Katzenbach*, *supra*, at 313, 329–330, 86

S.Ct. 803. There is no longer such a disparity.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

B

The Government's defense of the formula is limited. First, the Government contends that the formula is "reverse-engineered": Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. Brief for Federal Respondent 48–49. Under that reasoning, there need not be any logical relationship between the criteria in the formula and the reason for coverage; all that is necessary is that the formula happen to capture the jurisdictions Congress wanted to single out.

The Government suggests that *Katzenbach* sanctioned such an approach, but the analysis in *Katzenbach* was quite different. *Katzenbach* reasoned that the coverage formula was rational because the "formula . . . was relevant to the problem": "Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." 383 U.S., at 329, 330, 86 S.Ct. 803.

Here, by contrast, the Government's reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one—subjecting a disfavored subset of States to "extraordinary legislation otherwise unfamiliar to our federal system," *Northwest Austin*, *supra*, at 211, 129 S.Ct. 2504—that failure to establish even relevance is fatal.

The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then—regardless of how that discrimination compares to discrimination in States unburdened by coverage. Brief for Federal Respondent 49–50. This argument does not look to "current political conditions," *Northwest Austin*, *supra*, at 203, 129 S.Ct. 2504, but instead relies on a comparison between the States in 1965. That comparison reflected the different histories of the North and South. It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African–Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. The Court invoked that history—rightly so—in sustaining the disparate coverage of the Voting Rights Act in 1966. See *Katzenbach*, *supra*, at 308, 86 S.Ct. 803 ("The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.").

But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need[ ]" for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African–Americans attained political office in record numbers. And yet the coverage formula that Con-

gress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.

[15, 16] The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. See *Rice v. Cayetano,* 528 U.S. 495, 512, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) ("Consistent with the design of the Constitution, the [Fifteenth] Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment."). To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in *Northwest Austin,* and we make it clear again today.

C

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act. The court below and the parties have debated what that record shows—they have gone back and forth about whether to compare covered to noncovered jurisdictions as blocks, how to disaggregate the data State by State, how to weigh § 2 cases as evidence of ongoing discrimination, and whether to consider evidence not before Congress, among other issues. Compare, *e.g.,* 679 F.3d, at 873–883 (case below), with *id.,* at 889–902 (Williams, J., dissenting). Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time. *Katzenbach, supra,* at 308, 315, 331, 86 S.Ct. 803; *Northwest Austin,* 557 U.S., at 201, 129 S.Ct. 2504.

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40–year–old facts having no logical relation to the present day. The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent's contention, see *post,* at 2644, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

The dissent also turns to the record to argue that, in light of voting discrimination in Shelby County, the county cannot complain about the provisions that subject it to preclearance. *Post,* at 2644 – 2648. But that is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired. Shel-

by County's claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance. The county was selected based on that formula, and may challenge it in court.

D

The dissent proceeds from a flawed premise. It quotes the famous sentence from *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819), with the following emphasis: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Post*, at 2637 (emphasis in dissent). But this case is about a part of the sentence that the dissent does not emphasize—the part that asks whether a legislative means is "consist[ent] with the letter and spirit of the constitution." The dissent states that "[i]t cannot tenably be maintained" that this is an issue with regard to the Voting Rights Act, *post*, at 2637, but four years ago, in an opinion joined by two of today's dissenters, the Court expressly stated that "[t]he Act's preclearance requirement and its coverage formula raise serious constitutional questions." *Northwest Austin*, *supra*, at 204, 129 S.Ct. 2504. The dissent does not explain how those "serious constitutional questions" became untenable in four short years.

The dissent treats the Act as if it were just like any other piece of legislation, but this Court has made clear from the beginning that the Voting Rights Act is far from ordinary. At the risk of repetition, *Katzenbach* indicated that the Act was "uncommon" and "not otherwise appropriate," but was justified by "exceptional" and "unique" conditions. 383 U.S., at 334, 335, 86 S.Ct. 803. Multiple decisions since have reaffirmed the Act's "extraordinary" nature. See, *e.g.*, *Northwest Austin*, *supra*, at 211, 129 S.Ct. 2504. Yet the dissent goes so far as to suggest instead that the preclearance requirement and disparate treatment of the States should be upheld into the future "unless there [is] no or almost no evidence of unconstitutional action by States." *Post*, at 2650.

In other ways as well, the dissent analyzes the question presented as if our decision in *Northwest Austin* never happened. For example, the dissent refuses to consider the principle of equal sovereignty, despite *Northwest Austin*'s emphasis on its significance. *Northwest Austin* also emphasized the "dramatic" progress since 1965, 557 U.S., at 201, 129 S.Ct. 2504, but the dissent describes current levels of discrimination as "flagrant," "widespread," and "pervasive," *post*, at 2636, 2641 (internal quotation marks omitted). Despite the fact that *Northwest Austin* requires an Act's "disparate geographic coverage" to be "sufficiently related" to its targeted problems, 557 U.S., at 203, 129 S.Ct. 2504, the dissent maintains that an Act's limited coverage actually eases Congress's burdens, and suggests that a fortuitous relationship should suffice. Although *Northwest Austin* stated definitively that "current burdens" must be justified by "current needs," *ibid.*, the dissent argues that the coverage formula can be justified by history, and that the required showing can be weaker on reenactment than when the law was first passed.

There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distin-

guish between States in such a fundamental way based on 40–year–old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

* * *

[17, 18] Striking down an Act of Congress "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden,* 275 U.S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (Holmes, J., concurring). We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.

[19] Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley,* 502 U.S., at 500–501, 112 S.Ct. 820. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice THOMAS, concurring.

I join the Court's opinion in full but write separately to explain that I would find § 5 of the Voting Rights Act unconstitutional as well. The Court's opinion sets forth the reasons.

"The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem." *Ante,* at 2618. In the face of "unremitting and ingenious defiance" of citizens' constitutionally protected right to vote, § 5 was necessary to give effect to the Fifteenth Amendment in particular regions of the country. *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Though § 5's preclearance requirement represented a "shar[p] depart[ure]" from "basic principles" of federalism and the equal sovereignty of the States, *ante,* at 2622, 2623, the Court upheld the measure against early constitutional challenges because it was necessary at the time to address "voting discrimination where it persist[ed] on a pervasive scale." *Katzenbach, supra,* at 308, 86 S.Ct. 803.

Today, our Nation has changed. "[T]he conditions that originally justified [§ 5] no longer characterize voting in the covered jurisdictions." *Ante,* at 2618. As the Court explains: " '[V]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.' " *Ante,* at 2625 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder,*

557 U.S. 193, 202, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009)).

In spite of these improvements, however, Congress *increased* the already significant burdens of § 5. Following its reenactment in 2006, the Voting Rights Act was amended to "prohibit more conduct than before." *Ante,* at 2621. "Section 5 now forbids voting changes with 'any discriminatory purpose' as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, 'to elect their preferred candidates of choice.' " *Ante,* at 2621. While the pre–2006 version of the Act went well beyond protection guaranteed under the Constitution, see *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 480–482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997), it now goes even further.

It is, thus, quite fitting that the Court repeatedly points out that this legislation is "extraordinary" and "unprecedented" and recognizes the significant constitutional problems created by Congress' decision to raise "the bar that covered jurisdictions must clear," even as "the conditions justifying that requirement have dramatically improved." *Ante,* at 2627. However one aggregates the data compiled by Congress, it cannot justify the considerable burdens created by § 5. As the Court aptly notes: "[N]o one can fairly say that [the record] shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time." *Ante,* at 2629. Indeed, circumstances in the covered jurisdictions can no longer be characterized as "exceptional" or "unique." "The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists." *Northwest Austin, supra,* at 226, 129 S.Ct. 2504 (THOMAS, J., concurring in judgment in part and dissenting in part). Section 5 is, thus, unconstitutional.

While the Court claims to "issue no holding on § 5 itself," *ante,* at 2631, its own opinion compellingly demonstrates that Congress has failed to justify " 'current burdens' " with a record demonstrating " 'current needs.' " See *ante,* at 2622 (quoting *Northwest Austin, supra,* at 203, 129 S.Ct. 2504). By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision. For the reasons stated in the Court's opinion, I would find § 5 unconstitutional.

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

In the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, § 5 remains justifiable,[1] this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments "by appropriate legislation." With overwhelming support in both Houses, Congress concluded that, for two prime reasons, § 5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress' province to make and

1. The Court purports to declare unconstitutional only the coverage formula set out in § 4(b). See *ante,* at 2631. But without that formula, § 5 is immobilized.

should elicit this Court's unstinting approbation.

I

"[V]oting discrimination still exists; no one doubts that." *Ante,* at 2619. But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights.

A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the "blight of racial discrimination in voting" continued to "infec[t] the electoral process in parts of our country." *South Carolina v. Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable "variety and persistence" of laws disenfranchising minority citizens. *Id.,* at 311, 86 S.Ct. 803. To take just one example, the Court, in 1927, held unconstitutional a Texas law barring black voters from participating in primary elections, *Nixon v. Herndon,* 273 U.S. 536, 541, 47 S.Ct. 446, 71 L.Ed. 759; in 1944, the Court struck down a "reenacted" and slightly altered version of the same law, *Smith v. Allwright,* 321 U.S. 649, 658, 64 S.Ct. 757, 88 L.Ed. 987; and in 1953, the Court once again confronted an attempt by Texas to "circumven[t]" the Fifteenth Amendment by adopting yet another variant of the all-white primary, *Terry v. Adams,* 345 U.S. 461, 469, 73 S.Ct. 809, 97 L.Ed. 1152.

During this era, the Court recognized that discrimination against minority voters was a quintessentially political problem requiring a political solution. As Justice Holmes explained: If "the great mass of the white population intends to keep the blacks from voting," "relief from [that] great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States." *Giles v. Harris,* 189 U.S. 475, 488, 23 S.Ct. 639, 47 L.Ed. 909 (1903).

Congress learned from experience that laws targeting particular electoral practices or enabling case-by-case litigation were inadequate to the task. In the Civil Rights Acts of 1957, 1960, and 1964, Congress authorized and then expanded the power of "the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds." *Katzenbach,* 383 U.S., at 313, 86 S.Ct. 803. But circumstances reduced the ameliorative potential of these legislative Acts:

> "Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied

and evaded court orders or have simply closed their registration offices to freeze the voting rolls." *Id.*, at 314, 86 S.Ct. 803 (footnote omitted).

Patently, a new approach was needed.

Answering that need, the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history. Requiring federal preclearance of changes in voting laws in the covered jurisdictions—those States and localities where opposition to the Constitution's commands were most virulent—the VRA provided a fit solution for minority voters as well as for States. Under the preclearance regime established by § 5 of the VRA, covered jurisdictions must submit proposed changes in voting laws or procedures to the Department of Justice (DOJ), which has 60 days to respond to the changes. 79 Stat. 439, codified at 42 U.S.C. § 1973c(a). A change will be approved unless DOJ finds it has "the purpose [or] ... the effect of denying or abridging the right to vote on account of race or color." *Ibid.* In the alternative, the covered jurisdiction may seek approval by a three-judge District Court in the District of Columbia.

After a century's failure to fulfill the promise of the Fourteenth and Fifteenth Amendments, passage of the VRA finally led to signal improvement on this front. "The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965." Davidson, The Voting Rights Act: A Brief History, in Controversies in Minority Voting 7, 21 (B. Grofman & C. Davidson eds. 1992). And in assessing the overall effects of the VRA in 2006, Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (hereinafter 2006 Reauthorization), § 2(b)(1), 120 Stat. 577. On that matter of cause and effects there can be no genuine doubt.

Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. *City of Rome v. United States*, 446 U.S. 156, 181, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). Congress also found that as "registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength." *Ibid.* (quoting H.R.Rep. No. 94–196, p. 10 (1975)). See also *Shaw v. Reno*, 509 U.S. 630, 640, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) ("[I]t soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices" such as voting dilution). Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as "second-generation barriers" to minority voting.

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an "effort to segregate the races for purposes of voting." *Id.*, at 642, 113 S.Ct. 2816. Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority's votes. Grofman & Davidson, The Effect of Municipal Election Structure on Black Representation in Eight Southern States, in Quiet Revolution in the South 301, 319 (C. Davidson & B. Grofman eds. 1994) (hereinafter Quiet Revolution). A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect of VRA-occasioned increases in black voting. Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot. *Shaw,* 509 U.S., at 640–641, 113 S.Ct. 2816; *Allen v. State Bd. of Elections,* 393 U.S. 544, 569, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969); *Reynolds v. Sims,* 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). See also H.R.Rep. No. 109–478, p. 6 (2006) (although "[d]iscrimination today is more subtle than the visible methods used in 1965," "the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates").

In response to evidence of these substituted barriers, Congress reauthorized the VRA for five years in 1970, for seven years in 1975, and for 25 years in 1982. *Ante,* at 2620 – 2621. Each time, this Court upheld the reauthorization as a valid exercise of congressional power. *Ante,* at 2620. As the 1982 reauthorization approached its 2007 expiration date, Congress again considered whether the VRA's preclearance mechanism remained an appropriate response to the problem of voting discrimination in covered jurisdictions.

Congress did not take this task lightly. Quite the opposite. The 109th Congress that took responsibility for the renewal started early and conscientiously. In October 2005, the House began extensive hearings, which continued into November and resumed in March 2006. S.Rep. No. 109–295, p. 2 (2006). In April 2006, the Senate followed suit, with hearings of its own. *Ibid.* In May 2006, the bills that became the VRA's reauthorization were introduced in both Houses. *Ibid.* The House held further hearings of considerable length, as did the Senate, which continued to hold hearings into June and July. H.R. Rep. 109–478, at 5; S. Rep. 109–295, at 3–4. In mid-July, the House considered and rejected four amendments, then passed the reauthorization by a vote of 390 yeas to 33 nays. 152 Cong. Rec. H5207 (July 13, 2006); Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 182–183 (2007) (hereinafter Persily). The bill was read and debated in the Senate, where it passed by a vote of 98 to 0. 152 Cong. Rec. S8012 (July 20, 2006). President Bush signed it a week later, on July 27, 2006, recognizing the need for "further work . . . in the fight against injustice," and calling the reauthorization "an example of our continued commitment to a united America where every person is valued and treated with dignity and respect." 152 Cong. Rec. S8781 (Aug. 3, 2006).

In the long course of the legislative process, Congress "amassed a sizable record." *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 205, 129

S.Ct. 2504, 174 L.Ed.2d 140 (2009). See also 679 F.3d 848, 865–873 (C.A.D.C.2012) (describing the "extensive record" supporting Congress' determination that "serious and widespread intentional discrimination persisted in covered jurisdictions"). The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages. H.R. Rep. 109–478, at 5, 11–12; S. Rep. 109–295, at 2–4, 15. The compilation presents countless "examples of flagrant racial discrimination" since the last reauthorization; Congress also brought to light systematic evidence that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed." 679 F.3d, at 866.

After considering the full legislative record, Congress made the following findings: The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority voter registration and turnout and the number of minority elected officials. 2006 Reauthorization § 2(b)(1). But despite this progress, "second generation barriers constructed to prevent minority voters from fully participating in the electoral process" continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions. §§ 2(b)(2)-(3), 120 Stat. 577. Extensive "[e]vidence of continued discrimination," Congress concluded, "clearly show[ed] the continued need for Federal oversight" in covered jurisdictions. §§ 2(b)(4)-(5), *id.,* at 577–578. The overall record demonstrated to the federal lawmakers that, "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." § 2(b)(9), *id.,* at 578.

Based on these findings, Congress reauthorized preclearance for another 25 years, while also undertaking to reconsider the extension after 15 years to ensure that the provision was still necessary and effective. 42 U.S.C. § 1973b(a)(7), (8) (2006 ed., Supp. V). The question before the Court is whether Congress had the authority under the Constitution to act as it did.

II

In answering this question, the Court does not write on a clean slate. It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. The VRA addresses the combination of race discrimination and the right to vote, which is "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height.

The basis for this deference is firmly rooted in both constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, "Congress shall have power to enforce this article by appropriate legislation." [2] In choosing this language, the

2. The Constitution uses the words "right to vote" in five separate places: the Fourteenth,

Amendment's framers invoked Chief Justice Marshall's formulation of the scope of Congress' powers under the Necessary and Proper Clause:

> "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819) (emphasis added).

It cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments. Nowhere in today's opinion, or in *Northwest Austin*,[3] is there clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve. Notably, "the Founders' first successful amendment told Congress that it could 'make no law' over a certain domain"; in contrast, the Civil War Amendments used "language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality" and provided "sweeping enforcement powers . . . to enact 'appropriate' legislation targeting state abuses." A. Amar, America's Constitution: A Biography 361, 363, 399 (2005). See also McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L.Rev. 153, 182 (1997) (quoting Civil War-era framer that "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative.").

The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. In exercising that power, then, Congress may use "all means which are appropriate, which are plainly adapted" to the constitutional ends declared by these Amendments. *McCulloch*, 4 Wheat., at 421. So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end. "It is not for us to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Katzenbach v. Morgan*, 384 U.S. 641, 653, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its

Fifteenth, Nineteenth, Twenty–Fourth, and Twenty–Sixth Amendments. Each of these Amendments contains the same broad empowerment of Congress to enact "appropriate legislation" to enforce the protected right. The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens. These Amendments are in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections. U.S. Const., Art. I, § 4 ("[T]he Congress may at any time by Law make or alter" regulations concerning the "Times, Places and Manner of holding Elections for Senators and Representatives."); *Arizona v. Inter Tribal Council of Ariz., Inc.*, — U.S. —, ——, 133 S.Ct. 2247, ——, — L.Ed.2d —— (2013).

3. Acknowledging the existence of "serious constitutional questions," see *ante*, at 2630 (internal quotation marks omitted), does not suggest how those questions should be answered.

judgments in this domain should garner. *South Carolina v. Katzenbach* supplies the standard of review: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." 383 U.S., at 324, 86 S.Ct. 803. Faced with subsequent reauthorizations of the VRA, the Court has reaffirmed this standard. *E.g., City of Rome,* 446 U.S., at 178, 100 S.Ct. 1548. Today's Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed "rational means."

For three reasons, legislation *re*authorizing an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test. First, when reauthorization is at issue, Congress has already assembled a legislative record justifying the initial legislation. Congress is entitled to consider that preexisting record as well as the record before it at the time of the vote on reauthorization. This is especially true where, as here, the Court has repeatedly affirmed the statute's constitutionality and Congress has adhered to the very model the Court has upheld. See *id.,* at 174, 100 S.Ct. 1548 ("The appellants are asking us to do nothing less than overrule our decision in *South Carolina v. Katzenbach* . . ., in which we upheld the constitutionality of the Act."); *Lopez v. Monterey County,* 525 U.S. 266, 283, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999) (similar).

Second, the very fact that reauthorization is necessary arises because Congress has built a temporal limitation into the Act. It has pledged to review, after a span of years (first 15, then 25) and in light of contemporary evidence, the continued need for the VRA. Cf. *Grutter v. Bollinger,* 539 U.S. 306, 343, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (anticipating, but not guaranteeing, that, in 25 years, "the use of racial preferences [in higher education] will no longer be necessary").

Third, a reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. Demand for a record of violations equivalent to the one earlier made would expose Congress to a catch–22. If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime. See Persily 193–194.

This is not to suggest that congressional power in this area is limitless. It is this Court's responsibility to ensure that Congress has used appropriate means. The question meet for judicial review is whether the chosen means are "adapted to carry out the objects the amendments have in view." *Ex parte Virginia,* 100 U.S. 339, 346, 25 L.Ed. 676 (1880). The Court's role, then, is not to substitute its judgment for that of Congress, but to determine whether the legislative record sufficed to show that "Congress could rationally have determined that [its chosen] provisions were appropriate methods." *City of Rome,* 446 U.S., at 176–177, 100 S.Ct. 1548.

In summary, the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress' prerogative to use any rational means in exercise of its power in this area. And both precedent and logic dictate that the rational-means test should be easier to satisfy, and the burden on the statute's challenger should be higher, when what is at issue is the reauthorization of a remedy that the Court has previously affirmed, and that Congress found, from contemporary evi-

dence, to be working to advance the legislature's legitimate objective.

III

The 2006 reauthorization of the Voting Rights Act fully satisfies the standard stated in *McCulloch*, 4 Wheat., at 421: Congress may choose any means "appropriate" and "plainly adapted to" a legitimate constitutional end. As we shall see, it is implausible to suggest otherwise.

A

I begin with the evidence on which Congress based its decision to continue the preclearance remedy. The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws. See *City of Rome*, 446 U.S., at 181, 100 S.Ct. 1548 (identifying "information on the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General" as a primary basis for upholding the 1975 reauthorization). On that score, the record before Congress was huge. In fact, Congress found there were *more* DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490). 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 2d Sess., p. 172 (2006) (hereinafter Evidence of Continued Need).

All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory. H.R.Rep. No. 109–478, at 21. Congress found that the majority of DOJ objections included findings of discriminatory intent, see 679 F.3d, at 867, and that the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process." H.R. Rep. 109–478, at 21 (2006), 2006 U.S.C.C.A.N. 618, 631. On top of that, over the same time period the DOJ and private plaintiffs succeeded in more than 100 actions to enforce the § 5 preclearance requirements. 1 Evidence of Continued Need 186, 250.

In addition to blocking proposed voting changes through preclearance, DOJ may request more information from a jurisdiction proposing a change. In turn, the jurisdiction may modify or withdraw the proposed change. The number of such modifications or withdrawals provides an indication of how many discriminatory proposals are deterred without need for formal objection. Congress received evidence that more than 800 proposed changes were altered or withdrawn since the last reauthorization in 1982. H.R.Rep. No. 109–478, at 40–41.[4] Congress also received empirical studies finding that DOJ's requests for more information had a significant effect on the degree to which covered

4. This number includes only changes actually proposed. Congress also received evidence that many covered jurisdictions engaged in an "informal consultation process" with DOJ before formally submitting a proposal, so that the deterrent effect of preclearance was far broader than the formal submissions alone suggest. The Continuing Need for Section 5 Pre–Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 53–54 (2006). All agree that an unsupported assertion about "deterrence" would not be sufficient to justify keeping a remedy in place in perpetuity. See *ante*, at 2627. But it was certainly reasonable for Congress to consider the testimony of witnesses who had worked with officials in covered jurisdictions and observed a real-world deterrent effect.

jurisdictions "compl[ied] with their obligatio[n]" to protect minority voting rights. 2 Evidence of Continued Need 2555.

Congress also received evidence that litigation under § 2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. 1 Evidence of Continued Need 97. An illegal scheme might be in place for several election cycles before a § 2 plaintiff can gather sufficient evidence to challenge it. 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., p. 92 (2005) (hereinafter Section 5 Hearing). And litigation places a heavy financial burden on minority voters. See *id.,* at 84. Congress also received evidence that preclearance lessened the litigation burden on covered jurisdictions themselves, because the preclearance process is far less costly than defending against a § 2 claim, and clearance by DOJ substantially reduces the likelihood that a § 2 claim will be mounted. Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views From the Field: Hearing before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 13, 120–121 (2006). See also Brief for States of New York, California, Mississippi, and North Carolina as *Amici Curiae* 8–9 (Section 5 "reduc[es] the likelihood that a jurisdiction will face costly and protracted Section 2 litigation").

The number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy. Surveying the type of changes stopped by the preclearance procedure conveys a sense of the extent to which § 5 continues to protect minority voting rights. Set out below are characteristic examples of changes blocked in the years leading up to the 2006 reauthorization:

- In 1995, Mississippi sought to reenact a dual voter registration system, "which was initially enacted in 1892 to disenfranchise Black voters," and for that reason, was struck down by a federal court in 1987. H.R.Rep. No. 109–478, at 39.
- Following the 2000 census, the City of Albany, Georgia, proposed a redistricting plan that DOJ found to be "designed with the purpose to limit and retrogress the increased black voting strength . . . in the city as a whole." *Id.,* at 37 (internal quotation marks omitted).
- In 2001, the mayor and all-white five-member Board of Aldermen of Kilmichael, Mississippi, abruptly canceled the town's election after "an unprecedented number" of African–American candidates announced they were running for office. DOJ required an election, and the town elected its first black mayor and three black aldermen. *Id.,* at 36–37.
- In 2006, this Court found that Texas' attempt to redraw a congressional district to reduce the strength of Latino voters bore "the mark of intentional discrimination that could give rise to an equal protection violation," and ordered the district redrawn in compliance with the VRA. *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 440 [126 S.Ct. 2594, 165 L.Ed.2d 609] (2006). In response,

Texas sought to undermine this Court's order by curtailing early voting in the district, but was blocked by an action to enforce the § 5 preclearance requirement. See Order in *League of United Latin American Citizens v. Texas,* No. 06–cv–1046 (WD Tex.), Doc. 8.

- In 2003, after African–Americans won a majority of the seats on the school board for the first time in history, Charleston County, South Carolina, proposed an at-large voting mechanism for the board. The proposal, made without consulting any of the African–American members of the school board, was found to be an " 'exact replica' " of an earlier voting scheme that, a federal court had determined, violated the VRA. 811 F.Supp.2d 424, 483 (D.D.C.2011). See also S.Rep. No. 109–295, at 309. DOJ invoked § 5 to block the proposal.
- In 1993, the City of Millen, Georgia, proposed to delay the election in a majority-black district by two years, leaving that district without representation on the city council while the neighboring majority-white district would have three representatives. 1 Section 5 Hearing 744. DOJ blocked the proposal. The county then sought to move a polling place from a predominantly black neighborhood in the city to an inaccessible location in a predominantly white neighborhood outside city limits. *Id.,* at 816.
- In 2004, Waller County, Texas, threatened to prosecute two black students after they announced their intention to run for office. The county then attempted to reduce the availability of early voting in that election at polling places near a historically black university. 679 F.3d, at 865–866.
- In 1990, Dallas County, Alabama, whose county seat is the City of Selma, sought to purge its voter rolls of many black voters. DOJ rejected the purge as discriminatory, noting that it would have disqualified many citizens from voting "simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so." 1 Section 5 Hearing 356.

These examples, and scores more like them, fill the pages of the legislative record. The evidence was indeed sufficient to support Congress' conclusion that "racial discrimination in voting in covered jurisdictions [remained] serious and pervasive." 679 F.3d, at 865.[5]

Congress further received evidence indicating that formal requests of the kind set out above represented only the tip of the iceberg. There was what one commentator described as an "avalanche of case studies of voting rights violations in the covered jurisdictions," ranging from "outright intimidation and violence against minority voters" to "more subtle forms of voting rights deprivations." Persily 202

5. For an illustration postdating the 2006 reauthorization, see *South Carolina v. United States,* 898 F.Supp.2d 30 (D.D.C.2012), which involved a South Carolina voter-identification law enacted in 2011. Concerned that the law would burden minority voters, DOJ brought a § 5 enforcement action to block the law's implementation. In the course of the litigation, South Carolina officials agreed to binding interpretations that made it "far easier than some might have expected or feared" for South Carolina citizens to vote. *Id.,* at 37. A three-judge panel precleared the law after adopting both interpretations as an express "condition of preclearance." *Id.,* at 37–38. Two of the judges commented that the case demonstrated "the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.,* at 54 (opinion of Bates, J.).

(footnote omitted). This evidence gave Congress ever more reason to conclude that the time had not yet come for relaxed vigilance against the scourge of race discrimination in voting.

True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it. 2006 Reauthorization § 2(b)(1). But Congress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made. §§ 2(b)(2), (9). Concerns of this order, the Court previously found, gave Congress adequate cause to reauthorize the VRA. *City of Rome,* 446 U.S., at 180–182, 100 S.Ct. 1548 (congressional reauthorization of the preclearance requirement was justified based on "the number and nature of objections interposed by the Attorney General" since the prior reauthorization; extension was "necessary to preserve the limited and fragile achievements of the Act and to promote further amelioration of voting discrimination") (internal quotation marks omitted). Facing such evidence then, the Court expressly rejected the argument that disparities in voter turnout and number of elected officials were the only metrics capable of justifying reauthorization of the VRA. *Ibid.*

B

I turn next to the evidence on which Congress based its decision to reauthorize the coverage formula in § 4(b). Because Congress did not alter the coverage formula, the same jurisdictions previously subject to preclearance continue to be covered by this remedy. The evidence just described, of preclearance's continuing efficacy in blocking constitutional violations in the covered jurisdictions, itself grounded Congress' conclusion that the remedy should be retained for those jurisdictions.

There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting. *Ante,* at 2624 – 2625. Consideration of this long history, still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that "history did not end in 1965." *Ante,* at 2628. But the Court ignores that "what's past is prologue." W. Shakespeare, The Tempest, act 2, sc. 1. And "[t]hose who cannot remember the past are condemned to repeat it." 1 G. Santayana, The Life of Reason 284 (1905). Congress was especially mindful of the need to reinforce the gains already made and to prevent backsliding. 2006 Reauthorization § 2(b)(9).

Of particular importance, even after 40 years and thousands of discriminatory changes blocked by preclearance, conditions in the covered jurisdictions demonstrated that the formula was still justified by "current needs." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504.

Congress learned of these conditions through a report, known as the Katz study, that looked at § 2 suits between 1982 and 2004. To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., pp. 964–1124 (2005) (hereinafter Impact and Effectiveness). Because the private right of action authorized by § 2 of the VRA applies nationwide, a comparison of § 2 lawsuits in covered and noncovered jurisdictions provides an appropriate yardstick for measuring differences between covered and noncovered jurisdictions. If differences in the risk of voting discrimination between covered and noncovered jurisdictions had disappeared, one would

expect that the rate of successful § 2 lawsuits would be roughly the same in both areas.[6] The study's findings, however, indicated that racial discrimination in voting remains "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin*, 557 U.S., at 203, 129 S.Ct. 2504.

Although covered jurisdictions account for less than 25 percent of the country's population, the Katz study revealed that they accounted for 56 percent of successful § 2 litigation since 1982. Impact and Effectiveness 974. Controlling for population, there were nearly *four* times as many successful § 2 cases in covered jurisdictions as there were in noncovered jurisdictions. 679 F.3d, at 874. The Katz study further found that § 2 lawsuits are more likely to succeed when they are filed in covered jurisdictions than in noncovered jurisdictions. Impact and Effectiveness 974. From these findings—ignored by the Court—Congress reasonably concluded that the coverage formula continues to identify the jurisdictions of greatest concern.

The evidence before Congress, furthermore, indicated that voting in the covered jurisdictions was more racially polarized than elsewhere in the country. H.R.Rep. No. 109–478, at 34–35. While racially polarized voting alone does not signal a constitutional violation, it is a factor that increases the vulnerability of racial minorities to discriminatory changes in voting law. The reason is twofold. First, racial polarization means that racial minorities are at risk of being systematically outvoted and having their interests underrepresented in legislatures. Second, "when political preferences fall along racial lines, the natural inclinations of incumbents and ruling parties to entrench themselves have predictable racial effects. Under circumstances of severe racial polarization, efforts to gain political advantage translate into race-specific disadvantages." Ansolabehere, Persily, & Stewart, Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act, 126 Harv. L.Rev. Forum 205, 209 (2013).

In other words, a governing political coalition has an incentive to prevent changes in the existing balance of voting power. When voting is racially polarized, efforts by the ruling party to pursue that incentive "will inevitably discriminate against a racial group." *Ibid.* Just as buildings in California have a greater need to be earthquake-proofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination. This point was understood by Congress and is well recognized in the academic literature. See 2006 Reauthorization § 2(b)(3), 120 Stat. 577 ("The continued evidence of racially polarized voting in each of the jurisdictions covered by the [preclearance requirement] demonstrates that racial and language minorities remain politically vulnerable"); H.R.Rep. No. 109–478, at 35 (2006), 2006 U.S.C.C.A.N. 618; Davidson, The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities, in Quiet Revolution 21, 22.

The case for retaining a coverage formula that met needs on the ground was therefore solid. Congress might have been charged with rigidity had it afforded cov-

6. Because preclearance occurs only in covered jurisdictions and can be expected to stop the most obviously objectionable measures, one would expect a *lower* rate of successful § 2 lawsuits in those jurisdictions if the risk of voting discrimination there were the same as elsewhere in the country.

ered jurisdictions no way out or ignored jurisdictions that needed superintendence. Congress, however, responded to this concern. Critical components of the congressional design are the statutory provisions allowing jurisdictions to "bail out" of preclearance, and for court-ordered "bail ins." See *Northwest Austin*, 557 U.S., at 199, 129 S.Ct. 2504. The VRA permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters. 42 U.S.C. § 1973b(a) (2006 ed. and Supp. V). It also authorizes a court to subject a noncovered jurisdiction to federal preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there. § 1973a(c) (2006 ed.).

Congress was satisfied that the VRA's bailout mechanism provided an effective means of adjusting the VRA's coverage over time. H.R.Rep. No. 109–478, at 25 (the success of bailout "illustrates that: (1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so"). Nearly 200 jurisdictions have successfully bailed out of the preclearance requirement, and DOJ has consented to every bailout application filed by an eligible jurisdiction since the current bailout procedure became effective in 1984. Brief for Federal Respondent 54. The bail-in mechanism has also worked. Several jurisdictions have been subject to federal preclearance by court orders, including the States of New Mexico and Arkansas. App. to Brief for Federal Respondent 1a–3a.

This experience exposes the inaccuracy of the Court's portrayal of the Act as static, unchanged since 1965. Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions. True, many covered jurisdictions have not been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.

IV

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. See *supra*, at 2641 – 2642. Without even identifying a standard of review, the Court dismissively brushes off arguments based on "data from the record," and declines to enter the "debat[e about] what [the] record shows." *Ante*, at 2629. One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation.

I note the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County's facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the "equal sovereignty" doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the legislative record.

A

Shelby County launched a purely facial challenge to the VRA's 2006 reauthoriza-

tion. "A facial challenge to a legislative Act," the Court has other times said, "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

"[U]nder our constitutional system[,] courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma,* 413 U.S. 601, 610–611, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Instead, the "judicial Power" is limited to deciding particular "Cases" and "Controversies." U.S. Const., Art. III, § 2. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick,* 413 U.S., at 610, 93 S.Ct. 2908. Yet the Court's opinion in this case contains not a word explaining why Congress lacks the power to subject to preclearance the particular plaintiff that initiated this lawsuit—Shelby County, Alabama. The reason for the Court's silence is apparent, for as applied to Shelby County, the VRA's preclearance requirement is hardly contestable.

Alabama is home to Selma, site of the "Bloody Sunday" beatings of civil-rights demonstrators that served as the catalyst for the VRA's enactment. Following those events, Martin Luther King, Jr., led a march from Selma to Montgomery, Alabama's capital, where he called for passage of the VRA. If the Act passed, he foresaw, progress could be made even in Alabama, but there had to be a steadfast national commitment to see the task through to completion. In King's words, "the arc of the moral universe is long, but it bends toward justice." G. May, Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy 144 (2013).

History has proved King right. Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful § 2 suits, second only to its VRA-covered neighbor Mississippi. 679 F.3d, at 897 (Williams, J., dissenting). In other words, even while subject to the restraining effect of § 5, Alabama was found to have "deni[ed] or abridge[d]" voting rights "on account of race or color" more frequently than nearly all other States in the Union. 42 U.S.C. § 1973(a). This fact prompted the dissenting judge below to concede that "a more narrowly tailored coverage formula" capturing Alabama and a handful of other jurisdictions with an established track record of racial discrimination in voting "might be defensible." 679 F.3d, at 897 (opinion of Williams, J.). That is an understatement. Alabama's sorry history of § 2 violations alone provides sufficient justification for Congress' determination in 2006 that the State should remain subject to § 5's preclearance requirement.[7]

7. This lawsuit was filed by Shelby County, a political subdivision of Alabama, rather than by the State itself. Nevertheless, it is appropriate to judge Shelby County's constitutional challenge in light of instances of discrimination statewide because Shelby County is subject to § 5's preclearance requirement by virtue of *Alabama's* designation as a covered jurisdiction under § 4(b) of the VRA. See *ante,* at 2621 – 2622. In any event, Shelby County's recent record of employing an at-large electoral system tainted by intentional racial discrimination is by itself sufficient to justify subjecting the county to § 5's preclearance mandate. See *infra,* at 2646.

A few examples suffice to demonstrate that, at least in Alabama, the "current burdens" imposed by § 5's preclearance requirement are "justified by current needs." *Northwest Austin*, 557 U.S., at 203, 129 S.Ct. 2504. In the interim between the VRA's 1982 and 2006 reauthorizations, this Court twice confronted purposeful racial discrimination in Alabama. In *Pleasant Grove v. United States*, 479 U.S. 462, 107 S.Ct. 794, 93 L.Ed.2d 866 (1987), the Court held that Pleasant Grove—a city in Jefferson County, Shelby County's neighbor—engaged in purposeful discrimination by annexing all-white areas while rejecting the annexation request of an adjacent black neighborhood. The city had "shown unambiguous opposition to racial integration, both before and after the passage of the federal civil rights laws," and its strategic annexations appeared to be an attempt "to provide for the growth of a monolithic white voting block" for "the impermissible purpose of minimizing future black voting strength." *Id.*, at 465, 471–472, 107 S.Ct. 794.

Two years before *Pleasant Grove*, the Court in *Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985), struck down a provision of the Alabama Constitution that prohibited individuals convicted of misdemeanor offenses "involving moral turpitude" from voting. *Id.*, at 223, 105 S.Ct. 1916 (internal quotation marks omitted). The provision violated the Fourteenth Amendment's Equal Protection Clause, the Court unanimously concluded, because "its original enactment was motivated by a desire to discriminate against blacks on account of race[,] and the [provision] continues to this day to have that effect." *Id.*, at 233, 105 S.Ct. 1916.

Pleasant Grove and *Hunter* were not anomalies. In 1986, a Federal District Judge concluded that the at-large election systems in several Alabama counties violated § 2. *Dillard v. Crenshaw Cty.*, 640 F.Supp. 1347, 1354–1363 (M.D.Ala.1986). Summarizing its findings, the court stated that "[f]rom the late 1800's through the present, [Alabama] has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state." *Id.*, at 1360.

The *Dillard* litigation ultimately expanded to include 183 cities, counties, and school boards employing discriminatory at-large election systems. *Dillard v. Baldwin Cty. Bd. of Ed.*, 686 F.Supp. 1459, 1461 (M.D.Ala.1988). One of those defendants was Shelby County, which eventually signed a consent decree to resolve the claims against it. See *Dillard v. Crenshaw Cty.*, 748 F.Supp. 819 (M.D.Ala.1990).

Although the *Dillard* litigation resulted in overhauls of numerous electoral systems tainted by racial discrimination, concerns about backsliding persist. In 2008, for example, the city of Calera, located in Shelby County, requested preclearance of a redistricting plan that "would have eliminated the city's sole majority-black district, which had been created pursuant to the consent decree in *Dillard*." 811 F.Supp.2d 424, 443 (D.D.C.2011). Although DOJ objected to the plan, Calera forged ahead with elections based on the unprecleared voting changes, resulting in the defeat of the incumbent African–American councilman who represented the former majority-black district. *Ibid.* The city's defiance required DOJ to bring a § 5 enforcement action that ultimately yielded appropriate redress, including restoration of the majority-black district. *Ibid.*; Brief for Respondent–Intervenors Earl Cunningham et al. 20.

A recent FBI investigation provides a further window into the persistence of racial discrimination in state politics. See *United States v. McGregor*, 824 F.Supp.2d

1339, 1344–1348 (M.D.Ala.2011). Recording devices worn by state legislators cooperating with the FBI's investigation captured conversations between members of the state legislature and their political allies. The recorded conversations are shocking. Members of the state Senate derisively refer to African–Americans as "Aborigines" and talk openly of their aim to quash a particular gambling-related referendum because the referendum, if placed on the ballot, might increase African–American voter turnout. *Id.,* at 1345–1346 (internal quotation marks omitted). See also *id.,* at 1345 (legislators and their allies expressed concern that if the referendum were placed on the ballot, " '[e]very black, every illiterate' would be 'bused [to the polls] on HUD financed buses' "). These conversations occurred not in the 1870's, or even in the 1960's, they took place in 2010. *Id.,* at 1344–1345. The District Judge presiding over the criminal trial at which the recorded conversations were introduced commented that the "recordings represent compelling evidence that political exclusion through racism remains a real and enduring problem" in Alabama. *Id.,* at 1347. Racist sentiments, the judge observed, "remain regrettably entrenched in the high echelons of state government." *Ibid.*

These recent episodes forcefully demonstrate that § 5's preclearance requirement is constitutional as applied to Alabama and its political subdivisions.[8] And under our case law, that conclusion should suffice to resolve this case. See *United States v. Raines,* 362 U.S. 17, 24–25, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) ("[I]f the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality."). See also *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 743, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (SCALIA, J., dissenting) (where, as here, a state or local government raises a facial challenge to a federal statute on the ground that it exceeds Congress' enforcement powers under the Civil War Amendments, the challenge fails if the opposing party is able to show that the statute "could constitutionally be applied to *some* jurisdictions").

This Court has consistently rejected constitutional challenges to legislation enacted pursuant to Congress' enforcement powers under the Civil War Amendments upon finding that the legislation was constitutional as applied to the particular set of circumstances before the Court. See *United States v. Georgia,* 546 U.S. 151, 159, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006) (Title II of the Americans with Disabilities Act of 1990 (ADA) validly abrogates state sovereign immunity "insofar as [it] creates a private cause of action . . . for conduct that *actually* violates the Fourteenth Amendment"); *Tennessee v. Lane,* 541 U.S. 509, 530–534, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) (Title II of the ADA is constitutional "as it applies to the class of cases implicating the fundamental right of access to the courts"); *Raines,* 362 U.S., at 24–26, 80 S.Ct. 519 (federal statute proscribing deprivations of the right to vote based on race was constitutional as applied to the state officials before the Court, even if it could not constitutionally be applied to other parties). A similar approach is warranted here.[9]

8. Congress continued preclearance over Alabama, including Shelby County, *after* considering evidence of current barriers there to minority voting clout. Shelby County, thus, is no "redhead" caught up in an arbitrary scheme. See *ante,* at 2629.

9. The Court does not contest that Alabama's history of racial discrimination provides a

The VRA's exceptionally broad severability provision makes it particularly inappropriate for the Court to allow Shelby County to mount a facial challenge to §§ 4(b) and 5 of the VRA, even though application of those provisions to the county falls well within the bounds of Congress' legislative authority. The severability provision states:

> "If any provision of [this Act] or the application thereof to any person or circumstances is held invalid, the remainder of [the Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby." 42 U.S.C. § 1973p.

In other words, even if the VRA could not constitutionally be applied to certain States—*e.g.,* Arizona and Alaska, see *ante,* at 2622 —§ 1973p calls for those unconstitutional applications to be severed, leaving the Act in place for juris-dictions as to which its application does not transgress constitutional limits.

Nevertheless, the Court suggests that limiting the jurisdictional scope of the VRA in an appropriate case would be "to try our hand at updating the statute." *Ante,* at 2629. Just last Term, however, the Court rejected this very argument when addressing a materially identical severability provision, explaining that such a provision is "Congress' explicit textual instruction to leave unaffected the remainder of [the Act]" if any particular "application is unconstitutional." *National Federation of Independent Business v. Sebelius,* 567 U.S. ——, ——, 132 S.Ct. 2566, 2639, 183 L.Ed.2d 450 (2012) (plurality opinion) (internal quotation marks omitted); *id.,* at ——, 132 S.Ct., at 2641–2642 (GINSBURG, J., concurring in part, concurring in judgment in part, and dissenting in part) (slip op., at 60) (agreeing with the plurality's severability analysis). See also *Raines,* 362 U.S., at 23, 80 S.Ct. 519 (a statute capable of some constitutional applications may nonetheless be susceptible to a facial challenge only in "that rarest of cases where this Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application"). Leaping to resolve Shelby County's facial challenge without considering whether application of the VRA to Shelby County is constitutional, or even addressing the VRA's severability provision, the Court's opinion can hardly be described as an exemplar of restrained and moderate decisionmaking. Quite the opposite. Hubris is a fit word for today's demolition of the VRA.

B

The Court stops any application of § 5 by holding that § 4(b)'s coverage formula is unconstitutional. It pins this result, in large measure, to "the fundamental principle of equal sovereignty." *Ante,* at 2623 – 2624, 2630. In *Katzenbach,* however, the Court held, in no uncertain terms, that the principle "*applies only to the terms upon which States are admitted to the Union,* and not to the remedies for local evils which have subsequently appeared." 383 U.S., at 328–329, 86 S.Ct. 803 (emphasis added).

sufficient basis for Congress to require Alabama and its political subdivisions to preclear electoral changes. Nevertheless, the Court asserts that Shelby County may prevail on its facial challenge to § 4's coverage formula because it is subject to § 5's preclearance requirement by virtue of that formula. See *ante,* at 2630 ("The county was selected [for preclearance] based on th[e] [coverage] formula."). This misses the reality that Congress decided to subject Alabama to preclearance based on evidence of continuing constitutional violations in that State. See *supra,* at 2647, n. 8.

Katzenbach, the Court acknowledges, "rejected the notion that the [equal sovereignty] principle operate[s] as a bar on differential treatment outside [the] context [of the admission of new States]." *Ante*, at 2623 – 2624 (citing 383 U.S., at 328–329, 86 S.Ct. 803) (emphasis omitted). But the Court clouds that once clear understanding by citing dictum from *Northwest Austin* to convey that the principle of equal sovereignty "remains highly pertinent in assessing subsequent disparate treatment of States." *Ante*, at 2624 (citing 557 U.S., at 203, 129 S.Ct. 2504). See also *ante*, at 2630 (relying on *Northwest Austin*'s "emphasis on [the] significance" of the equal-sovereignty principle). If the Court is suggesting that dictum in *Northwest Austin* silently overruled *Katzenbach*'s limitation of the equal sovereignty doctrine to "the admission of new States," the suggestion is untenable. *Northwest Austin* cited *Katzenbach*'s holding in the course of *declining to decide* whether the VRA was constitutional or even what standard of review applied to the question. 557 U.S., at 203–204, 129 S.Ct. 2504. In today's decision, the Court ratchets up what was pure dictum in *Northwest Austin*, attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*. The Court does so with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach*'s ruling on the limited "significance" of the equal sovereignty principle.

Today's unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties. See, *e.g.*, 28 U.S.C. § 3704 (no State may operate or permit a sports-related gambling scheme, unless that State conducted such a scheme "at any time during the period beginning January 1, 1976, and ending August 31, 1990"); 26 U.S.C. § 142(*l*) (EPA required to locate green building project in a State meeting specified population criteria); 42 U.S.C. § 3796bb (at least 50 percent of rural drug enforcement assistance funding must be allocated to States with "a population density of fifty-two or fewer persons per square mile or a State in which the largest county has fewer than one hundred and fifty thousand people, based on the decennial census of 1990 through fiscal year 1997"); §§ 13925, 13971 (similar population criteria for funding to combat rural domestic violence); § 10136 (specifying rules applicable to Nevada's Yucca Mountain nuclear waste site, and providing that "[n]o State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987"). Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?

Of gravest concern, Congress relied on our pathmarking *Katzenbach* decision in each reauthorization of the VRA. It had every reason to believe that the Act's limited geographical scope would weigh in favor of, not against, the Act's constitutionality. See, *e.g.*, *United States v. Morrison*, 529 U.S. 598, 626–627, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (confining preclearance regime to States with a record of discrimination bolstered the VRA's constitutionality). Congress could hardly have foreseen that the VRA's limited geographic reach would render the Act constitutionally suspect. See Persily 195 ("[S]upporters of the Act sought to develop an evidentiary record for the principal purpose of explaining why the covered jurisdictions should remain covered, rather than justifying the coverage of certain jurisdictions but not others.").

In the Court's conception, it appears, defenders of the VRA could not prevail

upon showing what the record overwhelmingly bears out, *i.e.,* that there is a need for continuing the preclearance regime in covered States. In addition, the defenders would have to disprove the existence of a comparable need elsewhere. See Tr. of Oral Arg. 61–62 (suggesting that proof of egregious episodes of racial discrimination in covered jurisdictions would not suffice to carry the day for the VRA, unless such episodes are shown to be absent elsewhere). I am aware of no precedent for imposing such a double burden on defenders of legislation.

C

The Court has time and again declined to upset legislation of this genre unless there was no or almost no evidence of unconstitutional action by States. See, *e.g., City of Boerne v. Flores,* 521 U.S. 507, 530, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (legislative record "mention[ed] no episodes [of the kind the legislation aimed to check] occurring in the past 40 years"). No such claim can be made about the congressional record for the 2006 VRA reauthorization. Given a record replete with examples of denial or abridgment of a paramount federal right, the Court should have left the matter where it belongs: in Congress' bailiwick.

Instead, the Court strikes § 4(b)'s coverage provision because, in its view, the provision is not based on "current conditions." *Ante,* at 2627. It discounts, however, that one such condition was the preclearance remedy in place in the covered jurisdictions, a remedy Congress designed both to catch discrimination before it causes harm, and to guard against return to old ways. 2006 Reauthorization § 2(b)(3), (9). Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

But, the Court insists, the coverage formula is no good; it is based on "decades-old data and eradicated practices." *Ante,* at 2627. Even if the legislative record shows, as engaging with it would reveal, that the formula accurately identifies the jurisdictions with the worst conditions of voting discrimination, that is of no moment, as the Court sees it. Congress, the Court decrees, must "star[t] from scratch." *Ante,* at 2630. I do not see why that should be so.

Congress' chore was different in 1965 than it was in 2006. In 1965, there were a "small number of States . . . which in most instances were familiar to Congress by name," on which Congress fixed its attention. *Katzenbach,* 383 U.S., at 328, 86 S.Ct. 803. In drafting the coverage formula, "Congress began work with reliable evidence of actual voting discrimination in a great majority of the States" it sought to target. *Id.,* at 329, 86 S.Ct. 803. "The formula [Congress] eventually evolved to describe these areas" also captured a few States that had not been the subject of congressional factfinding. *Ibid.* Nevertheless, the Court upheld the formula in its entirety, finding it fair "to infer a significant danger of the evil" in all places the formula covered. *Ibid.*

The situation Congress faced in 2006, when it took up *re* authorization of the coverage formula, was not the same. By then, the formula had been in effect for many years, and *all* of the jurisdictions covered by it were "familiar to Congress by name." *Id.,* at 328, 86 S.Ct. 803. The question before Congress: Was there still a sufficient basis to support continued application of the preclearance remedy in each of those already-identified places? There was at that point no chance that the

formula might inadvertently sweep in new areas that were not the subject of congressional findings. And Congress could determine from the record whether the jurisdictions captured by the coverage formula still belonged under the preclearance regime. If they did, there was no need to alter the formula. That is why the Court, in addressing prior reauthorizations of the VRA, did not question the continuing "relevance" of the formula.

Consider once again the components of the record before Congress in 2006. The coverage provision identified a known list of places with an undisputed history of serious problems with racial discrimination in voting. Recent evidence relating to Alabama and its counties was there for all to see. Multiple Supreme Court decisions had upheld the coverage provision, most recently in 1999. There was extensive evidence that, due to the preclearance mechanism, conditions in the covered jurisdictions had notably improved. And there was evidence that preclearance was still having a substantial real-world effect, having stopped hundreds of discriminatory voting changes in the covered jurisdictions since the last reauthorization. In addition, there was evidence that racial polarization in voting was higher in covered jurisdictions than elsewhere, increasing the vulnerability of minority citizens in those jurisdictions. And countless witnesses, reports, and case studies documented continuing problems with voting discrimination in those jurisdictions. In light of this record, Congress had more than a reasonable basis to conclude that the existing coverage formula was not out of sync with conditions on the ground in covered areas. And certainly Shelby County was no candidate for release through the mechanism Congress provided. See *supra*, at 2643 – 2645, 2646 – 2647.

The Court holds § 4(b) invalid on the ground that it is "irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time." *Ante*, at 2631. But the Court disregards what Congress set about to do in enacting the VRA. That extraordinary legislation scarcely stopped at the particular tests and devices that happened to exist in 1965. The grand aim of the Act is to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race. As the record for the 2006 reauthorization makes abundantly clear, second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted *substitutes* for the first-generation barriers that originally triggered preclearance in those jurisdictions. See *supra*, at 2634 – 2635, 2636, 2640 – 2641.

The sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. *Ante*, at 2629 – 2630, 2630 – 2631. With that belief, and the argument derived from it, history repeats itself. The same assumption—that the problem could be solved when particular methods of voting discrimination are identified and eliminated—was indulged and proved wrong repeatedly prior to the VRA's enactment. Unlike prior statutes, which singled out particular tests or devices, the VRA is grounded in Congress' recognition of the "variety and persistence" of measures designed to impair minority voting rights. *Katzenbach*, 383 U.S., at 311, 86 S.Ct. 803; *supra*, at 2633. In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.

Beyond question, the VRA is no ordinary legislation. It is extraordinary be-

cause Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment. For a half century, a concerted effort has been made to end racial discrimination in voting. Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made.

The record supporting the 2006 reauthorization of the VRA is also extraordinary. It was described by the Chairman of the House Judiciary Committee as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 & half; years" he had served in the House. 152 Cong. Rec. H5143 (July 13, 2006) (statement of Rep. Sensenbrenner). After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support. It was the judgment of Congress that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." 2006 Reauthorization § 2(b)(7), 120 Stat. 577. That determination of the body empowered to enforce the Civil War Amendments "by appropriate legislation" merits this Court's utmost respect. In my judgment, the Court errs egregiously by overriding Congress' decision.

* * *

For the reasons stated, I would affirm the judgment of the Court of Appeals.

Dennis HOLLINGSWORTH et al., Petitioners

v.

Kristin M. PERRY et al.

No. 12–144.

Argued March 26, 2013.

Decided June 26, 2013.

Background: Same-sex couples who had been denied marriage licenses brought civil rights action against Governor of California and other state and local officials, alleging that California's Proposition 8, a voter-enacted ballot initiative that amended the California Constitution to provide that only marriage between a man and a woman was valid, thereby eliminating the right of same-sex couples to marry, violated their rights to due process and equal protection under the Fourteenth Amendment to the Federal Constitution. Initiative's official proponents intervened on behalf of defendants, and municipality and county intervened on behalf of plaintiffs. After a bench trial, the United States District Court for the Northern District of California, Vaughn R. Walker, Chief Judge, 704 F.Supp.2d 921, granted judgment for plaintiffs, and proponents' motion to vacate was denied by the District Court, James Ware, Chief Judge, 790 F.Supp.2d 1119. Proponents appealed both decisions. The United States Court of Appeals for the Ninth Circuit, 628 F.3d 1191, certified question, and the California Supreme Court, 52 Cal.4th 1116, 134 Cal.Rptr.3d 499, 265 P.3d 1002, answered that question. The Court of Appeals, Reinhardt, Circuit Judge, 671 F.3d 1052, affirmed, and rehearing en banc was denied, 681 F.3d 1065. Certiorari was granted.

Holding: The Supreme Court, Chief Justice Roberts, held that proponents did not