**THEODORE ROOSEVELT AMERICAN INN OF COURT**
Monday, November 14, 2022 at 5:30PM
Nassau County Bar Association, 15th & West Street, Mineola, NY 11501

# DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION: ANALYSIS AND IMPLICATIONS

This Unique Program Brings Together Four Highly-regarded Constitutional Law Professors to Analyze the Supreme Court's Landmark Decision Reversing Roe V. Wade, its Historical Context, and its Implications for the Future.

With student presentations regarding related ethical issues for lawyers, criminalization of abortion and other critical aspects of the Dobbs decision.

**PANELISTS:**
Professor John Q. Barrett, St. Johns University School of Law
Dean Roger Citron, Touro Law Center
Professor Tiffany Graham, Touro Law Center
Professor James Sample, Maurice A. Deane School of Law at Hofstra University

**LAW STUDENTS:**
Maurice A. Deane School of Law at Hofstra University: Olivia Lewis, and Alexandra Licitra
St. Johns University School of Law: Abigail Rafael; Erica Romeo; and Abigail Sloan
Touro Law Center: Amerra Bukhari; Won Han; Waheda Islam; and Madison Scarfaro

**PUPILLAGE COMMITTEE**:
**Co-Chairs**
Hon. Marilyn K. Genoa, Synergist Mediation
Lois Carter Schlissel, Esq., Meyer, Suozzi, English & Klein, P.C.

**Pupillage Committee**
Evelyn Kalenscher, Esq.
Ellen Tobin, Esq., Westerman Ball Ederer Miller Zucker & Sharfstein, LLP

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**Timed Agenda:**

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| 6:00 to 6:02 | Welcome to Members | *Hon. Helen Voutsinas* |
| 6:02 to 6:05 | Introduction and Overview of the Program | *Hon. Marilyn K. Genoa* |
| 6:05 to 6:10 | Introduction of Panel Members | *Lois Carter Schlissel, Esq*. |
| 6:10 to 6:20 | Jurisprudential Landscape Leading up to Dobbs v. Jackson Women's Health Organization | *Prof. John Q. Barrett* |
| 6:20 to 6:30 | Personnel Dominos That Take Us to Dobbs | *Prof. James Sample* |
| 6:30 to 6:50 | Analysis of Majority Decision and Dissenting Opinion: Dobbs v Jackson Women's Health Organization | *Dean Tiffany Graham* |
| 6:50 to 7:00 | Analysis of Concurring Decisions: Dobbs v Jackson Women's Health Organization | *Dean Roger Citron* |
| 7:00 to 7:04 | Introduction of Law Students | *Ellen Tobin, Esq.* |
| 7:05 to 7:15 | Criminalization of Abortion/Future Implication of Dobbs Decision<br>Maurice A. Deane School of Law at Hofstra University Students: | *Olivia Lewis and Alexandra Licitra* |
| 7:15 to 7:25 | Implication for Other Due Process Rights:<br>St. Johns University School of Law Students: | *Abigail Rafael; Erica Romeo; and Abigail Sloan* |
| 7:25 to 7:35 | Ethical Implications for Legal Profession<br>Touro Law Center Students: | *Amerra Bukhari; Won Han; Waheda Islam; and Madison Scarfaro* |
| 7:35 to 8:00 | Questions and Answers: Panelists/Students | *Evelyn Kalenscher, Esq.* |

# Hon. Marilyn K. Genoa

Marilyn K. Genoa is a principal of Synergist Mediation, as well as a principal in the law firm of Genoa & Associates, P.C. The retired Village Justice for the Village of Old Brookville, Marilyn is a Past President of the Theodore Roosevelt American Inn of Court as well as the Past President of the Nassau County Magistrates Association, and recipient of the Hon. Frank J. Santagata Memorial Award for exemplary ethics, professionalism and devotion to justice. Prior to being elected Village Justice, she was an elected Trustee of the Village and the Deputy Police Commissioner for the Old Brookville Police Department.

As a neutral, Marilyn mediates matters in the areas of business/ commercial, real estate, employment, zoning, personal injury, and surrogates court disputes. She serves on the boards of numerous not-for-profit agencies, including the Theodore Roosevelt American Inn of Court, Yashar, The Safe Center LI, We Care, and has chaired numerous committees for both the Nassau County Bar and New York State Bar Associations. She has lectured extensively before bar associations and professional organization.

Marilyn is admitted to practice in the Courts of the State of New York, the Courts of the State of York, and the Supreme Court of the United States of America. She received her law degree, with honors, from Hofstra University School of Law, her B.A. from Boston University, and her MSW from Adelphi University.

**Lois Schlissel, Esq.**

Lois Schlissel is of counsel to Meyer, Suozzi, English & Klein, P.C. She chaired the firm's employment law practice and served as the firm's managing attorney from 2002 to 2017. Mrs. Schlissel has lectured extensively before bar associations, labor unions, employment groups and professional organizations. She has given numerous media interviews and provided commentary relating to federal civil practice, employment law issues, workplace discrimination and sexual harassment. Prior to joining Meyer Suozzi, Mrs. Schlissel was a law clerk at the New York State Court of Appeals and, thereafter, a member of the litigation department in the New York City office of Skadden, Arps, Slate, Meaher and Flom, LLP. She is on the board of the Theodore Roosevelt American Inn of Court and is a past president. Mrs. Schlissel has served on the boards of Northwell Health, Adelphi University, Huntington Hospital, and the Touro Law Center Board of Governors.

# Evelyn Kalenscher, Esq.

Evelyn Kalenscher received a JD degree from Hofstra University School of Law in 1989. After retiring from private practice, she became a participant in the New York State Attorney Emeritus Program for retired attorneys who work pro-bono. Since 2009, Ms. Kalenscher has worked two days a week through the Nassau/Suffolk Law Services Volunteer Lawyers Project in the Landlord/Tenant Part of the Nassau County District Court representing indigent clients who are at risk of becoming evicted. She has been recognized by numerous organizations for her pro-bono work.

Ms. Kalenscher has been a member of the Theodore Roosevelt American Inn of Court since 1992, where she is a board member and served as its president in 2019-2020. She is a member of the Nassau County Bar Association where she served on the Ethics Committee as chair from 2010-2012, chair of the Domus House Committee from 2012-2013 and vice chair of the District Court Committee 2021-2022. She is also a member of the New York State Bar Association on the Real Property Committee and a board member of the Nassau Lawyers' Association of Long Island, Inc. Ms. Kalenscher is an active participant in her condominium community and was a member of its Board of Managers for sixteen years and served as its president for ten years until 2018. She currently has an advisory position on her community board.

Ms. Kalenscher is admitted to practice in the Courts of the State of New York, the United States District Court for the Eastern District of New York, and the Supreme Court of the United States of America

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# Ellen Tobin

Ellen Tobin is a Partner in the Firm's Litigation Department, representing individuals and businesses in federal and state court actions and arbitrations. Ellen's practice focuses on complex commercial cases including contract and real estate matters, business disputes and breakups, accounting and securities fraud and bankruptcy litigation. Ellen is active in the legal community, serving on the Board of Directors of the Nassau County Bar Association and the Board of the Federal Bar Association, E.D.N.Y. Chapter. Ellen is also an active member of the Theodore Roosevelt American Inn of Court.

Prior to joining the Firm, Ellen worked in the Manhattan office of a prominent international law firm, and for two years Ellen served as a Law Clerk for the Honorable A. Kathleen Tomlinson of the U.S. District Court for the Eastern District of New York.

Ellen is also committed to serving her community. She volunteers with Surf For All, an amazing not-for-profit that provides surfing programs for children with disabilities. She has done extensive pro bono work advocating for children and indigent parents in family court disputes on behalf of the Children's Law Center and the Brooklyn Family Defense Practice. She is a proud member of The Energeia Partnership at Molloy College.

Ellen received her Juris Doctor degree in 2005 from the University of Pennsylvania. In 2001 Ellen received a Bachelor of Arts degree from the University of Pennsylvania, from which she graduated *magna cum laude* and with Distinction in International Relations.

**Professor John Q. Barrett**

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**@JohnQBarrett**

John Q. Barrett is the Benjamin N. Cardozo Professor of Law at St. John's University, where he teaches Constitutional Law, Criminal Procedure, and Legal History. He also is the Elizabeth S. Lenna Fellow and a Board member at the Robert H. Jackson Center in Jamestown, New York. He is a biographer of U.S. Supreme Court Justice and Nuremberg chief prosecutor Robert H. Jackson (1892-1954) and regularly sends "Jackson List" emails—hundreds are archived at **thejacksonlist.com**—to over 100,000 readers, including lawyers, judges, teachers, and students, around the world. Before joining the St. John's faculty, Barrett was a U.S. Department of Justice attorney, Associate Counsel in the Office of Iran-Contra Independent Counsel Lawrence E. Walsh, and a law clerk to Judge A. Leon Higginbotham, Jr., of the U.S. Court of Appeals for the Third Circuit. Professor Barrett is a graduate of Georgetown University and Harvard Law School.

## Bio Roger Citron

Rodger Citron is the Associate Dean for Research and Scholarship and Professor of Law at Touro University, Jacob D. Fuchsberg Law Center. Associate Dean Citron is a graduate of Yale College, Phi Beta Kappa and summa cum laude, and Yale Law School. After law school, he clerked for the Hon. Thomas N. O'Neill, Jr., of the U.S. District Court for the Eastern District of Pennsylvania. Before becoming a law professor, he worked as a trial attorney at the United States Department of Justice; a director at FindLaw, Inc.; and an attorney-advisor at the Federal Communications Commission.

Associate Dean Citron teaches Civil Procedure, Administrative Law, and a seminar on the Supreme Court. His law review articles have been published in a number of law reviews, including the Stanford Journal of Complex Litigation, the South Carolina Law Review, and the Vermont Law Review. In addition to the articles he has published in law reviews, Professor Citron is a co-author of A Documentary Companion to Storming the Court (2009). His articles also have been published on Slate, Justia, and SCOTUS blog. From January 2007 through December 2010, he served as a reporter for the New York State Pattern Jury Instructions Committee.

**Tiffany C. Graham**
**Associate Professor of Law and Associate Dean of Diversity and Inclusion**
**Touro University, Jacob D. Fuchsberg Law Center**
**Central Islip, NY**

Tiffany C. Graham is an Associate Professor of Law and the Associate Dean of Diversity and Inclusion at Touro University, Jacob D. Fuchsberg Law Center in Central Islip (Long Island), New York. A graduate of Harvard and Radcliffe Colleges and the University of Virginia School of Law, she previously served as a federal law clerk on the United States District Court for the District of Columbia, worked as a commercial litigator in the Los Angeles office of Quinn Emanuel Urquhart Oliver and Hedges, LLP, and was named a Fulbright Scholar in 2014. She primarily teaches in the areas of constitutional law and race and the law, but has also taught criminal procedure, law and sexuality, and torts. She has written and spoken nationally on topics broadly related to LGBTQ+

equality, including marriage equality, LGBTQ+ youth homelessness, conversion therapy, and the integration of LGBTQ+ communities in rural spaces. Her work has appeared in multiple law journals and was most recently included in the book, *Integrating Doctrine and Diversity: Inclusion and Equity in the Law School Classroom* (Carolina Press 2021).

## Professor James Sample

James Sample is a Professor at the Maurice A. Deane School of Law at Hofstra University. He primarily teaches courses in Constitutional Law, Federal Courts and Civil Procedure. Prior to joining the Hofstra faculty in 2009, Professor Sample served as an attorney for several years in the Democracy Program at the Brennan Center for Justice at NYU. Before joining the Brennan Center, he worked on Brian Schweitzer's gubernatorial campaign in Montana and clerked for Judge Sidney R. Thomas of the U.S. Court of Appeals for the Ninth Circuit. His scholarly publications focus on judicial elections, judicial recusal, voting rights, campaign finance law, and the law of democracy. Citations to Professor Sample's work on issues related to democracy include in opinions of the United States Supreme Court, in leading law journals, as well as in major print and broadcast media. Prior to attending law school, he was a 3-time Emmy Award winner with NBC Sports.

Amerra Bukhari is a third-year full time student at Touro Law. She's interested in both criminal and civil law. She is involved in various organizations at her school such as Family Law, Employment and Labor Law Society, Student Bar Association, Women's Bar Association, and Asian American Law Student Association. Over her law school career, she's interned at the Richmond County's DA's Office and was a Summer Associate at Segal McCambridge in Midtown Manhattan. Currently, she's a law clerk at Segal McCambridge.  In her free time, she loves reading fantasy novels and watching Netflix.

- Olivia A. Lewis is a recent New York transplant after moving from her hometown of Layton, Utah to Hempstead, New York for law school. After graduating from Weber State University in 2021 with her Bachelor's in English with a minor in Professional and Technical Writing, Olivia started law school at Maurice A. Deane School of Law at Hofstra University. Having worked in Family Law as a paralegal 3 years prior to coming to law school, Olivia realized her passion for exploring the complexities of the law, and discovered that life as an attorney was the path to pursue after undergraduate. Olivia is currently interested in pursuing a career in discrimination law, and hopes to practice law (with her dog Duke of course) in New York after graduation.

Alexandra Licitra is a New York native and current 2L at Hofstra's Maurice A. Deane School of Law. After graduating from St. John's University in 2011 Alexandra spent almost 10 years travelling the world as a professional dancer. Since embarking on her law school journey, Alexandra has devoted herself to developing the skills necessary to become a fierce advocate. She is currently a junior staff member at Hofstra's Labor and Employment Law Journal and was recently accepted to participate in Hofstra's Pro Se Legal Assistance Program. Alexandra is motivated by a deep commitment to justice and equality which she hopes to translate into a successful career as a civil rights attorney.

Abigail Rafael is a second-year law student at St. John's University School of Law. Prior to law school, Abigail graduated magna cum laude from Binghamton University where she received her Bachelor of Arts in Politics, Philosophy and Law. She is currently the Director of Student Affairs for the Asian Pacific Islander American Law Student Association, a staff member of the Journal of Civil Rights and Economic Development and a member of the Polestino Trial Advocacy Institute. Her legal field of interest is disability law. She has previously interned for The Legal Aid Society and is currently externing for Disability Rights New York.

Abigail Sloan is a third-year law student at St. John's University School of Law. She is the Editor-in-Chief of the Journal of Civil Rights and Economic Development and is the Vice President of the Women's Law Society. Abigail has experience working in immigration law, housing law, and tenant-landlord law, and enjoys engaging in advocacy work. Prior to law school, Abigail graduated cum laude from the University of Connecticut where she received her Bachelor of Arts degree in Political Science and Psychological Sciences, with an emphasis in Human Rights.

Erica Romeo is a 3L at St. John's from Long Island, New York. Before law school, Erica studied Political Science at George Washington University. She currently serves as a Senior Articles Editor of the St. John's Law Review and an Assistant Director of Outreach for the Women's Law Society. After graduation this Spring, Erica will be joining Kirkland & Ellis in their Investment Funds Group.

My name is Won F. Han and I am currently in my last year of law school. I was fortunate enough to be selected for the accelerated Two-Year J.D. Program. Throughout my time at Touro, I joined the Trial Advocacy Practice Society Honors Program and now serve on the E-Board as the Outreach Coordinator. This past summer, I was a legal intern for the clinical programs available here at Touro, where I assisted my supervising attorney in landlord-tenant and special-education cases and served as a mentor to high school students preparing for mock trials as part of the Justice Institute Program. Prior to law school, I graduated from St. John's University with a BA in Legal Studies. I am particularly interested in pursuing a career as a litigator with a focus on personal injury cases. Upon graduation, I plan to make an impact in the Hispanic community and assist Spanish-speaking clients as well as continue to serve as a mentor to students who wish to engage in mock trials.

Waheda Islam is a 3L student at Touro Law Center. Graduate of John Jay College of Criminal Justice. Member of the NYC and Nassau Bar Association. Waheda interned at Jeffries & Corigliano, LLP, McCabe, Collins, McGeough & Fowler, LLP, did an externship at Hasbani & Light, P.C. and currently doing a child support medication clinic.

My name is Madison Scarfaro and I am currently a second year student at Touro University Jacob D. Fuchsberg Law Center. I am originally from Whitehall, Pennsylvania, but moved to Long Island for law school. I attended Wilkes University and double majored in Political Science & Criminology and double minored in Sociology & Women's and Gender Studies. At Touro, I am a Junior Staff Member for *Touro Law Review*; the President of Women's Bar Association, Sports and Entertainment Law Society Secretary, and a Touro Law Center Student Ambassador. I also do pro bono work through the Breaking Barriers Pro Bono Project.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. 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.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL. *v.* JACKSON WOMEN'S HEALTH ORGANIZATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19–1392. Argued December 1, 2021—Decided June 24, 2022

Mississippi's Gestational Age Act provides that "[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." Miss. Code Ann. §41–41–191. Respondents—Jackson Women's Health Organization, an abortion clinic, and one of its doctors—challenged the Act in Federal District Court, alleging that it violated this Court's precedents establishing a constitutional right to abortion, in particular *Roe* v. *Wade*, 410 U. S. 113, and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act, reasoning that Mississippi's 15-week restriction on abortion violates this Court's cases forbidding States to ban abortion pre-viability. The Fifth Circuit affirmed. Before this Court, petitioners defend the Act on the grounds that *Roe* and *Casey* were wrongly decided and that the Act is constitutional because it satisfies rational-basis review.

*Held*: The Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives. Pp. 8–79.

(a) The critical question is whether the Constitution, properly understood, confers a right to obtain an abortion. *Casey*'s controlling opinion skipped over that question and reaffirmed *Roe* solely on the basis of *stare decisis*. A proper application of *stare decisis*, however, requires an assessment of the strength of the grounds on which *Roe*

Syllabus

was based. The Court therefore turns to the question that the *Casey* plurality did not consider. Pp. 8–32.

(1) First, the Court reviews the standard that the Court's cases have used to determine whether the Fourteenth Amendment's reference to "liberty" protects a particular right. The Constitution makes no express reference to a right to obtain an abortion, but several constitutional provisions have been offered as potential homes for an implicit constitutional right. *Roe* held that the abortion right is part of a right to privacy that springs from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. See 410 U. S., at 152–153. The *Casey* Court grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause. Others have suggested that support can be found in the Fourteenth Amendment's Equal Protection Clause, but that theory is squarely foreclosed by the Court's precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the heightened scrutiny that applies to such classifications. See *Geduldig* v. *Aiello*, 417 U. S. 484, 496, n. 20; *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 273–274. Rather, regulations and prohibitions of abortion are governed by the same standard of review as other health and safety measures. Pp. 9–11.

(2) Next, the Court examines whether the right to obtain an abortion is rooted in the Nation's history and tradition and whether it is an essential component of "ordered liberty." The Court finds that the right to abortion is not deeply rooted in the Nation's history and tradition. The underlying theory on which *Casey* rested—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial.

The Court's decisions have held that the Due Process Clause protects two categories of substantive rights—those rights guaranteed by the first eight Amendments to the Constitution and those rights deemed fundamental that are not mentioned anywhere in the Constitution. In deciding whether a right falls into either of these categories, the question is whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to this Nation's "scheme of ordered liberty." *Timbs* v. *Indiana*, 586 U. S. ___, ___ (internal quotation marks omitted). The term "liberty" alone provides little guidance. Thus, historical inquiries are essential whenever the Court is asked to recognize a new component of the "liberty" interest protected by the Due Process Clause. In interpreting what is meant by "liberty," the Court must guard against the natural human tendency to confuse what the Fourteenth Amendment protects with the Court's own ardent views about the liberty that Americans should enjoy. For this reason,

the Court has been "reluctant" to recognize rights that are not mentioned in the Constitution. *Collins* v. *Harker Heights*, 503 U. S. 115, 125.

Guided by the history and tradition that map the essential components of the Nation's concept of ordered liberty, the Court finds the Fourteenth Amendment clearly does not protect the right to an abortion. Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe*, no federal or state court had recognized such a right. Nor had any scholarly treatise. Indeed, abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time the Fourteenth Amendment was adopted, three-quarters of the States had made abortion a crime at any stage of pregnancy. This consensus endured until the day *Roe* was decided. *Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis.

Respondents' argument that this history does not matter flies in the face of the standard the Court has applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the Fourteenth Amendment. The Solicitor General repeats *Roe*'s claim that it is "doubtful . . . abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus," 410 U. S., at 136, but the great common-law authorities—Bracton, Coke, Hale, and Blackstone—all wrote that a post-quickening abortion was a crime. Moreover, many authorities asserted that even a pre-quickening abortion was "unlawful" and that, as a result, an abortionist was guilty of murder if the woman died from the attempt. The Solicitor General suggests that history supports an abortion right because of the common law's failure to criminalize abortion before quickening, but the insistence on quickening was not universal, see *Mills* v. *Commonwealth*, 13 Pa. 631, 633; *State* v. *Slagle*, 83 N. C. 630, 632, and regardless, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so.

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, 410 U. S., at 154, and *Casey* described it as the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy," 505 U. S., at 851. Ordered

liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." *Roe*, 410 U. S., at 150; *Casey*, 505 U. S., at 852. But the people of the various States may evaluate those interests differently. The Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated. Pp. 11–30.

(3) Finally, the Court considers whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents. The Court concludes the right to obtain an abortion cannot be justified as a component of such a right. Attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. *Casey*, 505 U. S., at 851. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion is different because it destroys what *Roe* termed "potential life" and what the law challenged in this case calls an "unborn human being." None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. Accordingly, those cases do not support the right to obtain an abortion, and the Court's conclusion that the Constitution does not confer such a right does not undermine them in any way. Pp. 30–32.

(b) The doctrine of *stare decisis* does not counsel continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role and protects the interests of those who have taken action in reliance on a past decision. It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 455. It "contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827. And it restrains judicial hubris by respecting the judgment of those who grappled with important questions in the past. But *stare decisis* is not an inexorable command, *Pearson* v. *Callahan*, 555 U. S. 223, 233, and "is at its weakest when [the Court] interpret[s] the Constitution," *Agostini* v. *Felton*, 521 U. S. 203, 235. Some of the Court's most important constitutional decisions have overruled prior precedents. See, *e.g., Brown* v. *Board of Education*, 347 U. S. 483, 491 (overruling the infamous decision in *Plessy* v. *Ferguson*, 163 U. S. 537, and its progeny).

The Court's cases have identified factors that should be considered in deciding when a precedent should be overruled. *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ___, ___–___. Five factors

discussed below weigh strongly in favor of overruling *Roe* and *Casey*. Pp. 39–66.

(1) *The nature of the Court's error*. Like the infamous decision in *Plessy* v. *Ferguson*, *Roe* was also egregiously wrong and on a collision course with the Constitution from the day it was decided. *Casey* perpetuated its errors, calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who disagreed with *Roe*. Pp. 43–45.

(2) *The quality of the reasoning*. Without any grounding in the constitutional text, history, or precedent, *Roe* imposed on the entire country a detailed set of rules for pregnancy divided into trimesters much like those that one might expect to find in a statute or regulation. See 410 U. S., at 163–164. *Roe*'s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Then, after surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee, and did not explain why the sources on which it relied shed light on the meaning of the Constitution. As to precedent, citing a broad array of cases, the Court found support for a constitutional "right of personal privacy." *Id.,* at 152. But *Roe* conflated the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. See *Whalen* v. *Roe*, 429 U. S. 589, 599–600. None of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed "potential life." When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were "consistent with," among other things, "the relative weights of the respective interests involved" and "the demands of the profound problems of the present day." *Roe*, 410 U. S., at 165. These are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body. An even more glaring deficiency was *Roe*'s failure to justify the critical distinction it drew between pre- and post-viability abortions. See *id*., at 163. The arbitrary viability line, which *Casey* termed *Roe*'s central rule, has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. The most obvious problem with any such

argument is that viability has changed over time and is heavily dependent on factors—such as medical advances and the availability of quality medical care—that have nothing to do with the characteristics of a fetus.

When *Casey* revisited *Roe* almost 20 years later, it reaffirmed *Roe*'s central holding, but pointedly refrained from endorsing most of its reasoning. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause. 505 U. S., at 846. The controlling opinion criticized and rejected *Roe*'s trimester scheme, 505 U. S., at 872, and substituted a new and obscure "undue burden" test. *Casey*, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new test with no firm grounding in constitutional text, history, or precedent. Pp. 45–56.

(3) *Workability*. Deciding whether a precedent should be overruled depends in part on whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. *Casey*'s "undue burden" test has scored poorly on the workability scale. The *Casey* plurality tried to put meaning into the "undue burden" test by setting out three subsidiary rules, but these rules created their own problems. And the difficulty of applying *Casey*'s new rules surfaced in that very case. Compare 505 U. S., at 881–887, with *id.,* at 920–922 (Stevens, J., concurring in part and dissenting in part). The experience of the Courts of Appeals provides further evidence that *Casey*'s "line between" permissible and unconstitutional restrictions "has proved to be impossible to draw with precision." *Janus*, 585 U. S., at ___. *Casey* has generated a long list of Circuit conflicts. Continued adherence to *Casey*'s unworkable "undue burden" test would undermine, not advance, the "evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U. S., at 827. Pp. 56–62.

(4) *Effect on other areas of law*. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. See *Ramos* v. *Louisiana*, 590 U. S. ___, ___ (KAVANAUGH, J., concurring in part). Pp. 62–63.

(5) *Reliance interests.* Overruling *Roe* and *Casey* will not upend concrete reliance interests like those that develop in "cases involving property and contract rights." *Payne*, 501 U. S., at 828. In *Casey*, the controlling opinion conceded that traditional reliance interests were

not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." 505 U. S., at 856. Instead, the opinion perceived a more intangible form of reliance, namely, that "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Ibid.* The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women as well as the status of the fetus. The *Casey* plurality's speculative attempt to weigh the relative importance of the interests of the fetus and the mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson* v. *Skrupa*, 372 U. S. 726, 729–730.

The Solicitor General suggests that overruling *Roe* and *Casey* would threaten the protection of other rights under the Due Process Clause. The Court emphasizes that this decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion. Pp. 63–66.

(c) *Casey* identified another concern, namely, the danger that the public will perceive a decision overruling a controversial "watershed" decision, such as *Roe*, as influenced by political considerations or public opinion. 505 U. S., at 866–867. But the Court cannot allow its decisions to be affected by such extraneous concerns. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* would still be the law. The Court's job is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly. Pp. 66–69.

(d) Under the Court's precedents, rational-basis review is the appropriate standard to apply when state abortion regulations undergo constitutional challenge. Given that procuring an abortion is not a fundamental constitutional right, it follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson*, 372 U. S., at 729–730. That applies even when the laws at issue concern matters of great social significance and moral substance. A law regulating abortion, like other health and welfare laws, is entitled to a

Syllabus

"strong presumption of validity." *Heller* v. *Doe*, 509 U. S. 312, 319. It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. *Id.,* at 320.

Mississippi's Gestational Age Act is supported by the Mississippi Legislature's specific findings, which include the State's asserted interest in "protecting the life of the unborn." §2(b)(i). These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail. Pp. 76–78.

(e) Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. The Court overrules those decisions and returns that authority to the people and their elected representatives. Pp. 78–79.

945 F. 3d 265, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which THOMAS, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., and KAVANAUGH, J., filed concurring opinions. ROBERTS, C. J., filed an opinion concurring in the judgment. BREYER, SOTOMAYOR, and KAGAN, JJ., filed a dissenting opinion.

# SUPREME COURT OF THE UNITED STATES

No. 19–1392

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL., PETITIONERS *v.* JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2022]

JUSTICE ALITO delivered the opinion of the Court.

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

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe* v. *Wade*, 410 U. S. 113. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized

such a right, and its survey of history ranged from the constitutionally irrelevant (*e.g.*, its discussion of abortion in antiquity) to the plainly incorrect (*e.g.*, its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point at which a fetus was thought to achieve "viability," *i.e.*, the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting "potential life,"[1] it found that this interest could not justify any restriction on previability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend *Roe*'s reasoning. One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court end[ed] up drafting" if he were "a legislator," but his assessment of *Roe* was memorable and brutal: *Roe* was "not constitutional law" at all and gave "almost no sense of an obligation to try to be."[2]

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State.[3] As

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[1] *Roe* v. *Wade*, 410 U. S. 113, 163 (1973).

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

[3] L. Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 2 (1973) (Tribe).

Justice Byron White aptly put it in his dissent, the decision represented the "exercise of raw judicial power," 410 U. S., at 222, and it sparked a national controversy that has embittered our political culture for a half century.[4]

Eventually, in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), the Court revisited *Roe*, but the Members of the Court split three ways. Two Justices expressed no desire to change *Roe* in any way.[5] Four others wanted to overrule the decision in its entirety.[6] And the three remaining Justices, who jointly signed the controlling opinion, took a third position.[7] Their opinion did not endorse *Roe*'s reasoning, and it even hinted that one or more of its authors might have "reservations" about whether the Constitution protects a right to abortion.[8] But the opinion concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*'s "central holding"—that a State may not constitutionally protect fetal life before "viability"—even if that holding was wrong.[9] Anything less, the opinion claimed, would undermine respect for this Court and the rule of law.

Paradoxically, the judgment in *Casey* did a fair amount of overruling. Several important abortion decisions were

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

[5] See 505 U. S., at 911 (Stevens, J., concurring in part and dissenting in part); *id.,* at 922 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

[6] See *id*., at 944 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); *id.,* at 979 (Scalia, J., concurring in judgment in part and dissenting in part).

[7] See *id*., at 843 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[8] *Id*., at 853.

[9] *Id*., at 860.

overruled *in toto*, and *Roe* itself was overruled in part.[10] *Casey* threw out *Roe*'s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman's right to have an abortion.[11] The decision provided no clear guidance about the difference between a "due" and an "undue" burden. But the three Justices who authored the controlling opinion "call[ed] the contending sides of a national controversy to end their national division" by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.[12]

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.

Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as "viable" outside the womb. In defending this law, the State's primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. On the other side, respondents and the Solicitor General ask us to

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[10] *Id.*, at 861, 870, 873 (overruling *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983), and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986)).

[11] 505 U. S., at 874.

[12] *Id.*, at 867.

reaffirm *Roe* and *Casey*, and they contend that the Mississippi law cannot stand if we do so. Allowing Mississippi to prohibit abortions after 15 weeks of pregnancy, they argue, "would be no different than overruling *Casey* and *Roe* entirely." Brief for Respondents 43. They contend that "no half-measures" are available and that we must either reaffirm or overrule *Roe* and *Casey*. Brief for Respondents 50.

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

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."[13]

*Stare decisis*, the doctrine on which *Casey*'s controlling

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[13] Miss. Code Ann. §41–41–191(4)(b) (2018).

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

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Casey*, 505 U. S., at 979 (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand.

## I

The law at issue in this case, Mississippi's Gestational Age Act, see Miss. Code Ann. §41–41–191 (2018), contains this central provision: "Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." §4(b).[14]

To support this Act, the legislature made a series of factual findings. It began by noting that, at the time of enactment, only six countries besides the United States "permit[ted] nontherapeutic or elective abortion-on-demand after the twentieth week of gestation."[15] §2(a). The legisla-

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

[15] Those other six countries were Canada, China, the Netherlands,

ture then found that at 5 or 6 weeks' gestational age an "unborn human being's heart begins beating"; at 8 weeks the "unborn human being begins to move about in the womb"; at 9 weeks "all basic physiological functions are present"; at 10 weeks "vital organs begin to function," and "[h]air, fingernails, and toenails . . . begin to form"; at 11 weeks "an unborn human being's diaphragm is developing," and he or she may "move about freely in the womb"; and at 12 weeks the "unborn human being" has "taken on 'the human form' in all relevant respects." §2(b)(i) (quoting *Gonzales* v. *Carhart*, 550 U. S. 124, 160 (2007)). It found that most abortions after 15 weeks employ "dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child," and it concluded that the "intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." §2(b)(i)(8).

Respondents are an abortion clinic, Jackson Women's Health Organization, and one of its doctors. On the day the Gestational Age Act was enacted, respondents filed suit in Federal District Court against various Mississippi officials, alleging that the Act violated this Court's precedents establishing a constitutional right to abortion. The District

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North Korea, Singapore, and Vietnam. See A. Baglini, Charlotte Lozier Institute, Gestational Limits on Abortion in the United States Compared to International Norms 6–7 (2014); M. Lee, Is the United States One of Seven Countries That "Allow Elective Abortions After 20 Weeks of Pregnancy?" Wash. Post (Oct. 8, 2017), www.washingtonpost.com/news/fact-checker/wp/2017/10/09/is-the-united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-preganacy (stating that the claim made by the Mississippi Legislature and the Charlotte Lozier Institute was "backed by data"). A more recent compilation from the Center for Reproductive Rights indicates that Iceland and Guinea-Bissau are now also similarly permissive. See The World's Abortion Laws, Center for Reproductive Rights (Feb. 23, 2021), https://reproductiverights.org/maps/worlds-abortion-laws/.

Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act, reasoning that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions" and that 15 weeks' gestational age is "prior to viability." *Jackson Women's Health Org.* v. *Currier*, 349 F. Supp. 3d 536, 539–540 (SD Miss. 2019) (internal quotation marks omitted). The Fifth Circuit affirmed. 945 F. 3d 265 (2019).

We granted certiorari, 593 U. S. ___ (2021), to resolve the question whether "all pre-viability prohibitions on elective abortions are unconstitutional," Pet. for Cert. i. Petitioners' primary defense of the Mississippi Gestational Age Act is that *Roe* and *Casey* were wrongly decided and that "the Act is constitutional because it satisfies rational-basis review." Brief for Petitioners 49. Respondents answer that allowing Mississippi to ban pre-viability abortions "would be no different than overruling *Casey* and *Roe* entirely." Brief for Respondents 43. They tell us that "no half-measures" are available: We must either reaffirm or overrule *Roe* and *Casey*. Brief for Respondents 50.

## II

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. Skipping over that question, the controlling opinion in *Casey* reaffirmed *Roe*'s "central holding" based solely on the doctrine of *stare decisis*, but as we will explain, proper application of *stare decisis* required an assessment of the strength of the grounds on which *Roe* was based. See *infra,* at 45–56.

We therefore turn to the question that the *Casey* plurality did not consider, and we address that question in three steps. First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. Second,

we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as "ordered liberty." Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.

## A

### 1

Constitutional analysis must begin with "the language of the instrument," *Gibbons* v. *Ogden*, 9 Wheat. 1, 186–189 (1824), which offers a "fixed standard" for ascertaining what our founding document means, 1 J. Story, Commentaries on the Constitution of the United States §399, p. 383 (1833). The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.

*Roe,* however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. See 410 U. S., at 152–153. And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.*, at 152.

The Court's discussion left open at least three ways in which some combination of these provisions could protect the abortion right. One possibility was that the right was "founded . . . in the Ninth Amendment's reservation of rights to the people." *Id.,* at 153. Another was that the right was rooted in the First, Fourth, or Fifth Amendment, or in some combination of those provisions, and that this right had been "incorporated" into the Due Process Clause of the Fourteenth Amendment just as many other Bill of Rights provisions had by then been incorporated. *Ibid*; see

also *McDonald* v. *Chicago*, 561 U. S. 742, 763–766 (2010) (majority opinion) (discussing incorporation). And a third path was that the First, Fourth, and Fifth Amendments played no role and that the right was simply a component of the "liberty" protected by the Fourteenth Amendment's Due Process Clause. *Roe*, 410 U. S., at 153. *Roe* expressed the "feel[ing]" that the Fourteenth Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance.[16] The *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause.

We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents' *amici* have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause. See Brief for United States as *Amicus Curiae* 24 (Brief for United States); see also Brief for Equal Protection Constitutional Law Scholars as *Amici Curiae*. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the "heightened scrutiny" that applies to such classifications.[17] The regulation of a medical procedure that

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[16] The Court's words were as follows: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U. S., at 153.

[17] See, *e.g., Sessions* v. *Morales-Santana*, 582 U. S. 47, ___ (2017) (slip op., at 8).

only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other." *Geduldig* v. *Aiello*, 417 U. S. 484, 496, n. 20 (1974). And as the Court has stated, the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women. *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 273–274 (1993) (internal quotation marks omitted). Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.[18]

With this new theory addressed, we turn to *Casey*'s bold assertion that the abortion right is an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. 505 U. S., at 846; Brief for Respondents 17; Brief for United States 21–22.

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

The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243, 247–251 (1833) (opinion for the Court by Marshall, C. J.), but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. See *McDonald*, 561

[18] We discuss this standard in Part VI of this opinion.

U. S., at 763–767, and nn. 12–13. The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty." *Timbs* v. *Indiana*, 586 U. S. ___, ___ (2019) (slip op., at 3) (internal quotation marks omitted); *McDonald*, 561 U. S., at 764, 767 (internal quotation marks omitted); *Glucksberg*, 521 U. S., at 721 (internal quotation marks omitted).[19] And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue.

Justice Ginsburg's opinion for the Court in *Timbs* is a recent example. In concluding that the Eighth Amendment's protection against excessive fines is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition," 586 U. S., at ___ (slip op., at 7) (internal quotation marks omitted), her opinion traced the right back to Magna Carta, Blackstone's Commentaries, and 35 of the 37 state constitutions in effect at the ratification of the Fourteenth Amendment. 586 U. S., at ___–___ (slip op., at 3–7).

A similar inquiry was undertaken in *McDonald*, which held that the Fourteenth Amendment protects the right to keep and bear arms. The lead opinion surveyed the origins of the Second Amendment, the debates in Congress about

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[19] See also, *e.g., Duncan* v. *Louisiana*, 391 U. S. 145, 148 (1968) (asking whether "a right is among those 'fundamental principles of liberty and justice which lie at the base of our civil and political institutions'"); *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937) (requiring "a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" (quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934))).

the adoption of the Fourteenth Amendment, the state constitutions in effect when that Amendment was ratified (at least 22 of the 37 States protected the right to keep and bear arms), federal laws enacted during the same period, and other relevant historical evidence. 561 U. S., at 767–777. Only then did the opinion conclude that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id.*, at 778; see also *id.*, at 822–850 (THOMAS, J., concurring in part and concurring in judgment) (surveying history and reaching the same result under the Fourteenth Amendment's Privileges or Immunities Clause).

*Timbs* and *McDonald* concerned the question whether the Fourteenth Amendment protects rights that are expressly set out in the Bill of Rights, and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution. Thus, in *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of "Anglo-American common law tradition," 521 U. S., at 711, and made clear that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition," *id.*, at 720–721.

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. "Liberty" is a capacious term. As Lincoln once said: "We all declare for Liberty; but in using the same word we do not all mean the same thing."[20] In a well-known essay, Isaiah Berlin reported that "[h]istorians of ideas" had cataloged more than

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

200 different senses in which the term had been used.[21]

In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been "reluctant" to recognize rights that are not mentioned in the Constitution. *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992). "Substantive due process has at times been a treacherous field for this Court," *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion), and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives. See *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214, 225–226 (1985). As the Court cautioned in *Glucksberg*, "[w]e must . . . exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." 521 U. S., at 720 (internal quotation marks and citation omitted).

On occasion, when the Court has ignored the "[a]ppropriate limits" imposed by "'respect for the teachings of history,'" *Moore,* 431 U. S., at 503 (plurality opinion), it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner* v. *New York*, 198 U. S. 45 (1905). The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect

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[21] Four Essays on Liberty 121 (1969).

the right to an abortion.[22]

B

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

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[22] That is true regardless of whether we look to the Amendment's Due Process Clause or its Privileges or Immunities Clause. Some scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights. See, *e.g., McDonald* v. *Chicago*, 561 U. S. 742, 813–850 (2010) (THOMAS, J., concurring in part and concurring in judgment); *Duncan*, 391 U. S., at 165–166 (Black, J., concurring); A. Amar, Bill of Rights: Creation and Reconstruction 163–180 (1998) (Amar); J. Ely, Democracy and Distrust 22–30 (1980); 2 W. Crosskey, Politics and the Constitution in the History of the United States 1089–1095 (1953). But even on that view, such a right would need to be rooted in the Nation's history and tradition. See *Corfield* v. *Coryell*, 6 F. Cas. 546, 551–552 (No. 3,230) (CC ED Pa. 1823) (describing unenumerated rights under the Privileges and Immunities Clause, Art. IV, §2, as those "fundamental" rights "which have, at all times, been enjoyed by the citizens of the several states"); Amar 176 (relying on *Corfield* to interpret the Privileges or Immunities Clause); cf. *McDonald*, 561 U. S., at 819–820, 832, 854 (opinion of THOMAS, J.) (reserving the question whether the Privileges or Immunities Clause protects "any rights besides those enumerated in the Constitution").

[23] See R. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N. C. L. Rev. 730 (1968) (Lucas); see also D. Garrow, Liberty and Sexuality 334–335 (1994) (Garrow) (stating that Lucas was "undeniably the first person to fully

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

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

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a

We begin with the common law, under which abortion was a crime at least after "quickening"—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.[24]

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articulate on paper" the argument that "a woman's right to choose abortion was a fundamental individual freedom protected by the U. S. Constitution's guarantee of personal liberty").

[24]The exact meaning of "quickening" is subject to some debate. Compare Brief for Scholars of Jurisprudence as *Amici Curiae* 12–14, and n. 32 (emphasis deleted) ("'a quick child'" meant simply a "live" child, and under the era's outdated knowledge of embryology, a fetus was thought to become "quick" at around the sixth week of pregnancy), with Brief for American Historical Association et al. as *Amici Curiae* 6, n. 2 ("quick" and "quickening" consistently meant "the woman's perception of fetal movement"). We need not wade into this debate. First, it suffices for present purposes to show that abortion was criminal by *at least* the 16th or 18th week of pregnancy. Second, as we will show, during the relevant period—*i.e.,* the period surrounding the enactment of the Fourteenth Amendment—the quickening distinction was abandoned as States criminalized abortion at all stages of pregnancy. See *infra*, at 21–

The "eminent common-law authorities (Blackstone, Coke, Hale, and the like)," *Kahler* v. *Kansas*, 589 U. S. ___, ___ (2020) (slip op., at 7), *all* describe abortion after quickening as criminal. Henry de Bracton's 13th-century treatise explained that if a person has "struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide." 2 De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879); see also 1 Fleta, c. 23, reprinted in 72 Selden Soc. 60–61 (H. Richardson & G. Sayles eds. 1955) (13th-century treatise).[25]

Sir Edward Coke's 17th-century treatise likewise asserted that abortion of a quick child was "murder" if the "childe be born alive" and a "great misprision" if the "childe dieth in her body." 3 Institutes of the Laws of England 50–51 (1644). ("Misprision" referred to "some heynous offence under the degree of felony." *Id.*, at 139.) Two treatises by Sir Matthew Hale likewise described abortion of a quick child who died in the womb as a "great crime" and a "great misprision." Pleas of the Crown 53 (P. Glazebrook ed. 1972); 1 History of the Pleas of the Crown 433 (1736) (Hale). And writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a "quick" child was "by the ancient law homicide or manslaughter" (citing Bracton), and at least a very "heinous misdemeanor" (citing Coke). 1 Commentaries on the Laws of England 129–130 (7th ed. 1775) (Blackstone).

English cases dating all the way back to the 13th century corroborate the treatises' statements that abortion was a crime. See generally J. Dellapenna, Dispelling the Myths

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25.

[25] Even before Bracton's time, English law imposed punishment for the killing of a fetus. See Leges Henrici Primi 222–223 (L. Downer ed. 1972) (imposing penalty for any abortion and treating a woman who aborted a "quick" child "as if she were a murderess").

of Abortion History 126, and n. 16, 134–142, 188–194, and nn. 84–86 (2006) (Dellapenna); J. Keown, Abortion, Doctors and the Law 3–12 (1988) (Keown). In 1732, for example, Eleanor Beare was convicted of "destroying the Foetus in the Womb" of another woman and "thereby causing her to miscarry."[26] For that crime and another "misdemeanor," Beare was sentenced to two days in the pillory and three years' imprisonment.[27]

Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*. Cf. *Glucksberg*, 521 U. S., at 713 (removal of "common law's harsh sanctions did not represent an acceptance of suicide"). Quite to the contrary, in the 1732 case mentioned above, the judge said of the charge of abortion (with no mention of quickening) that he had "never met with a case so barbarous and unnatural."[28] Similarly, an indictment from 1602, which did not distinguish between a pre-quickening and post-quickening abortion, described abortion as "pernicious" and "against the peace of our Lady the Queen, her crown and dignity." Keown 7 (discussing *R.* v. *Webb*, Calendar of Assize Records, Surrey Indictments 512 (1980)).

That the common law did not condone even pre-quickening abortions is confirmed by what one might call a proto-felony-murder rule. Hale and Blackstone explained a way in which a pre-quickening abortion could rise to the level of a homicide. Hale wrote that if a physician gave a woman "with child" a "potion" to cause an abortion, and the woman died, it was "murder" because the potion was given "*unlawfully* to destroy her child within her." 1 Hale 429–430 (emphasis added). As Blackstone explained, to be

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[26] 2 Gentleman's Magazine 931 (Aug. 1732).

[27] *Id.*, at 932.

[28] *Ibid.*

"murder" a killing had to be done with "malice aforethought, . . . either express or implied." 4 Blackstone 198 (emphasis deleted). In the case of an abortionist, Blackstone wrote, "the law will imply [malice]" for the same reason that it would imply malice if a person who intended to kill one person accidentally killed a different person:

> "[I]f one shoots at A and misses *him*, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. *So also*, if one gives *a woman with child* a medicine to procure abortion, and it operates so violently as to kill the woman, *this is murder* in the person who gave it." *Id.*, at 200–201 (emphasis added; footnote omitted).[29]

Notably, Blackstone, like Hale, did not state that this proto-felony-murder rule required that the woman be "with quick child"—only that she be "with child." *Id.*, at 201. And it is revealing that Hale and Blackstone treated abortionists differently from *other* physicians or surgeons who caused the death of a patient "without any intent of doing [the patient] any bodily hurt." Hale 429; see 4 Blackstone 197. These other physicians—even if "unlicensed"—would not be "guilty of murder or manslaughter." Hale 429. But a physician performing an abortion would, precisely because his aim was an "unlawful" one.

In sum, although common-law authorities differed on the severity of punishment for abortions committed at different

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[29] Other treatises restated the same rule. See 1 W. Russell & C. Greaves, Crimes and Misdemeanors 540 (5th ed. 1845) ("So where a person gave medicine to a woman to procure an abortion, and where a person put skewers into the woman for the same purpose, by which in both cases the women were killed, these acts were clearly held to be murder" (footnotes omitted)); 1 E. East, Pleas of the Crown 230 (1803) (similar).

points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy.

b

In this country, the historical record is similar. The "most important early American edition of Blackstone's Commentaries," *District of Columbia* v. *Heller*, 554 U. S. 570, 594 (2008), reported Blackstone's statement that abortion of a quick child was at least "a heinous misdemeanor," 2 St. George Tucker, Blackstone's Commentaries 129–130 (1803), and that edition also included Blackstone's discussion of the proto-felony-murder rule, 5 *id.*, at 200–201. Manuals for justices of the peace printed in the Colonies in the 18th century typically restated the common-law rule on abortion, and some manuals repeated Hale's and Blackstone's statements that anyone who prescribed medication "unlawfully to destroy the child" would be guilty of murder if the woman died. See, *e.g.*, J. Parker, Conductor Generalis 220 (1788); 2 R. Burn, Justice of the Peace, and Parish Officer 221–222 (7th ed. 1762) (English manual stating the same).[30]

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[30] For manuals restating one or both rules, see J. Davis, Criminal Law 96, 102–103, 339 (1838); Conductor Generalis 194–195 (1801) (printed in Philadelphia); Conductor Generalis 194–195 (1794) (printed in Albany); Conductor Generalis 220 (1788) (printed in New York); Conductor Generalis 198 (1749) (printed in New York); G. Webb, Office and Authority of a Justice of Peace 232 (1736) (printed in Williamsburg); Conductor Generalis 161 (1722) (printed in Philadelphia); see also J. Conley, Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America, 6 J. Legal Hist. 257, 265, 267 (1985) (noting that these manuals were the justices' "primary source of legal reference" and of "practical value for a wider audience than the justices").

For cases stating the proto-felony-murder rule, see, *e.g.*, *Commonwealth* v. *Parker*, 50 Mass. 263, 265 (1845); *People* v. *Sessions*, 58 Mich.

The few cases available from the early colonial period corroborate that abortion was a crime. See generally Dellapenna 215–228 (collecting cases). In Maryland in 1652, for example, an indictment charged that a man "Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb." *Proprietary* v. *Mitchell*, 10 Md. Archives 80, 183 (1652) (W. Browne ed. 1891). And by the 19th century, courts frequently explained that the common law made abortion of a quick child a crime. See, *e.g.*, *Smith* v. *Gaffard*, 31 Ala. 45, 51 (1857); *Smith* v. *State*, 33 Me. 48, 55 (1851); *State* v. *Cooper*, 22 N. J. L. 52, 52–55 (1849); *Commonwealth* v. *Parker*, 50 Mass. 263, 264–268 (1845).

c

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages,[31] and thus, as one court put it in 1872: "[U]ntil the period of quickening there is no *evidence* of life; and whatever may be said of the feotus, the law has fixed upon this period of gestation as the time when the child is endowed with life" because "foetal movements are the first clearly marked and well defined *evidences of life*." *Evans* v. *People*, 49 N. Y. 86, 90 (emphasis added); *Cooper*, 22 N. J. L., at 56 ("In contemplation of law life commences at the moment of quickening, at that moment when the embryo gives *the first physical proof of life*, no matter when it first received it" (emphasis added)).

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594, 595–596, 26 N. W. 291, 292–293 (1886); *State* v. *Moore*, 25 Iowa 128, 131–132 (1868); *Smith* v. *State*, 33 Me. 48, 54–55 (1851).

[31] See E. Rigby, A System of Midwifery 73 (1841) ("Under all circumstances, the diagnosis of pregnancy must ever be difficult and obscure during the early months"); see also *id.,* at 74–80 (discussing rudimentary techniques for detecting early pregnancy); A. Taylor, A Manual of Medical Jurisprudence 418–421 (6th Am. ed. 1866) (same).

The Solicitor General offers a different explanation of the basis for the quickening rule, namely, that before quickening the common law did not regard a fetus "as having a 'separate and independent existence.'" Brief for United States 26 (quoting *Parker*, 50 Mass., at 266). But the case on which the Solicitor General relies for this proposition also suggested that the criminal law's quickening rule was out of step with the treatment of prenatal life in other areas of law, noting that "to many purposes, in reference to civil rights, an infant *in ventre sa mere* is regarded as a person in being." *Ibid*. (citing 1 Blackstone 129); see also *Evans,* 49 N. Y., at 89; *Mills* v. *Commonwealth*, 13 Pa. 631, 633 (1850); *Morrow* v. *Scott*, 7 Ga. 535, 537 (1849); *Hall* v. *Hancock*, 32 Mass. 255, 258 (1834); *Thellusson* v. *Woodford*, 4 Ves. 227, 321–322, 31 Eng. Rep. 117, 163 (1789).

At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. During that period, treatise writers and commentators criticized the quickening distinction as "neither in accordance with the result of medical experience, nor with the principles of the common law." F. Wharton, Criminal Law §1220, p. 606 (rev. 4th ed. 1857) (footnotes omitted); see also J. Beck, Researches in Medicine and Medical Jurisprudence 26–28 (2d ed. 1835) (describing the quickening distinction as "absurd" and "injurious").[32] In 1803, the British Parliament made abortion

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[32] See *Mitchell* v. *Commonwealth*, 78 Ky. 204, 209–210 (1879) (acknowledging the common-law rule but arguing that "the law should punish abortions and miscarriages, willfully produced, at any time during the period of gestation"); *Mills* v. *Commonwealth*, 13 Pa., 631, 633 (1850) (the quickening rule "never ought to have been the law anywhere"); J. Bishop, Commentaries on the Law of Statutory Crimes §744, p. 471 (1873) ("If we look at the reason of the law, we shall prefer" a rule that "discard[s] this doctrine of the necessity of a quickening"); I. Dana, Report of the Committee on the Production of Abortion, in 5 Transactions

a crime at all stages of pregnancy and authorized the imposition of severe punishment. See Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803). One scholar has suggested that Parliament's decision "may partly have been attributable to the medical man's concern that fetal life should be protected by the law at all stages of gestation." Keown 22.

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. See Appendix A, *infra* (listing state statutory provisions in chronological order).[33] By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.[34] See *ibid.* Of the nine States that had not yet

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of the Maine Medical Association 37–39 (1866); Report on Criminal Abortion, in 12 Transactions of the American Medical Association 75–77 (1859); W. Guy, Principles of Medical Forensics 133–134 (1845); J. Chitty, Practical Treatise on Medical Jurisprudence 438 (2d Am. ed. 1836); 1 T. Beck & J. Beck, Elements of Medical Jurisprudence 293 (5th ed. 1823); 2 T. Percival, The Works, Literary, Moral and Medical 430 (1807); see also Keown 38–39 (collecting English authorities).

[33] See generally Dellapenna 315–319 (cataloging the development of the law in the States); E. Quay, Justifiable Abortion—Medical and Legal Foundations, 49 Geo. L. J. 395, 435–437, 447–520 (1961) (Quay) (same); J. Witherspoon, Reexamining *Roe*: Nineteenth-Century Abortion Statutes and The Fourteenth Amendment, 17 St. Mary's L. J. 29, 34–36 (1985) (Witherspoon) (same).

[34] Some scholars assert that only 27 States prohibited abortion at all stages. See, *e.g.*, Dellapenna 315; Witherspoon 34–35, and n. 15. Those scholars appear to have overlooked Rhode Island, which criminalized abortion at all stages in 1861. See Acts and Resolves R. I. 1861, ch. 371, §1, p. 133 (criminalizing the attempt to "procure the miscarriage" of "any pregnant woman" or "any woman supposed by such person to be pregnant," without mention of quickening). The *amicus* brief for the American Historical Association asserts that only 26 States prohibited abortion at all stages, but that brief incorrectly excludes West Virginia and Nebraska from its count. Compare Brief for American Historical Association 27–28 (citing Quay), with Appendix A, *infra*.

criminalized abortion at all stages, all but one did so by 1910. See *ibid.*

The trend in the Territories that would become the last 13 States was similar: All of them criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico). See Appendix B, *infra*; see also *Casey*, 505 U. S., at 952 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); Dellapenna 317–319. By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother." 410 U. S., at 139.[35]

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. See *id.*, at 118, and n. 2 (listing States). And though *Roe* discerned a "trend toward liberalization" in about "one-third of the States," those States still criminalized some abortions and regulated them more stringently than *Roe* would allow. *Id.*, at 140, and n. 37; Tribe 2. In short, the

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[35] The statutes of three States (Massachusetts, New Jersey, and Pennsylvania) prohibited abortions performed "unlawfully" or "without lawful justification." *Roe*, 410 U. S., at 139 (internal quotation marks omitted). In Massachusetts, case law held that abortion was allowed when, according to the judgment of physicians in the relevant community, the procedure was necessary to preserve the woman's life or her physical or emotional health. *Commonwealth* v. *Wheeler*, 315 Mass. 394, 395, 53 N. E. 2d 4, 5 (1944). In the other two States, however, there is no clear support in case law for the proposition that abortion was lawful where the mother's life was not at risk. See *State* v. *Brandenberg,* 137 N. J. L. 124, 58 A. 2d 709 (1948); *Commonwealth* v. *Trombetta*, 131 Pa. Super. 487, 200 A. 107 (1938).

Statutes in the two remaining jurisdictions (the District of Columbia and Alabama) permitted "abortion to preserve the mother's health." *Roe*, 410 U. S., at 139. Case law in those jurisdictions does not clarify the breadth of these exceptions.

"Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 793 (1986) (White, J., dissenting).

d

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. The Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: "Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice]." 521 U. S., at 719.

3

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

Neither respondents nor the Solicitor General disputes the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy. See Brief for Petitioners 12–13; see also Brief for American Historical Association et al. as *Amici Curiae* 27–28, and nn. 14–15 (conceding that 26 out of 37 States prohibited abortion before quickening); Tr. of Oral Arg. 74–75 (respondents' counsel conceding the same). Instead, respondents are forced to argue that it "does [not] matter that some States prohibited abortion at the time *Roe* was decided or when the Fourteenth Amendment was adopted." Brief for Respondents 21. But that argument flies in the face of the standard we have applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the Fourteenth Amendment.

Not only are respondents and their *amici* unable to show

that a constitutional right to abortion was established when the Fourteenth Amendment was adopted, but they have found no support for the existence of an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise. The earliest sources called to our attention are a few district court and state court decisions decided shortly before *Roe* and a small number of law review articles from the same time period.[36]

A few of respondents' *amici* muster historical arguments, but they are very weak. The Solicitor General repeats *Roe*'s claim that it is "'doubtful' . . . 'abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.'" Brief for United States 26 (quoting *Roe*, 410 U. S., at 136). But as we have seen, great common-law authorities like Bracton, Coke, Hale, and Blackstone all wrote that a post-quickening abortion was a crime—and a serious one at that. Moreover, Hale and Blackstone (and many other authorities following them) asserted that even a pre-quickening abortion was "unlawful" and that, as a result, an abortionist was guilty of murder if the woman died from the attempt.

Instead of following these authorities, *Roe* relied largely on two articles by a pro-abortion advocate who claimed that Coke had intentionally misstated the common law because of his strong anti-abortion views.[37] These articles have

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[36] See 410 U. S., at 154–155 (collecting cases decided between 1970 and 1973); C. Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About To Arise From the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty? 17 N. Y. L. Forum 335, 337–339 (1971) (Means II); C. Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality, 14 N. Y. L. Forum 411 (1968) (Means I); Lucas 730.

[37] See 410 U. S., at 136, n. 26 (citing Means II); 410 U. S., at 132–133, n. 21 (citing Means I).

been discredited,[38] and it has come to light that even members of Jane Roe's legal team did not regard them as serious scholarship. An internal memorandum characterized this author's work as donning "the guise of impartial scholarship while advancing the proper ideological goals."[39] Continued reliance on such scholarship is unsupportable.

The Solicitor General next suggests that history supports an abortion right because the common law's failure to criminalize abortion before quickening means that "at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages."[40] Brief for United States 26–27; see also Brief for Respondents 21. But the insistence on quickening was not universal, see *Mills*, 13 Pa., at 633; *State* v. *Slagle*, 83 N. C. 630, 632 (1880), and regardless, the fact that many States in the

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[38] For critiques of Means's work, see, *e.g.*, Dellapenna 143–152, 325–331; Keown 3–12; J. Finnis, "Shameless Acts" in Colorado: Abuse of Scholarship in Constitutional Cases, 7 Academic Questions 10, 11–12 (1994); R. Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment, 63 Cal. L. Rev. 1250, 1267–1282 (1975); R. Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Ford. L. Rev. 807, 814–829 (1973).

[39] Garrow 500–501, and n. 41 (internal quotation marks omitted).

[40] In any event, *Roe*, *Casey*, and other related abortion decisions imposed substantial restrictions on a State's capacity to regulate abortions performed after quickening. See, *e.g.*, *June Medical Services L. L. C.* v. *Russo*, 591 U. S. ___ (2020) (holding a law requiring doctors performing abortions to secure admitting privileges to be unconstitutional); *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582 (2016) (similar); *Casey*, 505 U. S., at 846 (declaring that prohibitions on "abortion before viability" are unconstitutional); *id.*, at 887–898 (holding that a spousal notification provision was unconstitutional). In addition, *Doe* v. *Bolton*, 410 U. S. 179 (1973), has been interpreted by some to protect a broad right to obtain an abortion at any stage of pregnancy provided that a physician is willing to certify that it is needed due to a woman's "emotional" needs or "familial" concerns. *Id.*, at 192. See, *e.g.*, *Women's Medical Professional Corp.* v. *Voinovich*, 130 F. 3d 187, 209 (CA6 1997), cert. denied, 523 U. S. 1036 (1998); but see *id.*, at 1039 (THOMAS, J., dissenting from denial of certiorari).

late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so. When legislatures began to exercise that authority as the century wore on, no one, as far as we are aware, argued that the laws they enacted violated a fundamental right. That is not surprising since common-law authorities had repeatedly condemned abortion and described it as an "unlawful" act without regard to whether it occurred before or after quickening. See *supra*, at 16–21.

Another *amicus* brief relied upon by respondents (see Brief for Respondents 21) tries to dismiss the significance of the state criminal statutes that were in effect when the Fourteenth Amendment was adopted by suggesting that they were enacted for illegitimate reasons. According to this account, which is based almost entirely on statements made by one prominent proponent of the statutes, important motives for the laws were the fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading White Protestant women to "shir[k their] maternal duties." Brief for American Historical Association et al. as *Amici Curiae* 20.

Resort to this argument is a testament to the lack of any real historical support for the right that *Roe* and *Casey* recognized. This Court has long disfavored arguments based on alleged legislative motives. See, *e.g.*, *Erie* v. *Pap's A. M.*, 529 U. S. 277, 292 (2000) (plurality opinion); *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 652 (1994); *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968); *Arizona* v. *California*, 283 U. S. 423, 455 (1931) (collecting cases). The Court has recognized that inquiries into legislative motives "are a hazardous matter." *O'Brien*, 391 U. S., at 383. Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we

have been reluctant to attribute those motives to the legislative body as a whole. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Id.,* at 384.

Here, the argument about legislative motive is not even based on statements by legislators, but on statements made by a few supporters of the new 19th-century abortion laws, and it is quite a leap to attribute these motives to all the legislators whose votes were responsible for the enactment of those laws. Recall that at the time of the adoption of the Fourteenth Amendment, over three-quarters of the States had adopted statutes criminalizing abortion (usually at all stages of pregnancy), and that from the early 20th century until the day *Roe* was handed down, every single State had such a law on its books. Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?

There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point. See, *e.g.*, *Nash* v. *Meyer*, 54 Idaho 283, 301, 31 P. 2d 273, 280 (1934); *State* v. *Ausplund*, 86 Ore. 121, 131–132, 167 P. 1019, 1022–1023 (1917); *Trent* v. *State*, 15 Ala. App. 485, 488, 73 S. 834, 836 (1916); *State* v. *Miller*, 90 Kan. 230, 233, 133 P. 878, 879 (1913); *State* v. *Tippie*, 89 Ohio St. 35, 39–40, 105 N. E. 75, 77 (1913); *State* v. *Gedicke*, 43 N. J. L. 86, 90 (1881); *Dougherty* v. *People*, 1 Colo. 514, 522–523 (1873); *State* v. *Moore*, 25 Iowa 128, 131–132 (1868); *Smith,* 33 Me., at 57; see also *Memphis Center for Reproductive Health* v. *Slatery*, 14 F. 4th 409, 446, and n. 11 (CA6 2021) (Thapar, J., concurring in judgment in part and dissenting in part) (citing cases).

One may disagree with this belief (and our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests),

but even *Roe* and *Casey* did not question the good faith of abortion opponents. See, *e.g., Casey*, 505 U. S., at 850 ("Men and women of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy even in its earliest stage"). And we see no reason to discount the significance of the state laws in question based on these *amici*'s suggestions about legislative motive.[41]

C

1

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, 410 U. S., at 154, and *Casey* described it as the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy," 505 U. S., at 851. *Casey* elaborated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Ibid.*

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free *to think* and *to say* what they

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[41] Other *amicus* briefs present arguments about the motives of proponents of liberal access to abortion. They note that some such supporters have been motivated by a desire to suppress the size of the African-American population. See Brief for African-American Organization et al. as *Amici Curiae* 14–21; see also *Box* v. *Planned Parenthood of Ind. and Ky., Inc.*, 587 U. S. ___, ___–___ (2019) (THOMAS, J., concurring) (slip op., at 1–4). And it is beyond dispute that *Roe* has had that demographic effect. A highly disproportionate percentage of aborted fetuses are Black. See, *e.g.*, Dept. of Health and Human Servs., Centers for Disease Control and Prevention (CDC), K. Kortsmit et al., Abortion Surveillance—United States, 2019, 70 Morbidity and Mortality Report, Surveillance Summaries, p. 20 (Nov. 26, 2021) (Table 6). For our part, we do not question the motives of either those who have supported or those who have opposed laws restricting abortions.

wish about "existence," "meaning," the "universe," and "the mystery of human life," they are not always free *to act* in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty."

Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." *Roe*, 410 U. S., at 150 (emphasis deleted); *Casey*, 505 U. S., at 852. But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being." Miss. Code Ann. §41–41–191(4)(b). Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, *Loving* v. *Virginia*, 388 U. S. 1 (1967); the right to marry while in prison, *Turner* v. *Safley*, 482 U. S. 78 (1987); the right to obtain contraceptives, *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972), *Carey* v. *Population Services Int'l*, 431 U. S. 678 (1977); the right to reside with relatives, *Moore* v. *East Cleveland*, 431 U. S. 494 (1977); the right to make decisions about the education of one's children, *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); the right not to be sterilized without consent, *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942); and the right in certain circumstances not to undergo involuntary surgery, forced

administration of drugs, or other substantially similar procedures, *Winston* v. *Lee*, 470 U. S. 753 (1985), *Washington* v. *Harper*, 494 U. S. 210 (1990), *Rochin* v. *California*, 342 U. S. 165 (1952). Respondents and the Solicitor General also rely on post-*Casey* decisions like *Lawrence* v. *Texas*, 539 U. S. 558 (2003) (right to engage in private, consensual sexual acts), and *Obergefell* v. *Hodges*, 576 U. S. 644 (2015) (right to marry a person of the same sex). See Brief for Respondents 18; Brief for United States 23–24.

These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. *Casey*, 505 U. S., at 851. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. See *Compassion in Dying* v. *Washington*, 85 F. 3d 1440, 1444 (CA9 1996) (O'Scannlain, J., dissenting from denial of rehearing en banc). None of these rights has any claim to being deeply rooted in history. *Id.*, at 1440, 1445.

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." See *Roe*, 410 U. S., at 159 (abortion is "inherently different"); *Casey*, 505 U. S., at 852 (abortion is "a unique act"). None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

2

In drawing this critical distinction between the abortion right and other rights, it is not necessary to dispute *Casey*'s claim (which we accept for the sake of argument) that "the

specific practices of States at the time of the adoption of the Fourteenth Amendment" do not "mar[k] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." 505 U. S., at 848. Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.

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

Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy;[42] that leave for pregnancy and childbirth are now guaranteed by law in many cases;[43] that the costs of medical care asso-

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[42] See, *e.g.*, Pregnancy Discrimination Act, 92 Stat. 2076, 42 U. S. C. §2000e(k) (federal law prohibiting pregnancy discrimination in employment); Dept. of Labor, Women's Bureau, Employment Protections for Workers Who Are Pregnant or Nursing, https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections (showing that 46 States and the District of Columbia have employment protections against pregnancy discrimination).

[43] See, *e.g.*, Family and Medical Leave Act of 1993, 107 Stat. 9, 29 U. S. C. §2612 (federal law guaranteeing employment leave for pregnancy and birth); Bureau of Labor Statistics, Access to Paid and Unpaid Family Leave in 2018, https://www.bls.gov/opub/ted/2019/access-to-paid-

ciated with pregnancy are covered by insurance or government assistance;[44] that States have increasingly adopted "safe haven" laws, which generally allow women to drop off babies anonymously;[45] and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.[46] They also claim that many people now have a new appreciation of fetal life and that when prospective parents who want to have a child view a sonogram, they typically have no doubt that what they see is their daughter or son.

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and-unpaid-family-leave-in-2018.htm (showing that 89 percent of civilian workers had access to unpaid family leave in 2018).

[44] The Affordable Care Act (ACA) requires non-grandfathered health plans in the individual and small group markets to cover certain essential health benefits, which include maternity and newborn care. See 124 Stat. 163, 42 U. S. C. §18022(b)(1)(D). The ACA also prohibits annual limits, see §300gg–11, and limits annual cost-sharing obligations on such benefits, §18022(c). State Medicaid plans must provide coverage for pregnancy-related services—including, but not limited to, prenatal care, delivery, and postpartum care—as well as services for other conditions that might complicate the pregnancy. 42 CFR §§440.210(a)(2)(i)–(ii) (2020). State Medicaid plans are also prohibited from imposing deductions, cost-sharing, or similar charges for pregnancy-related services for pregnant women. 42 U. S. C. §§1396o(a)(2)(B), (b)(2)(B).

[45] Since *Casey*, all 50 States and the District of Columbia have enacted such laws. Dept. of Health and Human Servs., Children's Bureau, Infant Safe Haven Laws 1–2 (2016), https://www.childwelfare.gov/pubPDFs/safehaven.pdf (noting that safe haven laws began in Texas in 1999).

[46] See, *e.g.*, CDC, Adoption Experiences of Women and Men and Demand for Children To Adopt by Women 18–44 Years of Age in the United States 16 (Aug. 2008) ("[N]early 1 million women were seeking to adopt children in 2002 (*i.e.*, they were in demand for a child), whereas the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent"); CDC, National Center for Health Statistics, Adoption and Nonbiological Parenting, https://www.cdc.gov/nchs/nsfg/key_statistics/a-keystat.htm#adoption (showing that approximately 3.1 million women between the ages of 18–49 had ever "[t]aken steps to adopt a child" based on data collected from 2015–2019).

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

D

1

The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a "'deeply rooted'" one, "'in this Nation's history and tradition.'" *Glucksberg*, 521 U. S., at 721; see *post*, at 12–14 (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ.). The dissent does not identify *any* pre-*Roe* authority that supports such a right—no state constitutional provision or statute, no federal or state judicial precedent, not even a scholarly treatise. Compare *post*, at 12–14, n. 2, with *supra,* at 15–16, and n. 23. Nor does the dissent dispute the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; that by the late 1950s at least 46 States prohibited abortion "however and whenever performed" except if necessary to save "the life of the mother," *Roe*, 410 U. S., at 139; and that when *Roe* was decided in 1973 similar statutes were still in effect in 30 States. Compare *post*, at 12–14, nn. 2–3, with *supra,* at 23–25, and nn. 33–34.[47]

The dissent's failure to engage with this long tradition is

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[47] By way of contrast, at the time *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), was decided, the Connecticut statute at issue was an extreme outlier. See Brief for Planned Parenthood Federation of America, Inc. as *Amicus Curiae* in *Griswold* v. *Connecticut*, O. T. 1964, No. 496, p. 27.

devastating to its position. We have held that the "established method of substantive-due-process analysis" requires that an unenumerated right be "'deeply rooted in this Nation's history and tradition'" before it can be recognized as a component of the "liberty" protected in the Due Process Clause. *Glucksberg*, 521 U. S., at 721; cf. *Timbs*, 586 U. S., at ___ (slip op., at 7). But despite the dissent's professed fidelity to *stare decisis*, it fails to seriously engage with that important precedent—which it cannot possibly satisfy.

The dissent attempts to obscure this failure by misrepresenting our application of *Glucksberg*. The dissent suggests that we have focused only on "the legal status of abortion in the 19th century," *post,* at 26, but our review of this Nation's tradition extends well past that period. As explained, for more than a century after 1868—including "another half-century" after women gained the constitutional right to vote in 1920, see *post*, at 15; Amdt. 19—it was firmly established that laws prohibiting abortion like the Texas law at issue in *Roe* were permissible exercises of state regulatory authority. And today, another half century later, more than half of the States have asked us to overrule *Roe* and *Casey*. The dissent cannot establish that a right to abortion has *ever* been part of this Nation's tradition.

2

Because the dissent cannot argue that the abortion right is rooted in this Nation's history and tradition, it contends that the "constitutional tradition" is "not captured whole at a single moment," and that its "meaning gains content from the long sweep of our history and from successive judicial precedents." *Post*, at 18 (internal quotation marks omitted). This vague formulation imposes no clear restraints on what Justice White called the "exercise of raw judicial power," *Roe*, 410 U. S., at 222 (dissenting opinion), and while the dissent claims that its standard "does not mean

anything goes," *post*, at 17, any real restraints are hard to discern.

The largely limitless reach of the dissenters' standard is illustrated by the way they apply it here. First, if the "long sweep of history" imposes any restraint on the recognition of unenumerated rights, then *Roe* was surely wrong, since abortion was never allowed (except to save the life of the mother) in a majority of States for over 100 years before that decision was handed down. Second, it is impossible to defend *Roe* based on prior precedent because all of the precedents *Roe* cited, including *Griswold* and *Eisenstadt*, were critically different for a reason that we have explained: None of those cases involved the destruction of what *Roe* called "potential life." See *supra*, at 32.

So without support in history or relevant precedent, *Roe*'s reasoning cannot be defended even under the dissent's proposed test, and the dissent is forced to rely solely on the fact that a constitutional right to abortion was recognized in *Roe* and later decisions that accepted *Roe*'s interpretation. Under the doctrine of *stare decisis*, those precedents are entitled to careful and respectful consideration, and we engage in that analysis below. But as the Court has reiterated time and time again, adherence to precedent is not "'an inexorable command.'" *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 455 (2015). There are occasions when past decisions should be overruled, and as we will explain, this is one of them.

3

The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. This is evident in the analogy that the dissent draws between the abortion right and the rights recognized in *Griswold* (contraception), *Eisenstadt* (same), *Lawrence* (sexual conduct with member of the same sex), and *Obergefell* (same-sex marriage). Perhaps this is

designed to stoke unfounded fear that our decision will imperil those other rights, but the dissent's analogy is objectionable for a more important reason: what it reveals about the dissent's views on the protection of what *Roe* called "potential life." The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a "potential life," but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear: The Constitution does not permit the States to regard the destruction of a "potential life" as a matter of any significance.

That view is evident throughout the dissent. The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a State's interest in protecting prenatal life. The dissent repeatedly praises the "balance," *post*, at 2, 6, 8, 10, 12, that the viability line strikes between a woman's liberty interest and the State's interest in prenatal life. But for reasons we discuss later, see *infra,* at 50–54, 55–56, and given in the opinion of THE CHIEF JUSTICE, *post,* at 2–5 (opinion concurring in judgment), the viability line makes no sense. It was not adequately justified in *Roe*, and the dissent does not even try to defend it today. Nor does it identify any other point in a pregnancy after which a State is permitted to prohibit the destruction of a fetus.

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

our Nation's legal traditions authorizes the Court to adopt that "'theory of life.'" *Post*, at 8.

III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. See *Casey*, 505 U. S., at 856 (joint opinion); see also *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble*, 576 U. S., at 455. It fosters "evenhanded" decisionmaking by requiring that like cases be decided in a like manner. *Payne*, 501 U. S., at 827. It "contributes to the actual and perceived integrity of the judicial process." *Ibid*. And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges." N. Gorsuch, A Republic, If You Can Keep It 217 (2019).

We have long recognized, however, that *stare decisis* is "not an inexorable command," *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009) (internal quotation marks omitted), and it "is at its weakest when we interpret the Constitution," *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997). It has been said that it is sometimes more important that an issue "'be settled than that it be settled right.'" *Kimble*, 576 U. S., at 455 (quoting *Burnet* v. *Coronado Oil & Gas Co*., 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)). But when it comes to the interpretation of the Constitution—the "great charter of our liberties," which was meant "to en-

dure through a long lapse of ages," *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 326 (1816) (opinion for the Court by Story, J.)—we place a high value on having the matter "settled right." In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. See Art. V; *Kimble*, 576 U. S., at 456. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents. We mention three. In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court repudiated the "separate but equal" doctrine, which had allowed States to maintain racially segregated schools and other facilities. *Id*., at 488 (internal quotation marks omitted). In so doing, the Court overruled the infamous decision in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule. See *Brown*, 347 U. S., at 491.

In *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937), the Court overruled *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 (1923), which had held that a law setting minimum wages for women violated the "liberty" protected by the Fifth Amendment's Due Process Clause. *Id.*, at 545. *West Coast Hotel* signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation. See *Lochner* v. *New York*, 198 U. S. 45 (1905) (holding invalid a law setting maximum working hours); *Coppage* v. *Kansas*, 236 U. S. 1 (1915) (holding invalid a law banning contracts forbidding employees to join a union); *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504 (1924) (holding invalid laws fixing the weight of loaves of bread).

Finally, in *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S.

624 (1943), after the lapse of only three years, the Court overruled *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940), and held that public school students could not be compelled to salute the flag in violation of their sincere beliefs. *Barnette* stands out because nothing had changed during the intervening period other than the Court's belated recognition that its earlier decision had been seriously wrong.

On many other occasions, this Court has overruled important constitutional decisions. (We include a partial list in the footnote that follows.[48]) Without these decisions,

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[48] See, *e.g.*, *Obergefell* v. *Hodges*, 576 U. S. 644 (2015) (right to same-sex marriage), overruling *Baker* v. *Nelson*, 409 U. S. 810 (1972); *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010) (right to engage in campaign-related speech), overruling *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990), and partially overruling *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93 (2003); *Montejo* v. *Louisiana*, 556 U. S. 778 (2009) (Sixth Amendment right to counsel), overruling *Michigan* v. *Jackson*, 475 U. S. 625 (1986); *Crawford* v. *Washington*, 541 U. S. 36 (2004) (Sixth Amendment right to confront witnesses), overruling *Ohio* v. *Roberts*, 448 U. S. 56 (1980); *Lawrence* v. *Texas*, 539 U. S. 558 (2003) (right to engage in consensual, same-sex intimacy in one's home), overruling *Bowers* v. *Hardwick*, 478 U. S. 186 (1986); *Ring* v. *Arizona*, 536 U. S. 584 (2002) (Sixth Amendment right to a jury trial in capital prosecutions), overruling *Walton* v. *Arizona*, 497 U. S. 639 (1990); *Agostini* v. *Felton*, 521 U. S. 203 (1997) (evaluating whether government aid violates the Establishment Clause), overruling *Aguilar* v. *Felton*, 473 U. S. 402 (1985), and *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996) (lack of congressional power under the Indian Commerce Clause to abrogate States' Eleventh Amendment immunity), overruling *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 (1989); *Payne* v. *Tennessee*, 501 U. S. 808 (1991) (the Eighth Amendment does not erect a *per se* bar to the admission of victim impact evidence during the penalty phase of a capital trial), overruling *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989); *Batson* v. *Kentucky*, 476 U. S. 79 (1986) (the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race), overruling *Swain* v. *Alabama*, 380 U. S. 202 (1965); *Garcia* v. *San Antonio*

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*Metropolitan Transit Authority*, 469 U. S. 528, 530 (1985) (rejecting the principle that the Commerce Clause does not empower Congress to enforce requirements, such as minimum wage laws, against the States "'in areas of traditional governmental functions'"), overruling *National League of Cities* v. *Usery*, 426 U. S. 833 (1976); *Illinois* v. *Gates*, 462 U. S. 213 (1983) (the Fourth Amendment requires a totality of the circumstances approach for determining whether an informant's tip establishes probable cause), overruling *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and *Spinelli* v. *United States*, 393 U. S. 410 (1969); *United States* v. *Scott*, 437 U. S. 82 (1978) (the Double Jeopardy Clause does not apply to Government appeals from orders granting defense motions to terminate a trial before verdict), overruling *United States* v. *Jenkins*, 420 U. S. 358 (1975); *Craig* v. *Boren*, 429 U. S. 190 (1976) (gender-based classifications are subject to intermediate scrutiny under the Equal Protection Clause), overruling *Goesaert* v. *Cleary*, 335 U. S. 464 (1948); *Taylor* v. *Louisiana*, 419 U. S. 522 (1975) (jury system which operates to exclude women from jury service violates the defendant's Sixth and Fourteenth Amendment right to an impartial jury), overruling *Hoyt* v. *Florida*, 368 U. S. 57 (1961); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) (*per curiam*) (the mere advocacy of violence is protected under the First Amendment unless it is directed to incite or produce imminent lawless action), overruling *Whitney* v. *California*, 274 U. S. 357 (1927); *Katz* v. *United States*, 389 U. S. 347, 351 (1967) (Fourth Amendment "protects people, not places," and extends to what a person "seeks to preserve as private"), overruling *Olmstead* v. *United States*, 277 U. S. 438 (1928), and *Goldman* v. *United States*, 316 U. S. 129 (1942); *Miranda* v. *Arizona*, 384 U. S. 436 (1966) (procedural safeguards to protect the Fifth Amendment privilege against self-incrimination), overruling *Crooker* v. *California*, 357 U. S. 433 (1958), and *Cicenia* v. *Lagay*, 357 U. S. 504 (1958); *Malloy* v. *Hogan*, 378 U. S. 1 (1964) (the Fifth Amendment privilege against self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States), overruling *Twining* v. *New Jersey*, 211 U. S. 78 (1908), and *Adamson* v. *California*, 332 U. S. 46 (1947); *Wesberry* v. *Sanders*, 376 U. S. 1, 7–8 (1964) (congressional districts should be apportioned so that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's"), overruling in effect *Colegrove* v. *Green*, 328 U. S. 549 (1946); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to counsel for indigent defendant in a criminal prosecution in state court under the Sixth and Fourteenth Amendments), overruling *Betts* v. *Brady*, 316 U. S. 455 (1942); *Baker* v. *Carr*, 369 U. S. 186 (1962) (federal courts have jurisdiction to consider constitutional challenges to state redistricting plans), effectively overruling in part *Colegrove*, 328 U. S. 549;

American constitutional law as we know it would be unrecognizable, and this would be a different country.

No Justice of this Court has ever argued that the Court should *never* overrule a constitutional decision, but overruling a precedent is a serious matter. It is not a step that should be taken lightly. Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision. *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ___, ___–___ (2018) (slip op., at 34–35); *Ramos* v. *Louisiana*, 590 U. S. ___, ___–___ (2020) (KAVANAUGH, J., concurring in part) (slip op., at 7–9).

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

A

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

The infamous decision in *Plessy* v. *Ferguson*, was one

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*Mapp* v. *Ohio*, 367 U. S. 643 (1961) (the exclusionary rule regarding the inadmissibility of evidence obtained in violation of the Fourth Amendment applies to the States), overruling *Wolf* v. *Colorado*, 338 U. S. 25 (1949); *Smith* v. *Allwright*, 321 U. S. 649 (1944) (racial restrictions on the right to vote in primary elections violates the Equal Protection Clause of the Fourteenth Amendment), overruling *Grovey* v. *Townsend*, 295 U. S. 45 (1935); *United States* v. *Darby*, 312 U. S. 100 (1941) (congressional power to regulate employment conditions under the Commerce Clause), overruling *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938) (Congress does not have the power to declare substantive rules of common law; a federal court sitting in diversity jurisdiction must apply the substantive state law), overruling *Swift* v. *Tyson*, 16 Pet. 1 (1842).

such decision. It betrayed our commitment to "equality before the law." 163 U. S., at 562 (Harlan, J., dissenting). It was "egregiously wrong" on the day it was decided, see *Ramos,* 590 U. S., at ___ (opinion of KAVANAUGH, J.) (slip op., at 7), and as the Solicitor General agreed at oral argument, it should have been overruled at the earliest opportunity, see Tr. of Oral Arg. 92–93.

*Roe* was also egregiously wrong and deeply damaging. For reasons already explained, *Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.

*Roe* was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but "raw judicial power," *Roe*, 410 U. S., at 222 (White, J., dissenting), the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*. "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since." *Casey*, 505 U. S., at 995–996 (opinion of Scalia, J.). Together, *Roe* and *Casey* represent an error that cannot be allowed to stand.

As the Court's landmark decision in *West Coast Hotel* illustrates, the Court has previously overruled decisions that

wrongly removed an issue from the people and the democratic process. As Justice White later explained, "decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken." *Thornburgh*, 476 U. S., at 787 (dissenting opinion).

B

*The quality of the reasoning*. Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered. See *Janus*, 585 U. S., at ___ (slip op., at 38); *Ramos*, 590 U. S., at ___–___ (opinion of KAVANAUGH, J.) (slip op., at 7–8). In Part II, *supra*, we explained why *Roe* was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds.

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

party and has never been plausibly explained. *Roe*'s reasoning quickly drew scathing scholarly criticism, even from supporters of broad access to abortion.

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

1

a

The weaknesses in *Roe*'s reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation. See 410 U. S., at 163–164. Dividing pregnancy into three trimesters, the Court imposed special rules for each. During the first trimester, the Court announced, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.*, at 164. After that point, a State's interest in regulating abortion for the sake of a woman's health became compelling, and accordingly, a State could "regulate the abortion procedure in ways that are reasonably related to maternal health." *Ibid.* Finally, in "the stage subsequent to viability," which in 1973 roughly coincided with the beginning of the third trimester, the State's interest in "the potentiality of human life" became compelling, and therefore a State could "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.,* at 164–165.

This elaborate scheme was the Court's own brainchild. Neither party advocated the trimester framework; nor did either party or any *amicus* argue that "viability" should mark the point at which the scope of the abortion right and a State's regulatory authority should be substantially transformed. See Brief for Appellant and Brief for Appellee in *Roe* v. *Wade*, O. T. 1972, No. 70–18; see also C. Forsythe, Abuse of Discretion: The Inside Story of *Roe* v. *Wade* 127, 141 (2012).

b

Not only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources on which constitutional decisions are usually based. We have already discussed *Roe*'s treatment of constitutional text, and the opinion failed to show that history, precedent, or any other cited source supported its scheme.

*Roe* featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to explain why it was included. For example, multiple paragraphs were devoted to an account of the views and practices of ancient civilizations where infanticide was widely accepted. See 410 U. S., at 130–132 (discussing ancient Greek and Roman practices).[49] When it came to the most important historical fact—how the States regulated abortion when the Fourteenth Amendment was adopted—the Court said almost nothing. It allowed that States had tightened their abortion laws "in the middle and late 19th century," *id*., at 139, but it implied that these laws might have

[49] See, *e.g.*, C. Patterson, "Not Worth the Rearing": The Causes of Infant Exposure in Ancient Greece, 115 Transactions Am. Philosophical Assn. 103, 111–123 (1985); A. Cameron, The Exposure of Children and Greek Ethics, 46 Classical Rev. 105–108 (1932); H. Bennett, The Exposure of Infants in Ancient Rome, 18 Classical J. 341–351 (1923); W. Harris, Child-Exposure in the Roman Empire, 84 J. Roman Studies 1 (1994).

been enacted not to protect fetal life but to further "a Victorian social concern" about "illicit sexual conduct," *id.*, at 148.

*Roe*'s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Relying on two discredited articles by an abortion advocate, the Court erroneously suggested—contrary to Bracton, Coke, Hale, Blackstone, and a wealth of other authority—that the common law had probably never really treated post-quickening abortion as a crime. See *id.*, at 136 ("[I]t now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus"). This erroneous understanding appears to have played an important part in the Court's thinking because the opinion cited "the lenity of the common law" as one of the four factors that informed its decision. *Id.*, at 165.

After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee. This included a lengthy account of the "position of the American Medical Association" and "[t]he position of the American Public Health Association," as well as the vote by the American Bar Association's House of Delegates in February 1972 on proposed abortion legislation. *Id.*, at 141, 144, 146 (emphasis deleted). Also noted were a British judicial decision handed down in 1939 and a new British abortion law enacted in 1967. *Id.*, at 137–138. The Court did not explain why these sources shed light on the meaning of the Constitution, and not one of them adopted or advocated anything like the scheme that *Roe* imposed on the country.

Finally, after all this, the Court turned to precedent. Citing a broad array of cases, the Court found support for a constitutional "right of personal privacy," *id.,* at 152, but it conflated two very different meanings of the term: the right

to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. See *Whalen* v. *Roe*, 429 U. S. 589, 599–600 (1977). Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, and some of the cases in that category involved personal decisions that were obviously very, very far afield. See *Pierce*, 268 U. S. 510 (right to send children to religious school); *Meyer*, 262 U. S. 390 (right to have children receive German language instruction).

What remained was a handful of cases having something to do with marriage, *Loving*, 388 U. S. 1 (right to marry a person of a different race), or procreation, *Skinner*, 316 U. S. 535 (right not to be sterilized); *Griswold*, 381 U. S. 479 (right of married persons to obtain contraceptives); *Eisenstadt*, 405 U. S. 438 (same, for unmarried persons). But none of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed "potential life."

When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were "consistent with" the following: (1) "the relative weights of the respective interests involved," (2) "the lessons and examples of medical and legal history," (3) "the lenity of the common law," and (4) "the demands of the profound problems of the present day." *Roe*, 410 U. S., at 165. Put aside the second and third factors, which were based on the Court's flawed account of history, and what remains are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.

c

What *Roe* did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no

authority to regulate first trimester abortions for the purpose of protecting a woman's health? The Court's only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth. *Id.*, at 163. But the Court did not explain why mortality rates were the only factor that a State could legitimately consider. Many health and safety regulations aim to avoid adverse health consequences short of death. And the Court did not explain why it departed from the normal rule that courts defer to the judgments of legislatures "in areas fraught with medical and scientific uncertainties." *Marshall* v. *United States*, 414 U. S. 417, 427 (1974).

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

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the womb." 410 U. S., at 163.

As Professor Laurence Tribe has written, "[c]learly, this mistakes 'a definition for a syllogism.'" Tribe 4 (quoting Ely 924). The definition of a "viable" fetus is one that is capable of surviving outside the womb, but why is this the point at which the State's interest becomes compelling? If, as *Roe* held, a State's interest in protecting prenatal life is compelling "after viability," 410 U. S., at 163, why isn't that interest "equally compelling before viability"? *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 519 (1989) (plurality opinion) (quoting *Thornburgh*, 476 U. S., at 795 (White, J., dissenting)). *Roe* did not say, and no explanation is apparent.

This arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. Some have argued that a fetus should not

be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a "person." Among the characteristics that have been offered as essential attributes of "personhood" are sentience, self-awareness, the ability to reason, or some combination thereof.[50] By this logic, it would be an open question whether even born individuals, including young children or those afflicted with certain developmental or medical conditions, merit protection as "persons." But even if one takes the view that "personhood" begins when a certain attribute or combination of attributes is acquired, it is very hard to see why viability should mark the point where "personhood" begins.

The most obvious problem with any such argument is that viability is heavily dependent on factors that have nothing to do with the characteristics of a fetus. One is the

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[50] See, *e.g.*, P. Singer, Rethinking Life & Death 218 (1994) (defining a person as "a being with awareness of her or his own existence over time, and the capacity to have wants and plans for the future"); B. Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses 9–13 (1992) (arguing that "the possession of interests is both necessary and sufficient for moral status" and that the "capacity for conscious awareness is a necessary condition for the possession of interests" (emphasis deleted)); M. Warren, On the Moral and Legal Status of Abortion, 57 The Monist 1, 5 (1973) (arguing that, to qualify as a person, a being must have at least one of five traits that are "central to the concept of personhood": (1) "consciousness (of objects and events external and/or internal to the being), and in particular the capacity to feel pain"; (2) "reasoning (the developed capacity to solve new and relatively complex problems)"; (3) "self-motivated activity (activity which is relatively independent of either genetic or direct external control)"; (4) "the capacity to communicate, by whatever means, messages of an indefinite variety of types"; and (5) "the presence of self-concepts, and self-awareness, either individual or racial, or both" (emphasis deleted)); M. Tooley, Abortion & Infanticide, 2 Philosophy & Pub. Affairs 37, 49 (Autumn 1972) (arguing that "having a right to life presupposes that one is capable of desiring to continue existing as a subject of experiences and other mental states").

state of neonatal care at a particular point in time. Due to the development of new equipment and improved practices, the viability line has changed over the years. In the 19th century, a fetus may not have been viable until the 32d or 33d week of pregnancy or even later.[51] When *Roe* was decided, viability was gauged at roughly 28 weeks. See 410 U. S., at 160. Today, respondents draw the line at 23 or 24 weeks. Brief for Respondents 8. So, according to *Roe*'s logic, States now have a compelling interest in protecting a fetus with a gestational age of, say, 26 weeks, but in 1973 States did not have an interest in protecting an identical fetus. How can that be?

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

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[51] See W. Lusk, Science and the Art of Midwifery 74–75 (1882) (explaining that "[w]ith care, the life of a child born within [the eighth month of pregnancy] may be preserved"); *id.*, at 326 ("Where the choice lies with the physician, the provocation of labor is usually deferred until the thirty-third or thirty-fourth week"); J. Beck, Researches in Medicine and Medical Jurisprudence 68 (2d ed. 1835) ("Although children born before the completion of the seventh month have occasionally survived, and been reared, yet in a medico-legal point of view, no child ought to be considered as capable of sustaining an independent existence until the seventh month has been fully completed"); see also J. Baker, The Incubator and the Medical Discovery of the Premature Infant, J. Perinatology 322 (2000) (explaining that, in the 19th century, infants born at seven to eight months' gestation were unlikely to survive beyond "the first days of life").

not enjoyed by an identical fetus in a remote area of a poor country?

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

The viability line, which *Casey* termed *Roe*'s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line.[52] The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy.

d

All in all, *Roe*'s reasoning was exceedingly weak, and academic commentators, including those who agreed with the

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[52] According to the Center for Reproductive Rights, only the United States and the Netherlands use viability as a gestational limit on the availability of abortion on-request. See Center for Reproductive Rights, The World's Abortion Laws (Feb. 23, 2021), https://reproductiverights.org/maps/worlds-abortion-laws.

decision as a matter of policy, were unsparing in their criticism. John Hart Ely famously wrote that *Roe* was "not constitutional law and g[ave] almost no sense of an obligation to try to be." Ely 947 (emphasis deleted). Archibald Cox, who served as Solicitor General under President Kennedy, commented that *Roe* "read[s] like a set of hospital rules and regulations" that "[n]either historian, layman, nor lawyer will be persuaded . . . are part of . . . the Constitution." The Role of the Supreme Court in American Government 113–114 (1976). Laurence Tribe wrote that "even if there is a need to divide pregnancy into several segments with lines that clearly identify the limits of governmental power, 'interest-balancing' of the form the Court pursues fails to justify any of the lines actually drawn." Tribe 4–5. Mark Tushnet termed *Roe* a "totally unreasoned judicial opinion." Red, White, and Blue: A Critical Analysis of Constitutional Law 54 (1988). See also P. Bobbitt, Constitutional Fate 157 (1982); A. Amar, Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 110 (2000).

Despite *Roe*'s weaknesses, its reach was steadily extended in the years that followed. The Court struck down laws requiring that second-trimester abortions be performed only in hospitals, *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 433–439 (1983); that minors obtain parental consent, *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 74 (1976); that women give written consent after being informed of the status of the developing prenatal life and the risks of abortion, *Akron*, 462 U. S., at 442–445; that women wait 24 hours for an abortion, *id.*, at 449–451; that a physician determine viability in a particular manner, *Colautti*, 439 U. S., at 390–397; that a physician performing a post-viability abortion use the technique most likely to preserve the life of the fetus, *id.,* at 397–401; and that fetal remains be treated in a humane and sanitary manner, *Akron*, 462 U. S., at 451–452.

Justice White complained that the Court was engaging in "unrestrained imposition of its own extraconstitutional value preferences." *Thornburgh*, 476 U. S., at 794 (dissenting opinion). And the United States as *amicus curiae* asked the Court to overrule *Roe* five times in the decade before *Casey*, see 505 U. S., at 844 (joint opinion), and then asked the Court to overrule it once more in *Casey* itself.

2

When *Casey* revisited *Roe* almost 20 years later, very little of *Roe*'s reasoning was defended or preserved. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause. 505 U. S., at 846. The Court did not reaffirm *Roe*'s erroneous account of abortion history. In fact, none of the Justices in the majority said anything about the history of the abortion right. And as for precedent, the Court relied on essentially the same body of cases that *Roe* had cited. Thus, with respect to the standard grounds for constitutional decisionmaking—text, history, and precedent—*Casey* did not attempt to bolster *Roe*'s reasoning.

The Court also made no real effort to remedy one of the greatest weaknesses in *Roe*'s analysis: its much-criticized discussion of viability. The Court retained what it called *Roe*'s "central holding"—that a State may not regulate previability abortions for the purpose of protecting fetal life—but it provided no principled defense of the viability line. 505 U. S., at 860, 870–871. Instead, it merely rephrased what *Roe* had said, stating that viability marked the point at which "the independent existence of a second life can in reason and fairness be the object of state protection that now overrides the rights of the woman." 505 U. S., at 870. Why "reason and fairness" demanded that the line be drawn at viability the Court did not explain. And the Justices who authored the controlling opinion conspicuously

failed to say that they agreed with the viability rule; instead, they candidly acknowledged "the reservations [some] of us may have in reaffirming [that] holding of *Roe*." *Id.*, at 853.

The controlling opinion criticized and rejected *Roe*'s trimester scheme, 505 U. S., at 872, and substituted a new "undue burden" test, but the basis for this test was obscure. And as we will explain, the test is full of ambiguities and is difficult to apply.

*Casey*, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent.

As discussed below, *Casey* also deployed a novel version of the doctrine of *stare decisis*. See *infra*, at 64–69. This new doctrine did not account for the profound wrongness of the decision in *Roe*, and placed great weight on an intangible form of reliance with little if any basis in prior case law. *Stare decisis* does not command the preservation of such a decision.

C

*Workability*. Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. *Montejo* v. *Louisiana*, 556 U. S. 778, 792 (2009); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989); *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 283–284 (1988). *Casey*'s "undue burden" test has scored poorly on the workability scale.

1

Problems begin with the very concept of an "undue burden." As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is "due" or "undue" is "inherently standardless." 505 U. S., at 992; see also *June Medical Services L. L. C.* v. *Russo*, 591 U. S. ___, ___ (2020) (GORSUCH, J., dissenting) (slip op., at 17) ("[W]hether a burden is deemed undue depends heavily on which factors the judge considers and how much weight he accords each of them" (internal quotation marks and alterations omitted)).

The *Casey* plurality tried to put meaning into the "undue burden" test by setting out three subsidiary rules, but these rules created their own problems. The first rule is that "a provision of law is invalid, if its purpose or effect is to place a *substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." 505 U. S., at 878 (emphasis added); see also *id.*, at 877. But whether a particular obstacle qualifies as "substantial" is often open to reasonable debate. In the sense relevant here, "substantial" means "of ample or considerable amount, quantity, or size." Random House Webster's Unabridged Dictionary 1897 (2d ed. 2001). Huge burdens are plainly "substantial," and trivial ones are not, but in between these extremes, there is a wide gray area.

This ambiguity is a problem, and the second rule, which applies at all stages of a pregnancy, muddies things further. It states that measures designed "to ensure that the woman's choice is informed" are constitutional so long as they do not impose "an undue burden on the right." *Casey*, 505 U. S., at 878. To the extent that this rule applies to previability abortions, it overlaps with the first rule and appears to impose a different standard. Consider a law that imposes an insubstantial obstacle but serves little purpose. As applied to a pre-viability abortion, would such a regulation be constitutional on the ground that it does not impose a "*substantial* obstacle"? Or would it be unconstitutional on

the ground that it creates an "*undue* burden" because the burden it imposes, though slight, outweighs its negligible benefits? *Casey* does not say, and this ambiguity would lead to confusion down the line. Compare *June Medical*, 591 U. S., at ___–___ (plurality opinion) (slip op., at 1–2), with *id.,* at ___–___ (ROBERTS, C. J., concurring) (slip op., at 5–6).

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

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

*Casey* provided no clear answer to these questions. It said that a regulation is unconstitutional if it imposes a

substantial obstacle "in a large fraction of cases in which [it] is relevant," 505 U. S., at 895, but there is obviously no clear line between a fraction that is "large" and one that is not. Nor is it clear what the Court meant by "cases in which" a regulation is "relevant." These ambiguities have caused confusion and disagreement. Compare *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 627–628 (2016), with *id.,* at 666–667, and n. 11 (ALITO, J., dissenting).

2

The difficulty of applying *Casey*'s new rules surfaced in that very case. The controlling opinion found that Pennsylvania's 24-hour waiting period requirement and its informed-consent provision did not impose "undue burden[s]," *Casey*, 505 U. S., at 881–887, but Justice Stevens, applying the same test, reached the opposite result, *id.,* at 920–922 (opinion concurring in part and dissenting in part). That did not bode well, and then-Chief Justice Rehnquist aptly observed that "the undue burden standard presents nothing more workable than the trimester framework." *Id.*, at 964–966 (dissenting opinion).

The ambiguity of the "undue burden" test also produced disagreement in later cases. In *Whole Woman's Health*, the Court adopted the cost-benefit interpretation of the test, stating that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access *together with the benefits those laws confer*." 579 U. S., at 607 (emphasis added). But five years later, a majority of the Justices rejected that interpretation. See *June Medical*, 591 U. S. ___. Four Justices reaffirmed *Whole Woman's Health*'s instruction to "weigh" a law's "benefits" against "the burdens it imposes on abortion access." 591 U. S., at ___ (plurality opinion) (slip op., at 2) (internal quotation marks omitted). But THE CHIEF JUSTICE—who cast

the deciding vote—argued that "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts." *Id.,* at ___ (opinion concurring in judgment) (slip op., at 6). And the four Justices in dissent rejected the plurality's interpretation of *Casey*. See 591 U. S., at ___ (opinion of ALITO, J., joined in relevant part by THOMAS, GORSUCH, and KAVANAUGH, JJ.) (slip op., at 4); *id.,* at ___–___ (opinion of GORSUCH, J.) (slip op., at 15–18); *id*., at ___–___ (opinion of KAVANAUGH, J.) (slip op., at 1–2) ("[F]ive Members of the Court reject the *Whole Woman's Health* cost-benefit standard").

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

3

The experience of the Courts of Appeals provides further evidence that *Casey*'s "line between" permissible and unconstitutional restrictions "has proved to be impossible to draw with precision." *Janus*, 585 U. S., at ___ (slip op., at 38).

*Casey* has generated a long list of Circuit conflicts. Most recently, the Courts of Appeals have disagreed about whether the balancing test from *Whole Woman's Health* correctly states the undue-burden framework.[53] They have disagreed on the legality of parental notification rules.[54]

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[53] Compare *Whole Woman's Health* v. *Paxton*, 10 F. 4th 430, 440 (CA5 2021), *EMW Women's Surgical Center, P.S.C.* v. *Friedlander*, 978 F. 3d 418, 437 (CA6 2020), and *Hopkins* v. *Jegley*, 968 F. 3d 912, 915 (CA8 2020) (*per curiam*), with *Planned Parenthood of Ind. & Ky., Inc.* v. *Box*, 991 F. 3d 740, 751–752 (CA7 2021).

[54] Compare *Planned Parenthood of Blue Ridge* v. *Camblos*, 155 F. 3d 352, 367 (CA4 1998), with *Planned Parenthood of Ind. & Ky., Inc.* v. *Ad-*

They have disagreed about bans on certain dilation and evacuation procedures.[55] They have disagreed about when an increase in the time needed to reach a clinic constitutes an undue burden.[56] And they have disagreed on whether a State may regulate abortions performed because of the fetus's race, sex, or disability.[57]

The Courts of Appeals have experienced particular difficulty in applying the large-fraction-of-relevant-cases test. They have criticized the assignment while reaching unpredictable results.[58] And they have candidly outlined *Casey*'s many other problems.[59]

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*ams*, 937 F. 3d 973, 985–990 (CA7 2019), cert. granted, judgment vacated, 591 U. S. ___ (2020), and *Planned Parenthood, Sioux Falls Clinic* v. *Miller*, 63 F. 3d 1452, 1460 (CA8 1995).

[55] Compare *Whole Woman's Health* v. *Paxton*, 10 F. 4th, at 435–436, with *West Ala. Women's Center* v. *Williamson*, 900 F. 3d 1310, 1319, 1327 (CA11 2018), and *EMW Women's Surgical Center, P.S.C.* v. *Friedlander*, 960 F. 3d 785, 806–808 (CA6 2020).

[56] Compare *Tucson Woman's Clinic* v. *Eden*, 379 F. 3d 531, 541 (CA9 2004), with *Women's Medical Professional Corp.* v. *Baird*, 438 F. 3d 595, 605 (CA6 2006), and *Greenville Women's Clinic* v. *Bryant*, 222 F. 3d 157, 171–172 (CA4 2000).

[57] Compare *Preterm-Cleveland* v. *McCloud*, 994 F. 3d 512, 520–535 (CA6 2021), with *Little Rock Family Planning Servs.* v. *Rutledge*, 984 F. 3d 682, 688–690 (CA8 2021).

[58] See, *e.g., Bristol Regional Women's Center, P.C.* v. *Slatery*, 7 F. 4th 478, 485 (CA6 2021); *Reproductive Health Servs.* v. *Strange*, 3 F. 4th 1240, 1269 (CA11 2021) (*per curiam*); *June Medical Servs., L.L.C.* v. *Gee*, 905 F. 3d 787, 814 (CA5 2020), rev'd, 591 U. S. ___; *Preterm-Cleveland*, 994 F. 3d, at 534; *Planned Parenthood of Ark. & Eastern Okla.* v. *Jegley*, 864 F. 3d 953, 958–960 (CA8 2017); *McCormack* v. *Hertzog*, 788 F. 3d 1017, 1029–1030 (CA9 2015); compare *A Womans Choice–East Side Womens Clinic* v. *Newman*, 305 F. 3d 684, 699 (CA7 2002) (Coffey, J., concurring), with *id.*, at 708 (Wood, J., dissenting).

[59] See, *e.g., Memphis Center for Reproductive Health* v. *Slatery*, 14 F. 4th 409, 451 (CA6 2021) (Thapar, J., concurring in judgment in part and dissenting in part); *Preterm-Cleveland*, 994 F. 3d, at 524; *Planned Parenthood of Ind. & Ky., Inc.* v. *Commissioner of Ind. State Dept. of*

*Casey*'s "undue burden" test has proved to be unworkable. "[P]lucked from nowhere," 505 U. S., at 965 (opinion of Rehnquist, C. J.), it "seems calculated to perpetuate give-it-a-try litigation" before judges assigned an unwieldy and inappropriate task. *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 551 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). Continued adherence to that standard would undermine, not advance, the "evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U. S., at 827.

D

*Effect on other areas of law*. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. See *Ramos*, 590 U. S., at ___ (opinion of KAVANAUGH, J.) (slip op., at 8); *Janus*, 585 U. S., at ___ (slip op., at 34).

Members of this Court have repeatedly lamented that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh*, 476 U. S., at 814 (O'Connor, J., dissenting); see *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 785 (1994) (Scalia, J., concurring in judgment in part and dissenting

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*Health*, 888 F. 3d 300, 313 (CA7 2018) (Manion, J., concurring in judgment in part and dissenting in part); *Planned Parenthood of Ind. & Ky., Inc.* v. *Box*, 949 F. 3d 997, 999 (CA7 2019) (Easterbrook, J., concurring in denial of reh'g en banc) ("How much burden is 'undue' is a matter of judgment, which depends on what the burden would be . . . and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators)"); *National Abortion Federation* v. *Gonzales*, 437 F. 3d 278, 290–296 (CA2 2006) (Walker, C. J., concurring); *Planned Parenthood of Rocky Mountains Servs. Corp.* v. *Owens*, 287 F. 3d 910, 931 (CA10 2002) (Baldock, J., dissenting).

in part); *Whole Woman's Health*, 579 U. S., at 631–633 (THOMAS, J., dissenting); *id.,* at 645–666, 678–684 (ALITO, J., dissenting); *June Medical*, 591 U. S., at ___–___ (GORSUCH, J., dissenting) (slip op., at 1–15).

The Court's abortion cases have diluted the strict standard for facial constitutional challenges.[60] They have ignored the Court's third-party standing doctrine.[61] They have disregarded standard *res judicata* principles.[62] They have flouted the ordinary rules on the severability of unconstitutional provisions,[63] as well as the rule that statutes should be read where possible to avoid unconstitutionality.[64] And they have distorted First Amendment doctrines.[65]

When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine "has failed to deliver the 'principled and intelligible' development of the law that *stare decisis* purports to secure." *Id*., at ___ (THOMAS, J., dissenting) (slip op., at 19) (quoting *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986)).

E

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

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[60] Compare *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), with *Casey*, 505 U. S., at 895; see also *supra,* at 56–59.

[61] Compare *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975), and *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 15, 17–18 (2004), with *June Medical*, 591 U. S., at ___ (ALITO, J., dissenting) (slip op., at 28), *id*., at ___–___ (GORSUCH, J., dissenting) (slip op., at 6–7) (collecting cases), and *Whole Woman's Health*, 579 U. S., at 632, n. 1 (THOMAS, J., dissenting).

[62] Compare *id.*, at 598–606 (majority opinion), with *id.,* at 645–666 (ALITO, J., dissenting).

[63] Compare *id.*, at 623–626 (majority opinion), with *id*., at 644–645 (ALITO, J., dissenting).

[64] See *Stenberg* v. *Carhart*, 530 U. S. 914, 977–978 (2000) (Kennedy, J., dissenting); *id.,* at 996–997 (THOMAS, J., dissenting).

[65] See *Hill* v. *Colorado*, 530 U. S. 703, 741–742 (2000) (Scalia, J., dissenting); *id.*, at 765 (Kennedy, J., dissenting).

See *Ramos*, 590 U. S., at ___ (opinion of KAVANAUGH, J.) (slip op., at 15); *Janus*, 585 U. S., at ___–___ (slip op., at 34–35).

1

Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." *Casey*, 505 U. S., at 856 (joint opinion); see also *Payne*, 501 U. S., at 828. In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." 505 U. S., at 856. For these reasons, we agree with the *Casey* plurality that conventional, concrete reliance interests are not present here.

2

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

When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and

intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. Compare Brief for Petitioners 34–36; Brief for Women Scholars et al. as *Amici Curiae* 13–20, 29–41, with Brief for Respondents 36–41; Brief for National Women's Law Center et al. as *Amici Curiae* 15–32. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson* v. *Skrupa*, 372 U. S. 726, 729–730 (1963).

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so.[66] In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi,[67] constituted

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[66] See Dept. of Commerce, U. S. Census Bureau (Census Bureau), An Analysis of the 2018 Congressional Election 6 (Dec. 2021) (Fig. 5) (showing that women made up over 50 percent of the voting population in every congressional election between 1978 and 2018).

[67] Census Bureau, QuickFacts, Mississippi (July 1, 2021), https://www.

55.5 percent of the voters who cast ballots.[68]

3

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

IV

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

The argument was cast in different terms, but stated simply, it was essentially as follows. The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not "social and political pressures." 505 U. S., at 865. There is a special danger that the public will

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census.gov/quickfacts/MS.

[68] Census Bureau, Voting and Registration in the Election of November 2020, Table 4b: Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States: November 2020, https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html.

perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial "watershed" decision, such as *Roe*. 505 U. S., at 866–867. A decision overruling *Roe* would be perceived as having been made "under fire" and as a "surrender to political pressure," 505 U. S., at 867, and therefore the preservation of public approval of the Court weighs heavily in favor of retaining *Roe*, see 505 U. S., at 869.

This analysis starts out on the right foot but ultimately veers off course. The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work. Cf. *Texas* v. *Johnson*, 491 U. S. 397 (1989); *Brown*, 347 U. S. 483. That is true both when we initially decide a constitutional issue *and* when we consider whether to overrule a prior decision. As Chief Justice Rehnquist explained, "The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task." *Casey*, 505 U. S., at 963 (opinion concurring in judgment in part and dissenting in part). In suggesting otherwise, the *Casey* plurality went beyond this Court's role in our constitutional system.

The *Casey* plurality "call[ed] the contending sides of a national controversy to end their national division," and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying

that the matter was closed. *Id.,* at 867. That unprecedented claim exceeded the power vested in us by the Constitution. As Alexander Hamilton famously put it, the Constitution gives the judiciary "neither Force nor Will." The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Our sole authority is to exercise "judgment"—which is to say, the authority to judge what the law means and how it should apply to the case at hand. *Ibid.* The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* and *Lochner* would still be the law. That is not how *stare decisis* operates.

The *Casey* plurality also misjudged the practical limits of this Court's influence. *Roe* certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* "inflamed" a national issue that has remained bitterly divisive for the past half century. *Casey*, 505 U. S., at 995 (opinion of Scalia, J.); see also R. Ginsburg, Speaking in a Judicial Voice, 67 N. Y. U. L. Rev. 1185, 1208 (1992) (*Roe* may have "halted a political process," "prolonged divisiveness," and "deferred stable settlement of the issue"). And for the past 30 years, *Casey* has done the same.

Neither decision has ended debate over the issue of a constitutional right to obtain an abortion. Indeed, in this case, 26 States expressly ask us to overrule *Roe* and *Casey* and to return the issue of abortion to the people and their elected representatives. This Court's inability to end debate on the issue should not have been surprising. This Court cannot bring about the permanent resolution of a rancorous national controversy simply by dictating a settlement and telling the people to move on. Whatever influence the Court may have on public attitudes must stem from the

strength of our opinions, not an attempt to exercise "raw judicial power." *Roe*, 410 U. S., at 222 (White, J., dissenting).

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

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

## V

## A

## 1

The dissent argues that we have "abandon[ed]" *stare decisis*, *post,* at 30, but we have done no such thing, and it is the dissent's understanding of *stare decisis* that breaks with tradition. The dissent's foundational contention is that the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless the Court can "poin[t] to major legal or factual changes undermining [the] decision's original basis." *Post*, at 37. To support this contention, the dissent claims that *Brown* v. *Board of Education*, 347 U. S. 483, and other landmark cases overruling prior precedents "responded to changed law and to changed facts and attitudes that had taken hold throughout society." *Post,* at 43. The unmistakable implication of this argument is that only the passage of time and new developments justified those decisions. Recognition that the cases they overruled were egregiously wrong on the day they were handed down was not enough.

The Court has never adopted this strange new version of

*stare decisis*—and with good reason. Does the dissent really maintain that overruling *Plessy* was not justified until the country had experienced more than a half-century of state-sanctioned segregation and generations of Black school children had suffered all its effects? *Post,* at 44–45.

Here is another example. On the dissent's view, it must have been wrong for *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, to overrule *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586, a bare three years after it was handed down. In both cases, children who were Jehovah's Witnesses refused on religious grounds to salute the flag or recite the pledge of allegiance. The *Barnette* Court did not claim that its reexamination of the issue was prompted by any intervening legal or factual developments, so if the Court had followed the dissent's new version of *stare decisis,* it would have been compelled to adhere to *Gobitis* and countenance continued First Amendment violations for some unspecified period.

Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket. And indeed, the dissent eventually admits that a decision *could* "be overruled just because it is terribly wrong," though the dissent does not explain when that would be so. *Post*, at 45.

2

Even if the dissent were correct in arguing that an egregiously wrong decision should (almost) never be overruled unless its mistake is later highlighted by "major legal or factual changes," reexamination of *Roe* and *Casey* would be amply justified. We have already mentioned a number of post-*Casey* developments, see *supra*, at 33–34, 59–63, but the most profound change may be the failure of the *Casey* plurality's call for "the contending sides" in the controversy about abortion "to end their national division," 505 U. S., at

867. That has not happened, and there is no reason to think that another decision sticking with *Roe* would achieve what *Casey* could not.

The dissent, however, is undeterred. It contends that the "very controversy surrounding *Roe* and *Casey*" is an important *stare decisis* consideration that requires upholding those precedents. See *post,* at 55–57. The dissent characterizes *Casey* as a "precedent about precedent" that is permanently shielded from further evaluation under traditional *stare decisis* principles. See *post,* at 57. But as we have explained, *Casey* broke new ground when it treated the national controversy provoked by *Roe* as a ground for refusing to reconsider that decision, and no subsequent case has relied on that factor. Our decision today simply applies longstanding *stare decisis* factors instead of applying a version of the doctrine that seems to apply only in abortion cases.

3

Finally, the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. *Post*, at 4–5, 26–27, n. 8. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Supra*, at 66. We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed "potential life." *Roe*, 410 U. S., at 150 (emphasis deleted); *Casey*, 505 U. S., at 852. Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by "appeals to a broader right to autonomy." *Supra*, at 32. It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own *stare*

*decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.

B

1

We now turn to the concurrence in the judgment, which reproves us for deciding whether *Roe* and *Casey* should be retained or overruled. That opinion (which for convenience we will call simply "the concurrence") recommends a "more measured course," which it defends based on what it claims is "a straightforward *stare decisis* analysis." *Post*, at 1 (opinion of ROBERTS, C. J.). The concurrence would "leave for another day whether to reject any right to an abortion at all," *post*, at 7, and would hold only that if the Constitution protects any such right, the right ends once women have had "a reasonable opportunity" to obtain an abortion, *post*, at 1. The concurrence does not specify what period of time is sufficient to provide such an opportunity, but it would hold that 15 weeks, the period allowed under Mississippi's law, is enough—at least "absent rare circumstances." *Post*, at 2, 10.

There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party. As we have recounted, both parties and the Solicitor General have urged us either to reaffirm or overrule *Roe* and *Casey*. See *supra*, at 4–5. And when the specific approach advanced by the concurrence was broached at oral argument, both respondents and the Solicitor General emphatically rejected it. Respondents' counsel termed it "completely unworkable" and "less principled and less workable than viability." Tr. of Oral Arg. 54. The Solicitor General argued that abandoning the viability line would leave courts and others with "no continued guidance." *Id.*, at 101. What is more, the concurrence has not identified any of the

more than 130 *amicus* briefs filed in this case that advocated its approach. The concurrence would do exactly what it criticizes *Roe* for doing: pulling "out of thin air" a test that "[n]o party or *amicus* asked the Court to adopt." *Post*, at 3.

2

The concurrence's most fundamental defect is its failure to offer any principled basis for its approach. The concurrence would "discar[d]" "the rule from *Roe* and *Casey* that a woman's right to terminate her pregnancy extends up to the point that the fetus is regarded as 'viable' outside the womb." *Post*, at 2. But this rule was a critical component of the holdings in *Roe* and *Casey*, and *stare decisis* is "a doctrine of preservation, not transformation," *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 384 (2010) (ROBERTS, C. J., concurring). Therefore, a new rule that discards the viability rule cannot be defended on *stare decisis* grounds.

The concurrence concedes that its approach would "not be available" if "the rationale of *Roe* and *Casey* were inextricably entangled with and dependent upon the viability standard." *Post*, at 7. But the concurrence asserts that the viability line is separable from the constitutional right they recognized, and can therefore be "discarded" without disturbing any past precedent. *Post*, at 7–8. That is simply incorrect.

*Roe*'s trimester rule was expressly tied to viability, see 410 U. S., at 163–164, and viability played a critical role in later abortion decisions. For example, in *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, the Court reiterated *Roe*'s rule that a "State may regulate an abortion to protect the life of the fetus and even may proscribe abortion" at "the stage *subsequent to viability*." 428 U. S., at 61 (emphasis added). The Court then rejected a challenge to Missouri's definition of viability, holding that the State's definition was consistent with *Roe*'s. 428 U. S.,

at 63–64. If viability was not an essential part of the rule adopted in *Roe*, the Court would have had no need to make that comparison.

The holding in *Colautti* v. *Franklin*, 439 U. S. 379, is even more instructive. In that case, the Court noted that prior cases had "stressed viability" and reiterated that "[v]iability is the critical point" under *Roe*. 439 U. S., at 388–389. It then struck down Pennsylvania's definition of viability, *id.*, at 389–394, and it is hard to see how the Court could have done that if *Roe*'s discussion of viability was not part of its holding.

When the Court reconsidered *Roe* in *Casey*, it left no doubt about the importance of the viability rule. It described the rule as *Roe*'s "central holding," 505 U. S., at 860, and repeatedly stated that the right it reaffirmed was "the right of the woman to choose to have an abortion *before viability*." *Id.*, at 846 (emphasis added). See *id.*, at 871 ("The woman's right to terminate her pregnancy *before viability* is the most central principle of *Roe* v. *Wade*. It is a rule of law and a component of liberty we cannot renounce" (emphasis added)); *id.*, at 872 (A "woman has a right to choose to terminate or continue her pregnancy *before viability*" (emphasis added)); *id.*, at 879 ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy *before viability*" (emphasis added)).

Our subsequent cases have continued to recognize the centrality of the viability rule. See *Whole Women's Health*, 579 U. S., at 589–590 ("[A] provision of law is constitutionally invalid, if the 'purpose or effect' of the provision 'is to place a substantial obstacle in the path of a woman seeking an abortion *before the fetus attains viability*'" (emphasis deleted and added)); *id.*, at 627 ("[W]e now use *'viability'* as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health" (emphasis added)).

Not only is the new rule proposed by the concurrence inconsistent with *Casey*'s unambiguous "language," *post*, at 8, it is also contrary to the judgment in that case and later abortion cases. In *Casey*, the Court held that Pennsylvania's spousal-notification provision was facially unconstitutional, not just that it was unconstitutional as applied to abortions sought prior to the time when a woman has had a reasonable opportunity to choose. See 505 U. S., at 887–898. The same is true of *Whole Women's Health*, which held that certain rules that required physicians performing abortions to have admitting privileges at a nearby hospital were facially unconstitutional because they placed "a substantial obstacle in the path of women seeking *a previability abortion*." 579 U. S., at 591 (emphasis added).

For all these reasons, *stare decisis* cannot justify the new "reasonable opportunity" rule propounded by the concurrence. If that rule is to become the law of the land, it must stand on its own, but the concurrence makes no attempt to show that this rule represents a correct interpretation of the Constitution. The concurrence does not claim that the right to a reasonable opportunity to obtain an abortion is "'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty.'" *Glucksberg*, 521 U. S., at 720–721. Nor does it propound any other theory that could show that the Constitution supports its new rule. And if the Constitution protects a woman's right to obtain an abortion, the opinion does not explain why that right should end after the point at which all "reasonable" women will have decided whether to seek an abortion. While the concurrence is moved by a desire for judicial minimalism, "we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right." *Citizens United*, 558 U. S., at 375 (ROBERTS, C. J., concurring). For the reasons that we have explained, the concurrence's approach is not.

The concurrence would "leave for another day whether to reject any right to an abortion at all," *post*, at 7, but "another day" would not be long in coming. Some States have set deadlines for obtaining an abortion that are shorter than Mississippi's. See, *e.g.*, *Memphis Center for Reproductive Health* v. *Slatery*, 14 F. 4th, at 414 (considering law with bans "at cascading intervals of two to three weeks" beginning at six weeks), reh'g en banc granted, 14 F. 4th 550 (CA6 2021). If we held only that Mississippi's 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. The "measured course" charted by the concurrence would be fraught with turmoil until the Court answered the question that the concurrence seeks to defer.

Even if the Court ultimately adopted the new rule suggested by the concurrence, we would be faced with the difficult problem of spelling out what it means. For example, if the period required to give women a "reasonable" opportunity to obtain an abortion were pegged, as the concurrence seems to suggest, at the point when a certain percentage of women make that choice, see *post*, at 1–2, 9–10, we would have to identify the relevant percentage. It would also be necessary to explain what the concurrence means when it refers to "rare circumstances" that might justify an exception. *Post*, at 10. And if this new right aims to give women a reasonable opportunity to get an abortion, it would be necessary to decide whether factors other than promptness in deciding might have a bearing on whether such an opportunity was available.

In sum, the concurrence's quest for a middle way would only put off the day when we would be forced to confront the question we now decide. The turmoil wrought by *Roe* and *Casey* would be prolonged. It is far better—for this Court

and the country—to face up to the real issue without further delay.

## VI

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

### A

Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history. See *supra,* at 8–39.

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson*, 372 U. S., at 729–730; see also *Dandridge* v. *Williams*, 397 U. S. 471, 484–486 (1970); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938). That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance. See, *e.g., Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 365–368 (2001) ("treatment of the disabled"); *Glucksberg*, 521 U. S., at 728 ("assisted suicide"); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 32–35, 55 (1973) ("financing public education").

A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." *Heller* v. *Doe*, 509 U. S. 312, 319 (1993). It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. *Id.,* at 320; *FCC* v. *Beach Communications, Inc.*, 508 U. S.

307, 313 (1993); *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976) (*per curiam*); *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 491 (1955). These legitimate interests include respect for and preservation of prenatal life at all stages of development, *Gonzales*, 550 U. S., at 157–158; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability. See *id.*, at 156–157; *Roe*, 410 U. S., at 150; cf. *Glucksberg*, 521 U. S., at 728–731 (identifying similar interests).

B

These legitimate interests justify Mississippi's Gestational Age Act. Except "in a medical emergency or in the case of a severe fetal abnormality," the statute prohibits abortion "if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." Miss. Code Ann. §41–41–191(4)(b). The Mississippi Legislature's findings recount the stages of "human prenatal development" and assert the State's interest in "protecting the life of the unborn." §2(b)(i). The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure "for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." §2(b)(i)(8); see also *Gonzales*, 550 U. S., at 135–143 (describing such procedures). These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail.

VII

We end this opinion where we began. Abortion presents

a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

## APPENDICES

### A

This appendix contains statutes criminalizing abortion at all stages of pregnancy in the States existing in 1868. The statutes appear in chronological order.

**1. Missouri (1825):**

> Sec. 12. "That every person who shall wilfully and maliciously administer or cause to be administered to or taken by any person, any poison, or other noxious, poisonous or destructive substance or liquid, with an intention to harm him or her thereby to murder, or thereby *to cause or procure the miscarriage of any woman then being with child*, and shall thereof be duly convicted, shall suffer imprisonment not exceeding seven years, and be fined not exceeding three thousand dollars."[69]

**2. Illinois (1827):**

> Sec. 46. "Every person who shall wilfully and maliciously administer, or cause to be administered to, or taken by any person, any poison, or other noxious or

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[69] 1825 Mo. Laws p. 283 (emphasis added); see also, Mo. Rev. Stat., Art. II, §§10, 36 (1835) (extending liability to abortions performed by instrument and establishing differential penalties for pre- and post-quickening abortion) (emphasis added).

destructive substance or liquid, with an intention to cause the death of such person, *or to procure the miscarriage of any woman, then being with child*, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, and be fined in a sum not exceeding one thousand dollars." [70]

**3. New York (1828):**

Sec. 9. "Every person who shall administer *to any woman pregnant with a quick child*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."

Sec. 21. "Every person who shall willfully administer *to any pregnant woman*, any medicine, drug, substance or thing whatever, or shall use or employ any instrument of other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."[71]

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[70] Ill. Rev. Code §46 (1827) (emphasis added); see also Ill. Rev. Code §46 (1833) (same); 1867 Ill. Laws p. 89 (extending liability to abortions "by means of any instrument[s]" and raising penalties to imprisonment "not less than two nor more than ten years").

[71] N. Y. Rev. Stat., pt. 4, ch. 1, Tit. 2, §9 (emphasis added); Tit. 6, §21

**4. Ohio (1834):**

Sec. 1. "Be it enacted by the General Assembly of State of Ohio, That any physician, or other person, who shall wilfully administer *to any pregnant woman* any medicine, drug, substance, or thing whatever, or shall use any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Sec. 2. "That any physician, or other person, who shall administer *to any woman pregnant with a quick child*, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such child or mother in consequence thereof, be deemed guilty of high misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary not more than seven years, nor less than one year."[72]

**5. Indiana (1835):**

Sec. 3. "That every person who shall wilfully administer *to any pregnant woman*, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent

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(1828) (emphasis added); 1829 N. Y. Laws p. 19 (codifying these provisions in the revised statutes).

[72] 1834 Ohio Laws pp. 20–21 (emphasis deleted and added).

thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall upon conviction be punished by imprisonment in the county jail any term of [time] not exceeding twelve months and be fined any sum not exceeding five hundred dollars."[73]

**6. Maine (1840):**

Sec. 13. "Every person, who shall administer *to any woman pregnant with child, whether such child be quick or not*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means whatever, with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done as necessary to preserve the life of the mother, shall be punished by imprisonment in the state prison, not more than five years, or by fine, not exceeding one thousand dollars, and imprisonment in the county jail, not more than one year."

Sec. 14. "Every person, who shall administer *to any woman, pregnant with child, whether such child shall be quick or not*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same shall have been done, as necessary to preserve her life, shall be punished by imprisonment in the county jail, not more than one year, or by fine, not exceeding one thousand dollars."[74]

**7. Alabama (1841):**

Sec. 2. "Every person who shall wilfully administer *to any pregnant woman* any medicines, drugs, substance or thing whatever, or shall use and employ any

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[73] 1835 Ind. Laws p. 66 (emphasis added).

[74] Me. Rev. Stat., Tit. 12, ch. 160, §§13–14 (1840) (emphasis added).

instrument or means whatever with intent thereby to procure the miscarriage of such woman, unless the same shall be necessary to preserve her life, or shall have been advised by a respectable physician to be necessary for that purpose, shall upon conviction, be punished by fine not exceeding five hundred dollars, and by imprisonment in the county jail, not less than three, and not exceeding six months."[75]

**8. Massachusetts (1845):**

Ch. 27. "Whoever, maliciously or without lawful justification, with intent to cause and procure the miscarriage *of a woman then pregnant with child*, shall administer to her, prescribe for her, or advise or direct her to take or swallow, any poison, drug, medicine or noxious thing, or shall cause or procure her with like intent, to take or swallow any poison, drug, medicine or noxious thing; and whoever maliciously and without lawful justification, shall use any instrument or means whatever with the like intent, and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned not more than twenty years, nor less than five years in the State Prison; and if the woman doth not die in consequence thereof, such offender shall be guilty of a misdemeanor, and shall be punished by imprisonment not exceeding seven years, nor less than one year, in the state prison or house of correction, or common jail, and by fine not exceeding two thousand dollars."[76]

**9. Michigan (1846):**

Sec. 33. "Every person who shall administer *to any*

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[75] 1841 Ala. Acts p. 143 (emphasis added).

[76] 1845 Mass. Acts p. 406 (emphasis added).

*woman pregnant with a quick child*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter."

Sec. 34. "Every person who shall wilfully administer *to any pregnant woman* any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment."[77]

**10. Vermont (1846):**

Sec. 1. "Whoever maliciously, or without lawful justification with intent to cause and procure the miscarriage *of a woman, then pregnant with child,* shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing, or shall cause or procure her, with like intent, to take or swallow any poison, drug, medicine or noxious thing, and whoever maliciously and without lawful justification, shall use any instrument or means whatever, with the like intent, and every person, with the like intent, knowingly aiding and assisting such offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned in

[77] Mich. Rev. Stat., Tit. 30, ch. 153, §§33–34 (1846) (emphasis added).

the state prison, not more than ten years, nor less than five years; and if the woman does not die in consequence thereof, such offenders shall be deemed guilty of a misdemeanor; and shall be punished by imprisonment in the state prison not exceeding three years, nor less than one year, and pay a fine not exceeding two hundred dollars."[78]

**11. Virginia (1848):**

Sec. 9. "Any free person who shall administer *to any pregnant woman*, any medicine, drug or substance whatever, or use or employ any instrument or other means with intent thereby to destroy the child with which such woman may be pregnant, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, unless the same shall have been done to preserve the life of such woman, shall be punished, if the death of a quick child be thereby produced, by confinement in the penitentiary, for not less than one nor more than five years, or if the death of a child, not quick, be thereby produced, by confinement in the jail for not less than one nor more than twelve months."[79]

**12. New Hampshire (1849):**

Sec. 1. "That every person, who shall wilfully administer *to any pregnant woman*, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or means whatever with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in the county jail

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[78] 1846 Vt. Acts & Resolves pp. 34–35 (emphasis added).

[79] 1848 Va. Acts p. 96 (emphasis added).

not more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment at the discretion of the Court."

Sec. 2. "Every person who shall administer *to any woman pregnant with a quick child*, any medicine, drug or substance whatever, or shall use or employ any instrument or means whatever, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for such purpose, shall, upon conviction, be punished by fine not exceeding one thousand dollars, and by confinement to hard labor not less than one year, nor more than ten years."[80]

**13. New Jersey (1849):**

"That if any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage *of a woman then pregnant with child*, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine, or noxious thing; and if any person or persons maliciously, and without lawful justification, shall use any instrument or means whatever, with the like intent; and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall, on conviction thereof, be adjudged guilty of a high misdemeanor; and if the woman die in consequence thereof, shall be punished by fine, not exceeding one thousand dollars, or imprisonment at hard labour for any term not exceeding fifteen years, or both; and if the woman doth not die in consequence thereof, such offender shall, on conviction thereof, be adjudged guilty of a misdemeanor, and be punished by fine, not exceed-

[80] 1849 N. H. Laws p. 708 (emphasis added).

ing five hundred dollars, or imprisonment at hard labour, for any term not exceeding seven years, or both."[81]

**14. California (1850):**

Sec. 45. "And every person who shall administer or cause to be administered or taken, any medical substances, or shall use or cause to be used any instruments whatever, with the intention *to procure the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the State Prison for a term not less than two years, nor more than five years: Provided, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."[82]

**15. Texas (1854):**

Sec. 1. "If any person, with the intent to procure the miscarriage *of any woman being with child*, unlawfully and maliciously shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or any means whatever, with like intent, every such offender, and every person counselling or aiding or abetting such offender, shall be punished by confinement to hard labor in the Penitentiary not exceeding ten years."[83]

**16. Louisiana (1856):**

Sec. 24. "Whoever shall feloniously administer or cause to be administered any drug, potion, or any other thing to any woman, for the purpose of procuring a premature delivery, and whoever shall administer or

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[81] 1849 N. J. Laws pp. 266–267 (emphasis added).
[82] 1850 Cal. Stats. p. 233 (emphasis added and deleted).
[83] 1854 Tex. Gen. Laws p. 58 (emphasis added).

cause to be administered *to any woman pregnant with child*, any drug, potion, or any other thing, for the purpose of procuring abortion, or a premature delivery, shall be imprisoned at hard labor, for not less than one, nor more than ten years."[84]

**17. Iowa (1858):**

Sec. 1. "That every person who shall willfully administer *to any pregnant woman*, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with the intent thereby to procure the miscarriage of any such woman, unless the same shall be necessary to preserve the life of such woman, shall upon conviction thereof, be punished by imprisonment in the county jail for a term of not exceeding one year, and be fined in a sum not exceeding one thousand dollars."[85]

**18. Wisconsin (1858):**

Sec. 11. "Every person who shall administer *to any woman pregnant with a child* any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."[86]

Sec. 58. "Every person who shall administer *to any pregnant woman*, or prescribe for any such woman, or advise or procure any such woman to take, any medicine, drug, or substance or thing whatever, or shall use

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[84] La. Rev. Stat. §24 (1856) (emphasis added).

[85] 1858 Iowa Acts p. 93 (codified in Iowa Rev. Laws §4221) (emphasis added).

[86] Wis. Rev. Stat., ch. 164, §11, ch. 169, §58 (1858) (emphasis added).

or employ any instrument or other means whatever, or advise or procure the same to be used, with intent thereby to procure the miscarriage of any such woman, shall upon conviction be punished by imprisonment in a county jail, not more than one year nor less than three months, or by fine, not exceeding five hundred dollars, or by both fine and imprisonment, at the discretion of the court."

**19. Kansas (1859):**

Sec. 10. "Every person who shall administer *to any woman, pregnant with a quick child*, any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree."

Sec. 37. "Every physician or other person who shall wilfully administer *to any pregnant woman* any medicine, drug or substance whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall, upon conviction, be adjudged guilty of a misdemeanor, and punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."[87]

**20. Connecticut (1860):**

Sec. 1. "That any person with intent *to procure the*

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[87] 1859 Kan. Laws pp. 233, 237 (emphasis added).

*miscarriage or abortion of any woman*, shall give or administer to her, prescribe for her, or advise, or direct, or cause or procure her to take, any medicine, drug or substance whatever, or use or advise the use of any instrument, or other means whatever, with the like intent, unless the same shall have been necessary to preserve the life of such woman, or of her unborn child, shall be deemed guilty of felony, and upon due conviction thereof shall be punished by imprisonment in the Connecticut state prison, not more than five years or less than one year, or by a fine of one thousand dollars, or both, at the discretion of the court."[88]

**21. Pennsylvania (1860):**

Sec. 87. "If any person shall unlawfully administer *to any woman, pregnant or quick with child, or supposed and believed to be pregnant or quick with child*, any drug, poison, or other substance whatsoever, or shall unlawfully use any instrument or other means whatsoever, with the intent to procure the miscarriage of such woman, and such woman, or any child with which she may be quick, shall die in consequence of either of said unlawful acts, the person so offending shall be guilty of felony, and shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years."

Sec. 88. "If any person, with intent *to procure the miscarriage of any woman*, shall unlawfully administer to her any poison, drug or substance whatsoever, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, such person shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dol-

[88] 1860 Conn. Pub. Acts p. 65 (emphasis added).

lars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years."[89]

**22. Rhode Island (1861):**

Sec. 1. "Every person who shall be convicted of wilfully administering *to any pregnant woman, or to any woman supposed by such person to be pregnant*, anything whatever, or shall employ any means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be imprisoned not exceeding one year, or fined not exceeding one thousand dollars."[90]

**23. Nevada (1861):**

Sec. 42. "[E]very person who shall administer, or cause to be administered or taken, any medicinal substance, or shall use, or cause to be used, any instruments whatever, with the intention *to procure the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison, for a term not less than two years, nor more than five years; provided, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."[91]

**24. West Virginia (1863):**

*West Virginia's Constitution adopted the laws of Virginia when it became its own State:*

"Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries

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[89] 1861 Pa. Laws pp. 404–405 (emphasis added).

[90] R. I. Acts & Resolves p. 133 (emphasis added).

[91] 1861 Nev. Laws p. 63 (emphasis added and deleted).

of the State of West Virginia, when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature."[92]

*The Virginia law in force in 1863 stated*:

Sec. 8. "Any free person who shall administer to, or cause to be taken, *by a woman*, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be confined in the penitentiary not less than one, nor more than five years. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child."[93]

**25. Oregon (1864):**

Sec. 509. "If any person shall administer *to any woman pregnant with child*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter."[94]

**26. Nebraska (1866):**

Sec. 42. "Every person who shall willfully and maliciously administer or cause to be administered to or taken by any person, any poison or other noxious or destructive substance or liquid, with the intention to

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[92] W. Va. Const., Art. XI, §8 (1862).

[93] Va. Code, Tit. 54, ch. 191, §8 (1849) (emphasis added); see also W. Va. Code, ch. 144, §8 (1870) (similar).

[94] Ore. Gen. Laws, Crim. Code, ch. 43, §509 (1865).

cause the death of such person, and being thereof duly convicted, shall be punished by confinement in the penitentiary for a term not less than one year and not more than seven years. And every person who shall administer or cause to be administered or taken, any such poison, substance or liquid, with the intention *to procure the miscarriage of any woman then being with child*, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years in the penitentiary, and fined in a sum not exceeding one thousand dollars."[95]

**27. Maryland (1868):**

Sec. 2. "And be it enacted, That any person who shall knowingly advertise, print, publish, distribute or circulate, or knowingly cause to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement or reference containing words or language, giving or conveying any notice, hint or reference to any person, or to the name of any person real or fictitious, from whom; or to any place, house, shop or office, when any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever; for the purpose of producing abortion, or who shall knowingly sell, or cause to be sold any such poison, drug, mixture, preparation, medicine or noxious thing or instrument of any kind whatever; or where any advice, direction, information or knowledge may be obtained *for the purpose of causing the miscarriage or abortion of any woman pregnant with child, at any period of her pregnancy*, or shall knowingly sell or cause to be sold any medicine, or who shall knowingly use or cause to be used any means

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[95] Neb. Rev. Stat., Tit. 4, ch. 4, §42 (1866) (emphasis added); see also Neb. Gen. Stat., ch. 58, §§6, 39 (1873) (expanding criminal liability for abortions by other means, including instruments).

whatsoever for that purpose, shall be punished by imprisonment in the penitentiary for not less than three years, or by a fine of not less than five hundred nor more than one thousand dollars, or by both, in the discretion of the Court; and in case of fine being imposed, one half thereof shall be paid to the State of Maryland, and one-half to the School Fund of the city or county where the offence was committed; provided, however, that nothing herein contained shall be construed so as to prohibit the supervision and management by a regular practitioner of medicine of all cases of abortion occurring spontaneously, either as the result of accident, constitutional debility, or any other natural cause, or the production of abortion by a regular practitioner of medicine when, after consulting with one or more respectable physicians, he shall be satisfied that the foetus is dead, or that no other method will secure the safety of the mother."[96]

**28. Florida (1868):**

Ch. 3, Sec. 11. "Every person who shall administer *to any woman pregnant with a quick child* any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."

Ch. 8, Sec. 9. "Whoever, with intent *to procure miscarriage of any woman*, unlawfully administers to her, or advises, or prescribes for her, or causes to be taken by her, any poison, drug, medicine, or other noxious thing, or unlawfully uses any instrument or other

[96] 1868 Md. Laws p. 315 (emphasis deleted and added).

means whatever with the like intent, or with like intent aids or assists therein, shall, if the woman does not die in consequence thereof, be punished by imprisonment in the State penittentiary not exceeding seven years, nor less than one year, or by fine not exceeding one thousand dollars."[97]

**29. Minnesota (1873):**

Sec. 1. "That any person who shall administer *to any woman with child*, or prescribe for any such woman, or suggest to, or advise, or procure her to take any medicine, drug, substance or thing whatever, or who shall use or employ, or advise or suggest the use or employment of any instrument or other means or force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for a term not more than ten (10) years nor less than three (3) years."

Sec. 2. "Any person who shall administer *to any woman with child*, or prescribe, or procure, or provide for any such woman, or suggest to, or advise, or procure any such woman to take any medicine, drug, substance or thing whatever, or shall use or employ, or suggest, or advise the use or employment of any instrument or other means or force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, shall upon conviction thereof be punished by imprisonment in the state prison for a term not more than two years nor less than

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[97] 1868 Fla. Laws, ch. 1637, pp. 64, 97 (emphasis added).

one year, or by fine not more than five thousand dollars nor less than five hundred dollars, or by such fine and imprisonment both, at the discretion of the court."[98]

**30. Arkansas (1875):**

Sec. 1. "That it shall be unlawful for any one to administer or prescribe any medicine or drugs *to any woman with child*, with intent to produce an abortion, or premature delivery of any foetus before the period of quickening, or to produce or attempt to produce such abortion by any other means; and any person offending against the provision of this section, shall be fined in any sum not exceeding one thousand ($1000) dollars, and imprisoned in the penitentiary not less than one (1) nor more than five (5) years; provided, that this section shall not apply to any abortion produced by any regular practicing physician, for the purpose of saving the mother's life."[99]

**31. Georgia (1876):**

Sec. 2. "That every person who shall administer *to any woman pregnant with a child*, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder."

Sec. 3. "That any person who shall wilfully administer *to any pregnant woman* any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to

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[98] 1873 Minn. Laws pp. 117–118 (emphasis added).

[99] 1875 Ark. Acts p. 5 (emphasis added and deleted).

procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished as prescribed in section 4310 of the Revised Code of Georgia."[100]

**32. North Carolina (1881):**

Sec. 1. "That every person who shall wilfully administer *to any woman either pregnant or quick with child*, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy said child, unless the same shall have been necessary to preserve the life of such mother, shall be guilty of a felony, and shall be imprisoned in the state penitentiary for not less than one year nor more than ten years, and be fined at the discretion of the court."

Sec. 2. "That every person who shall administer *to any pregnant woman*, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or any thing whatsoever, with intent thereby to procure the miscarriage of any such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, shall be guilty of a misdemeanor, and, on conviction, shall be imprisoned in the jail or state penitentiary for not less than one year or more than five years, and fined at the discretion of the court."[101]

**33. Delaware (1883):**

Sec. 2. "Every person who, with the intent to procure

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[100] 1876 Ga. Acts & Resolutions p. 113 (emphasis added).

[101] 1881 N. C. Sess. Laws pp. 584–585 (emphasis added).

the miscarriage *of any pregnant woman or women supposed by such person to be pregnant*, unless the same be necessary to preserve her life, shall administer to her, advise, or prescribe for her, or cause to be taken by her any poison, drug, medicine, or other noxious thing, or shall use any instrument or other means whatsoever, or shall aid, assist, or counsel any person so intending to procure a miscarriage, whether said miscarriage be accomplished or not, shall be guilty of a felony, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars and be imprisoned for a term not exceeding five years nor less than one year."[102]

**34. Tennessee (1883):**

Sec. 1. "That every person who shall administer *to any woman pregnant with child, whether such child be quick or not*, any medicine, drug or substance whatever, or shall use or employ any instrument, or other means whatever with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done with a view to preserve the life of the mother, shall be punished by imprisonment in the penitentiary not less than one nor more than five years."

Sec. 2. "Every person who shall administer any substance with the intention *to procure the miscarriage of a woman then being with child*, or shall use or employ any instrument or other means with such intent, unless the same shall have been done with a view to preserve the life of such mother, shall be punished by imprisonment in the penitentiary not less than one nor more than three years."[103]

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[102] 1883 Del. Laws, ch. 226 (emphasis added).

[103] 1883 Tenn. Acts pp. 188–189 (emphasis added).

**35. South Carolina (1883):**

Sec. 1. "That any person who shall administer *to any woman with child*, or prescribe for any such woman, or suggest to or advise or procure her to take, any medicine, substance, drug or thing whatever, or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the Penitentiary for a term not more than twenty years nor less than five years."

Sec. 2. "That any person who shall administer *to any woman with child*, or prescribe or procure or provide for any such woman, or advise or procure any such woman to take, any medicine, drug, substance or thing whatever, or shall use or employ or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, shall, upon conviction thereof, be punished by imprisonment in the Penitentiary for a term not more than five years, or by fine not more than five thousand dollars, or by such fine and imprisonment both, at the discretion of the Court; but no conviction shall be had under the provisions of Section 1 or 2 of this Act upon the uncorroborated evidence of such woman."[104]

**36. Kentucky (1910):**

Sec. 1. "It shall be unlawful for any person to prescribe or administer *to any pregnant woman, or to any*

[104] 1883 S. C. Acts pp. 547–548 (emphasis added).

*woman whom he has reason to believe pregnant, at any time during the period of gestation*, any drug, medicine or substance, whatsoever, with the intent thereby to procure the miscarriage of such woman, or with like intent, to use any instrument or means whatsoever, unless such miscarriage is necessary to preserve her life; and any person so offending, shall be punished by a fine of not less than five hundred nor more than one thousand dollars, and imprisoned in the State prison for not less than one nor more than ten years."

Sec. 2. "If by reason of any of the acts described in Section 1 hereof, the miscarriage of such woman is procured, and she does miscarry, causing the death of the unborn child, whether before or after quickening time, the person so offending shall be guilty of a felony, and confined in the penitentiary for not less than two, nor more than twenty-one years."

Sec. 3. "If, by reason of the commission of any of the acts described in Section 1 hereof, the woman to whom such drug or substance has been administered, or upon whom such instrument has been used, shall die, the person offending shall be punished as now prescribed by law, for the offense of murder or manslaughter, as the facts may justify."

Sec. 4. "The consent of the woman to the performance of the operation or administering of the medicines or substances, referred to, shall be no defense, and she shall be a competent witness in any prosecution under this act, and for that purpose she shall not be considered an accomplice."[105]

**37. Mississippi (1952):**

Sec. 1. "Whoever, by means of any instrument, medicine, drug, or other means whatever shall willfully and

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[105] 1910 Ky. Acts pp. 189–190 (emphasis added).

knowingly cause *any woman pregnant with child* to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the state penitentiary no less than one (1) year, nor more than ten (10) years; or if the death of the mother results therefrom, the person procuring, causing, or attempting to procure or cause the abortion or miscarriage shall be guilty of murder."

Sec. 2. "No act prohibited in section 1 hereof shall be considered as necessary for the preservation of the mother's life unless upon the prior advice, in writing, of two reputable licensed physicians."

Sec. 3. "The license of any physician or nurse shall be automatically revoked upon conviction under the provisions of this act."[106]

B

This appendix contains statutes criminalizing abortion at all stages in each of the Territories that became States and in the District of Columbia. The statutes appear in chronological order of enactment.

**1. Hawaii (1850):**

Sec. 1. "Whoever maliciously, without lawful justification, administers, or causes or procures to be administered any poison or noxious thing *to a woman then with child*, in order to produce her mis-carriage, or maliciously uses any instrument or other means with like intent, shall, if such woman be then quick with child, be punished by fine not exceeding one thousand dollars and imprisonment at hard labor not more than five years. And if she be then not quick with child, shall be punished by a fine not exceeding five hundred dollars,

[106] 1952 Miss. Laws p. 289 (codified at Miss. Code Ann. §2223 (1956) (emphasis added)).

and imprisonment at hard labor not more than two years."

Sec. 2. "Where means of causing abortion are used for the purpose of saving the life of the woman, the surgeon or other person using such means is lawfully justified."[107]

**2. Washington (1854):**

Sec. 37. "Every person who shall administer *to any woman pregnant with a quick child*, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, on conviction thereof, be imprisoned in the penitentiary not more than twenty years, nor less than one year."

Sec. 38. "Every person who shall administer *to any pregnant woman, or to any woman who he supposes to be pregnant*, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall on conviction thereof, be imprisoned in the penitentiary not more than five years, nor less than one year, or be imprisoned in the county jail not more than twelve months, nor less than one month, and be fined in any sum not exceeding one thousand dollars."[108]

**3. Colorado (1861):**

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[107] Haw. Penal Code, ch. 12, §§1–2 (1850) (emphasis added). Hawaii became a State in 1959. See Presidential Proclamation No. 3309, 73 Stat. c74–c75.

[108] Terr. of Wash. Stat., ch. 2, §§37–38, p. 81 (1854) (emphasis added). Washington became a State in 1889. See Presidential Proclamation No. 8, 26 Stat. 1552–1553.

Sec. 42. "[E]very person who shall administer substance or liquid, or who shall use or cause to be used any instrument, of whatsoever kind, with the intention *to procure the miscarriage of any woman then being with child*, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, and fined in a sum not exceeding one thousand dollars; and if any woman, by reason of such treatment, shall die, the person or persons administering, or causing to be administered, such poison, substance or liquid, or using or causing to be used, any instrument, as aforesaid, shall be deemed guilty of manslaughter, and if convicted, be punished accordingly."[109]

**4. Idaho (1864):**

Sec. 42. "[E]very person who shall administer or cause to be administered, or taken, any medicinal substance, or shall use or cause to be used, any instruments whatever, with the intention *to procure the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the territorial prison for a term not less than two years, nor more than five years: *Provided*, That no physician shall be effected by the last clause of this section, who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."[110]

**5. Montana (1864):**

Sec. 41. "[E]very person who shall administer, or cause to be administered, or taken, any medicinal substance, or shall use, or cause to be used, any instru-

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[109] 1861 Terr. of Colo. Gen. Laws pp. 296–297. Colorado became a State in 1876. See Presidential Proclamation No. 7, 19 Stat. 665–666.

[110] 1863–1864 Terr. of Idaho Laws p. 443. Idaho became a State in 1890. See 26 Stat. 215–219.

ments whatever, with the intention *to produce the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than two years nor more than five years. *Provided*, That no physician shall be affected by the last clause of this section, who in the discharge of his professional duties deems it necessary to produce the miscarriage of any woman in order to save her life."[111]

**6. Arizona (1865):**

Sec. 45. "[E]very person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention *to procure the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than two years nor more than five years: Provided, that no physician shall be affected by the last clause of this section, who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."[112]

**7. Wyoming (1869):**

Sec. 25. "[A]ny person who shall administer, or cause to be administered, or taken, any such poison, substance or liquid, or who shall use, or cause to be used, any instrument of whatsoever kind, with the intention *to procure the miscarriage of any woman then being with child*, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three

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[111] 1864 Terr. of Mont. Laws p. 184. Montana became a State in 1889. See Presidential Proclamation No. 7, 26 Stat. 1551–1552.

[112] Howell Code, ch. 10, §45 (1865). Arizona became a State in 1912. See Presidential Proclamation of Feb. 14, 1912, 37 Stat. 1728–1729.

years, in the penitentiary, and fined in a sum not exceeding one thousand dollars; and if any woman by reason of such treatment shall die, the person, or persons, administering, or causing to be administered such poison, substance, or liquid, or using or causing to be used, any instrument, as aforesaid, shall be deemed guilty of manslaughter, and if convicted, be punished by imprisonment for a term not less than three years in the penitentiary, and fined in a sum not exceeding one thousand dollars, unless it appear that such miscarriage was procured or attempted by, or under advice of a physician or surgeon, with intent to save the life of such woman, or to prevent serious and permanent bodily injury to her."[113]

**8. Utah (1876):**

Sec. 142. "Every person who provides, supplies, or administers *to any pregnant woman*, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the penitentiary not less than two nor more than ten years."[114]

**9. North Dakota (1877):**

Sec. 337. "Every person who administers *to any pregnant woman*, or who prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs

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[113] 1869 Terr. of Wyo. Gen. Laws p. 104 (emphasis added). Wyoming became a State in 1889. See 26 Stat. 222–226.

[114] Terr. of Utah Comp. Laws §1972 (1876) (emphasis added). Utah became a State in 1896. See Presidential Proclamation No. 9, 29 Stat. 876–877.

any instrument, or other means whatever with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the territorial prison not exceeding three years, or in a county jail not exceeding one year."[115]

**10. South Dakota (1877):** *Same as North Dakota.*

**11. Oklahoma (1890):**

Sec. 2187. "Every person who administers *to any pregnant woman*, or who prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the Territorial prison not exceeding three years, or in a county jail not exceeding one year."[116]

**12. Alaska (1899):**

Sec. 8. "That if any person shall administer *to any woman pregnant with a child* any medicine, drug, or substance whatever, or shall use any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed

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[115] Dakota Penal Code §337 (1877) (codified at N. D. Rev. Code §7177 (1895)), and S. D. Rev. Penal Code Ann. §337 (1883). North and South Dakota became States in 1889. See Presidential Proclamation No. 5, 26 Stat. 1548–1551.

[116] Okla. Stat. §2187 (1890) (emphasis added). Oklahoma became a State in 1907. See Presidential Proclamation of Nov. 16, 1907, 35 Stat. 2160–2161.

guilty of manslaughter, and shall be punished accordingly."[117]

**13. New Mexico (1919):**

Sec. 1. "Any person who shall administer *to any pregnant woman any medicine*, drug or substance whatever, or attempt by operation or any other method or means to produce an abortion or miscarriage upon such woman, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than two thousand ($2,000.00) Dollars, nor less than five hundred ($500.00) Dollars, or imprisoned in the penitentiary for a period of not less than one nor more than five years, or by both such fine and imprisonment in the discretion of the court trying the case."

Sec. 2. "Any person committing such act or acts mentioned in section one hereof which shall culminate in the death of the woman shall be deemed guilty of murder in the second degree; *Provided*, however, an abortion may be produced when two physicians licensed to practice in the State of New Mexico, in consultation, deem it necessary to preserve the life of the woman, or to prevent serious and permanent bodily injury."

Sec. 3. "For the purpose of the act, the term "pregnancy" is defined as that condition of a woman *from the date of conception to the birth of her child*."[118]

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**District of Columbia (1901):**

Sec. 809. "Whoever, with intent *to procure the miscarriage of any woman*, prescribes or administers to her

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[117] 1899 Alaska Sess. Laws ch. 2, p. 3 (emphasis added). Alaska became a State in 1959. See Presidential Proclamation No. 3269, 73 Stat. c16.

[118] N. M. Laws p. 6 (emphasis added). New Mexico became a State in 1912. See Presidential Proclamation of Jan. 6, 1912, 37 Stat. 1723–1724.

any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years."[119]

[119] §809, 31 Stat. 1322 (1901) (emphasis added).

# SUPREME COURT OF THE UNITED STATES

No. 19–1392

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL., PETITIONERS *v.* JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2022]

JUSTICE THOMAS, concurring.

I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. Respondents invoke one source for that right: the Fourteenth Amendment's guarantee that no State shall "deprive any person of life, liberty, or property without due process of law." The Court well explains why, under our substantive due process precedents, the purported right to abortion is not a form of "liberty" protected by the Due Process Clause. Such a right is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty." *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997) (internal quotation marks omitted). "[T]he idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to abortion is farcical." *June Medical Services L. L. C.* v. *Russo*, 591 U. S. ___, ___ (2020) (THOMAS, J., dissenting) (slip op., at 17).

I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that "due process of law" merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of

life, liberty, or property. See, *e.g., Johnson* v. *United States*, 576 U. S. 591, 623 (2015) (THOMAS, J., concurring in judgment). Other sources, by contrast, suggest that "due process of law" prohibited legislatures "from authorizing the deprivation of a person's life, liberty, or property without providing him the customary procedures to which freemen were entitled by the old law of England." *United States* v. *Vaello Madero*, 596 U. S. ___, ____ (2022) (THOMAS, J., concurring) (slip op., at 3) (internal quotation marks omitted). Either way, the Due Process Clause at most guarantees *process*. It does not, as the Court's substantive due process cases suppose, "forbi[d] the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided." *Reno* v. *Flores*, 507 U. S. 292, 302 (1993); see also, *e.g., Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992).

As I have previously explained, "substantive due process" is an oxymoron that "lack[s] any basis in the Constitution." *Johnson*, 576 U. S., at 607–608 (opinion of THOMAS, J.); see also, *e.g., Vaello Madero*, 596 U. S., at ___ (THOMAS, J., concurring) (slip op., at 3) ("[T]ext and history provide little support for modern substantive due process doctrine"). "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." *McDonald* v. *Chicago*, 561 U. S. 742, 811 (2010) (THOMAS, J., concurring in part and concurring in judgment); see also *United States* v. *Carlton*, 512 U. S. 26, 40 (1994) (Scalia, J., concurring in judgment). The resolution of this case is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.

The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts. Cases like *Griswold* v. *Connecticut*,

381 U. S. 479 (1965) (right of married persons to obtain contraceptives)*; *Lawrence* v. *Texas*, 539 U. S. 558 (2003) (right to engage in private, consensual sexual acts); and *Obergefell* v. *Hodges*, 576 U. S. 644 (2015) (right to same-sex marriage), are not at issue. The Court's abortion cases are unique, see *ante,* at 31–32, 66, 71–72, and no party has asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised," *McDonald*, 561 U. S., at 813 (opinion of THOMAS, J.). Thus, I agree that "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion." *Ante,* at 66.

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," *Ramos* v. *Louisiana*, 590 U. S. ___, ___ (2020) (THOMAS, J., concurring in judgment) (slip op., at 7), we have a duty to "correct the error" established in those precedents, *Gamble* v. *United States*, 587 U. S. ___, ___ (2019) (THOMAS, J., concurring) (slip op., at 9). After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment. Amdt.

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**Griswold* v. *Connecticut* purported not to rely on the Due Process Clause, but rather reasoned "that specific guarantees in the Bill of Rights"—including rights enumerated in the First, Third, Fourth, Fifth, and Ninth Amendments—"have penumbras, formed by emanations," that create "zones of privacy." 381 U. S., at 484. Since *Griswold,* the Court, perhaps recognizing the facial absurdity of *Griswold*'s penumbral argument, has characterized the decision as one rooted in substantive due process. See, *e.g., Obergefell* v. *Hodges*, 576 U. S. 644, 663 (2015); *Washington* v. *Glucksberg*, 521 U. S. 702, 720 (1997).

14, §1; see *McDonald*, 561 U. S., at 806 (opinion of THOMAS, J.). To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights. See *id.*, at 854. That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach. See *ante,* at 15, n. 22.

Moreover, apart from being a demonstrably incorrect reading of the Due Process Clause, the "legal fiction" of substantive due process is "particularly dangerous." *McDonald*, 561 U. S., at 811 (opinion of THOMAS, J.); accord, *Obergefell*, 576 U. S., at 722 (THOMAS, J., dissenting). At least three dangers favor jettisoning the doctrine entirely.

First, "substantive due process exalts judges at the expense of the People from whom they derive their authority." *Ibid.* Because the Due Process Clause "speaks only to 'process,' the Court has long struggled to define what substantive rights it protects." *Timbs* v. *Indiana*, 586 U. S. ___, ___ (2019) (THOMAS, J., concurring in judgment) (slip op., at 2) (internal quotation marks omitted). In practice, the Court's approach for identifying those "fundamental" rights "unquestionably involves policymaking rather than neutral legal analysis." *Carlton*, 512 U. S., at 41–42 (opinion of Scalia, J.); see also *McDonald*, 561 U. S., at 812 (opinion of THOMAS, J.) (substantive due process is "a jurisprudence devoid of a guiding principle"). The Court divines new rights in line with "its own, extraconstitutional value preferences" and nullifies state laws that do not align with the judicially created guarantees. *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 794 (1986) (White, J., dissenting).

Nowhere is this exaltation of judicial policymaking clearer than this Court's abortion jurisprudence. In *Roe* v. *Wade*, 410 U. S. 113 (1973), the Court divined a right to

abortion because it "fe[lt]" that "the Fourteenth Amendment's concept of personal liberty" included a "right of privacy" that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.,* at 153. In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), the Court likewise identified an abortion guarantee in "the liberty protected by the Fourteenth Amendment," but, rather than a "right of privacy," it invoked an ethereal "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.*, at 851. As the Court's preferred manifestation of "liberty" changed, so, too, did the test used to protect it, as *Roe*'s author lamented. See *Casey*, 505 U. S., at 930 (Blackmun, J., concurring in part and dissenting in part) ("[T]he *Roe* framework is far more administrable, and far less manipulable, than the 'undue burden' standard").

Now, in this case, the nature of the purported "liberty" supporting the abortion right has shifted yet again. Respondents and the United States propose no fewer than three different interests that supposedly spring from the Due Process Clause. They include "bodily integrity," "personal autonomy in matters of family, medical care, and faith," Brief for Respondents 21, and "women's equal citizenship," Brief for United States as *Amicus Curiae* 24. That 50 years have passed since *Roe* and abortion advocates still cannot coherently articulate the right (or rights) at stake proves the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification.

Second, substantive due process distorts other areas of constitutional law. For example, once this Court identifies a "fundamental" right for one class of individuals, it invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others. See, *e.g., Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454 (1972) (relying on *Griswold* to invalidate a state statute prohibiting distribution

of contraceptives to unmarried persons). Statutory classifications implicating certain "nonfundamental" rights, meanwhile, receive only cursory review. See, *e.g., Armour* v. *Indianapolis*, 566 U. S. 673, 680 (2012). Similarly, this Court deems unconstitutionally "vague" or "overbroad" those laws that impinge on its preferred rights, while letting slide those laws that implicate supposedly lesser values. See, *e.g.*, *Johnson*, 576 U. S., at 618–621 (opinion of THOMAS, J.); *United States* v. *Sineneng-Smith*, 590 U. S. ___, ___–___ (2020) (THOMAS, J., concurring) (slip op., at 3–5). "In fact, our vagueness doctrine served as the basis for the first draft of the majority opinion in *Roe* v. *Wade*," and it since has been "deployed . . . to nullify even mild regulations of the abortion industry." *Johnson,* 576 U. S., at 620–621 (opinion of THOMAS, J.). Therefore, regardless of the doctrinal context, the Court often "demand[s] extra justifications for encroachments" on "preferred rights" while "relax[ing] purportedly higher standards of review for less-preferred rights." *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 640–642 (2016) (THOMAS, J., dissenting). Substantive due process is the core inspiration for many of the Court's constitutionally unmoored policy judgments.

Third, substantive due process is often wielded to "disastrous ends." *Gamble*, 587 U. S., at ___ (THOMAS, J., concurring) (slip op., at 16). For instance, in *Dred Scott* v. *Sandford*, 19 How. 393 (1857), the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories. See *id.,* at 452. While *Dred Scott* "was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox," *Obergefell*, 576 U. S., at 696 (ROBERTS, C. J., dissenting), that overruling was "[p]urchased at the price of immeasurable human suffering," *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 240 (1995) (THOMAS, J., concurring in part and concurring in judgment). Now today, the Court rightly overrules *Roe* and

*Casey*—two of this Court's "most notoriously incorrect" substantive due process decisions, *Timbs*, 586 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 2)—after more than 63 million abortions have been performed, see National Right to Life Committee, Abortion Statistics (Jan. 2022), https://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf. The harm caused by this Court's forays into substantive due process remains immeasurable.

* * *

Because the Court properly applies our substantive due process precedents to reject the fabrication of a constitutional right to abortion, and because this case does not present the opportunity to reject substantive due process entirely, I join the Court's opinion. But, in future cases, we should "follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away." *Carlton*, 512 U. S., at 42 (opinion of Scalia, J.). Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.

# SUPREME COURT OF THE UNITED STATES

No. 19–1392

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL., PETITIONERS *v.* JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2022]

JUSTICE KAVANAUGH, concurring.

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

## I

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

On the one side, many pro-choice advocates forcefully argue that the ability to obtain an abortion is critically important for women's personal and professional lives, and for women's health. They contend that the widespread availability of abortion has been essential for women to advance in society and to achieve greater equality over the last 50 years. And they maintain that women must have the freedom to choose for themselves whether to have an abortion.

On the other side, many pro-life advocates forcefully argue that a fetus is a human life. They contend that all human life should be protected as a matter of human dignity

and fundamental morality. And they stress that a significant percentage of Americans with pro-life views are women.

When it comes to abortion, one interest must prevail over the other at any given point in a pregnancy. Many Americans of good faith would prioritize the interests of the pregnant woman. Many other Americans of good faith instead would prioritize the interests in protecting fetal life—at least unless, for example, an abortion is necessary to save the life of the mother. Of course, many Americans are conflicted or have nuanced views that may vary depending on the particular time in pregnancy, or the particular circumstances of a pregnancy.

The issue before this Court, however, is not the policy or morality of abortion. The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion. To be sure, this Court has held that the Constitution protects unenumerated rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty. But a right to abortion is not deeply rooted in American history and tradition, as the Court today thoroughly explains.[1]

On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the

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[1]The Court's opinion today also recounts the pre-constitutional common-law history in England. That English history supplies background information on the issue of abortion. As I see it, the dispositive point in analyzing American history and tradition for purposes of the Fourteenth Amendment inquiry is that abortion was largely prohibited in most American States as of 1868 when the Fourteenth Amendment was ratified, and that abortion remained largely prohibited in most American States until *Roe* was decided in 1973.

States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.

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

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

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

To be clear, then, the Court's decision today *does not outlaw* abortion throughout the United States. On the contrary, the Court's decision properly leaves the question of abortion for the people and their elected representatives in the democratic process. Through that democratic process, the people and their representatives may decide to allow or limit abortion. As Justice Scalia stated, the "States may, if they wish, permit abortion on demand, but the Constitution

does not *require* them to do so." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 979 (1992) (opinion concurring in judgment in part and dissenting in part).

Today's decision therefore does not prevent the numerous States that readily allow abortion from continuing to readily allow abortion. That includes, if they choose, the *amici* States supporting the plaintiff in this Court: New York, California, Illinois, Maine, Massachusetts, Rhode Island, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Michigan, Wisconsin, Minnesota, New Mexico, Colorado, Nevada, Oregon, Washington, and Hawaii. By contrast, other States may maintain laws that more strictly limit abortion. After today's decision, all of the States may evaluate the competing interests and decide how to address this consequential issue.[2]

In arguing for a *constitutional* right to abortion that would override the people's choices in the democratic process, the plaintiff Jackson Women's Health Organization and its *amici* emphasize that the Constitution does not freeze the American people's rights as of 1791 or 1868. I fully agree. To begin, I agree that constitutional rights apply to situations that were unforeseen in 1791 or 1868—such as applying the First Amendment to the Internet or the Fourth Amendment to cars. Moreover, the Constitution authorizes the creation of new rights—state and federal, statutory and constitutional. But when it comes to creating new rights, the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitution—state legislation, state constitutional amendments, federal legislation, and federal constitutional

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

amendments. See generally Amdt. 9; Amdt. 10; Art. I, §8; Art. V; J. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 7–21, 203–216 (2018); A. Amar, America's Constitution: A Biography 285–291, 315–347 (2005).

The Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties based on our own moral or policy views. As Justice Rehnquist stated, this Court has not "been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court." *Furman* v. *Georgia*, 408 U. S. 238, 467 (1972) (dissenting opinion); see *Washington* v. *Glucksberg*, 521 U. S. 702, 720–721 (1997); *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 292–293 (1990) (Scalia, J., concurring).

This Court therefore does not possess the authority either to declare a constitutional right to abortion *or* to declare a constitutional prohibition of abortion. See *Casey*, 505 U. S., at 953 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); *id.,* at 980 (opinion of Scalia, J.); *Roe* v. *Wade*, 410 U. S. 113, 177 (1973) (Rehnquist, J., dissenting); *Doe* v. *Bolton*, 410 U. S. 179, 222 (1973) (White, J., dissenting).

In sum, the Constitution is neutral on the issue of abortion and allows the people and their elected representatives to address the issue through the democratic process. In my respectful view, the Court in *Roe* therefore erred by taking sides on the issue of abortion.

## II

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

The principle of *stare decisis* requires respect for the

Court's precedents and for the accumulated wisdom of the judges who have previously addressed the same issue. *Stare decisis* is rooted in Article III of the Constitution and is fundamental to the American judicial system and to the stability of American law.

Adherence to precedent is the norm, and *stare decisis* imposes a high bar before this Court may overrule a precedent. This Court's history shows, however, that *stare decisis* is not absolute, and indeed cannot be absolute. Otherwise, as the Court today explains, many long-since-overruled cases such as *Plessy* v. *Ferguson*, 163 U. S. 537 (1896); *Lochner* v. *New York*, 198 U. S. 45 (1905); *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940); and *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), would never have been overruled and would still be the law.

In his canonical *Burnet* opinion in 1932, Justice Brandeis stated that in "cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–407 (1932) (dissenting opinion). That description of the Court's practice remains accurate today. Every current Member of this Court has voted to overrule precedent. And over the last 100 years beginning with Chief Justice Taft's appointment in 1921, every one of the 48 Justices appointed to this Court has voted to overrule precedent. Many of those Justices have voted to overrule a substantial number of very significant and longstanding precedents. See, *e.g.*, *Obergefell* v. *Hodges*, 576 U. S. 644 (2015) (overruling *Baker* v. *Nelson*); *Brown* v. *Board of Education*, 347 U. S. 483 (1954) (overruling *Plessy* v. *Ferguson*); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937) (overruling *Adkins* v. *Children's Hospital of D. C.* and in effect *Lochner* v. *New York*).

But that history alone does not answer the critical question: When precisely should the Court overrule an erroneous constitutional precedent? The history of *stare decisis* in

this Court establishes that a constitutional precedent may be overruled only when (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, and (iii) overruling the prior decision would not unduly upset legitimate reliance interests. See *Ramos* v. *Louisiana*, 590 U. S. ___, ___–___ (2020) (KAVANAUGH, J., concurring in part) (slip op., at 7–8).

Applying those factors, I agree with the Court today that *Roe* should be overruled. The Court in *Roe* erroneously assigned itself the authority to decide a critically important moral and policy issue that the Constitution does not grant this Court the authority to decide. As Justice Byron White succinctly explained, *Roe* was "an improvident and extravagant exercise of the power of judicial review" because "nothing in the language or history of the Constitution" supports a constitutional right to abortion. *Bolton*, 410 U. S., at 221–222 (dissenting opinion).

Of course, the fact that a precedent is wrong, even egregiously wrong, does not alone mean that the precedent should be overruled. But as the Court today explains, *Roe* has caused significant negative jurisprudential and real-world consequences. By taking sides on a difficult and contentious issue on which the Constitution is neutral, *Roe* overreached and exceeded this Court's constitutional authority; gravely distorted the Nation's understanding of this Court's proper constitutional role; and caused significant harm to what *Roe* itself recognized as the State's "important and legitimate interest" in protecting fetal life. 410 U. S., at 162. All of that explains why tens of millions of Americans—and the 26 States that explicitly ask the Court to overrule *Roe*—do not accept *Roe* even 49 years later. Under the Court's longstanding *stare decisis* principles, *Roe*

should be overruled.[3]

But the *stare decisis* analysis here is somewhat more complicated because of *Casey*. In 1992, 19 years after *Roe*, *Casey* acknowledged the continuing dispute over *Roe*. The Court sought to find common ground that would resolve the abortion debate and end the national controversy. After careful and thoughtful consideration, the *Casey* plurality reaffirmed a right to abortion through viability (about 24 weeks), while also allowing somewhat more regulation of abortion than *Roe* had allowed.[4]

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

But as has become increasingly evident over time, *Casey*'s

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[3] I also agree with the Court's conclusion today with respect to reliance. Broad notions of societal reliance have been invoked in support of *Roe*, but the Court has not analyzed reliance in that way in the past. For example, American businesses and workers relied on *Lochner* v. *New York*, 198 U. S. 45 (1905), and *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 (1923), to construct a laissez-faire economy that was free of substantial regulation. In *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937), the Court nonetheless overruled *Adkins* and in effect *Lochner*. An entire region of the country relied on *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), to enforce a system of racial segregation. In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court overruled *Plessy*. Much of American society was built around the traditional view of marriage that was upheld in *Baker* v. *Nelson*, 409 U. S. 810 (1972), and that was reflected in laws ranging from tax laws to estate laws to family laws. In *Obergefell* v. *Hodges*, 576 U. S. 644 (2015), the Court nonetheless overruled *Baker*.

[4] As the Court today notes, *Casey*'s approach to *stare decisis* pointed in two directions. *Casey* reaffirmed *Roe*'s viability line, but it expressly overruled the *Roe* trimester framework and also expressly overruled two landmark post-*Roe* abortion cases—*Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983), and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986). See *Casey*, 505 U. S., at 870, 872–873, 878–879, 882. *Casey* itself thus directly contradicts any notion of absolute *stare decisis* in abortion cases.

well-intentioned effort did not resolve the abortion debate. The national division has not ended. In recent years, a significant number of States have enacted abortion restrictions that directly conflict with *Roe*. Those laws cannot be dismissed as political stunts or as outlier laws. Those numerous state laws collectively represent the sincere and deeply held views of tens of millions of Americans who continue to fervently believe that allowing abortions up to 24 weeks is far too radical and far too extreme, and does not sufficiently account for what *Roe* itself recognized as the State's "important and legitimate interest" in protecting fetal life. 410 U. S., at 162. In this case, moreover, a majority of the States—26 in all—ask the Court to overrule *Roe* and return the abortion issue to the States.

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

In any event, although *Casey* is relevant to the *stare decisis* analysis, the question of whether to overrule *Roe* cannot be dictated by *Casey* alone. To illustrate that *stare decisis* point, consider an example. Suppose that in 1924 this Court had expressly reaffirmed *Plessy* v. *Ferguson* and upheld the States' authority to segregate people on the basis of race. Would the Court in *Brown* some 30 years later in

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[5] To be clear, public opposition to a prior decision is not a basis for overruling (or reaffirming) that decision. Rather, the question of whether to overrule a precedent must be analyzed under this Court's traditional *stare decisis* factors. The only point here is that *Casey* adopted a special *stare decisis* principle with respect to *Roe* based on the idea of resolving the national controversy and ending the national division over abortion. The continued and significant opposition to *Roe*, as reflected in the laws and positions of numerous States, is relevant to assessing *Casey* on its own terms.

1954 have reaffirmed *Plessy* and upheld racially segregated schools simply because of that intervening 1924 precedent? Surely the answer is no.

In sum, I agree with the Court's application today of the principles of *stare decisis* and its conclusion that *Roe* should be overruled.

## III

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

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

*Second*, as I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the Due Process Clause or the *Ex Post Facto* Clause. Cf. *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964).

Other abortion-related legal questions may emerge in the

future. But this Court will no longer decide the fundamental question of whether abortion must be allowed throughout the United States through 6 weeks, or 12 weeks, or 15 weeks, or 24 weeks, or some other line. The Court will no longer decide how to evaluate the interests of the pregnant woman and the interests in protecting fetal life throughout pregnancy. Instead, those difficult moral and policy questions will be decided, as the Constitution dictates, by the people and their elected representatives through the constitutional processes of democratic self-government.

* * *

The *Roe* Court took sides on a consequential moral and policy issue that this Court had no constitutional authority to decide. By taking sides, the *Roe* Court distorted the Nation's understanding of this Court's proper role in the American constitutional system and thereby damaged the Court as an institution. As Justice Scalia explained, *Roe* "destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level." *Casey*, 505 U. S., at 995 (opinion concurring in judgment in part and dissenting in part).

The Court's decision today properly returns the Court to a position of judicial neutrality on the issue of abortion, and properly restores the people's authority to resolve the issue of abortion through the processes of democratic self-government established by the Constitution.

To be sure, many Americans will disagree with the Court's decision today. That would be true no matter how the Court decided this case. Both sides on the abortion issue believe sincerely and passionately in the rightness of their cause. Especially in those difficult and fraught circumstances, the Court must scrupulously adhere to the Constitution's neutral position on the issue of abortion.

Since 1973, more than 20 Justices of this Court have now

grappled with the divisive issue of abortion. I greatly respect all of the Justices, past and present, who have done so. Amidst extraordinary controversy and challenges, all of them have addressed the abortion issue in good faith after careful deliberation, and based on their sincere understandings of the Constitution and of precedent. I have endeavored to do the same.

In my judgment, on the issue of abortion, the Constitution is neither pro-life nor pro-choice. The Constitution is neutral, and this Court likewise must be scrupulously neutral. The Court today properly heeds the constitutional principle of judicial neutrality and returns the issue of abortion to the people and their elected representatives in the democratic process.

# SUPREME COURT OF THE UNITED STATES

No. 19–1392

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL., PETITIONERS *v.* JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2022]

CHIEF JUSTICE ROBERTS, concurring in the judgment.

We granted certiorari to decide one question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." Pet. for Cert. i. That question is directly implicated here: Mississippi's Gestational Age Act, Miss. Code Ann. §41–41–191 (2018), generally prohibits abortion after the fifteenth week of pregnancy—several weeks before a fetus is regarded as "viable" outside the womb. In urging our review, Mississippi stated that its case was "an ideal vehicle" to "reconsider the bright-line viability rule," and that a judgment in its favor would "not require the Court to overturn" *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). Pet. for Cert. 5.

Today, the Court nonetheless rules for Mississippi by doing just that. I would take a more measured course. I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—

certainly not all the way to viability. Mississippi's law allows a woman three months to obtain an abortion, well beyond the point at which it is considered "late" to discover a pregnancy. See A. Ayoola, Late Recognition of Unintended Pregnancies, 32 Pub. Health Nursing 462 (2015) (pregnancy is discoverable and ordinarily discovered by six weeks of gestation). I see no sound basis for questioning the adequacy of that opportunity.

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

## I

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

First, this Court seriously erred in *Roe* in adopting viability as the earliest point at which a State may legislate to advance its substantial interests in the area of abortion. See *ante,* at 50–53. *Roe* set forth a rigid three-part framework anchored to viability, which more closely resembled a regulatory code than a body of constitutional law. That

framework, moreover, came out of thin air. Neither the Texas statute challenged in *Roe* nor the Georgia statute at issue in its companion case, *Doe* v. *Bolton*, 410 U. S. 179 (1973), included *any* gestational age limit. No party or *amicus* asked the Court to adopt a bright line viability rule. And as for *Casey*, arguments for or against the viability rule played only a *de minimis* role in the parties' briefing and in the oral argument. See Tr. of Oral Arg. 17–18, 51 (fleeting discussion of the viability rule).

It is thus hardly surprising that neither *Roe* nor *Casey* made a persuasive or even colorable argument for why the time for terminating a pregnancy must extend to viability. The Court's jurisprudence on this issue is a textbook illustration of the perils of deciding a question neither presented nor briefed. As has been often noted, *Roe*'s defense of the line boiled down to the circular assertion that the State's interest is compelling only when an unborn child can live outside the womb, because that is when the unborn child can live outside the womb. See 410 U. S., at 163–164; see also J. Ely, The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*, 82 Yale L. J. 920, 924 (1973) (*Roe*'s reasoning "mistake[s] a definition for a syllogism").

Twenty years later, the best defense of the viability line the *Casey* plurality could conjure up was workability. See 505 U. S., at 870. But see *ante,* at 53 (opinion of the Court) (discussing the difficulties in applying the viability standard). Although the plurality attempted to add more content by opining that "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," *Casey*, 505 U. S., at 870, that mere suggestion provides no basis for choosing viability as the critical tipping point. A similar implied consent argument could be made with respect to a law banning abortions after fifteen weeks, well beyond the point at which nearly all women are aware that they are pregnant, A. Ayoola, M. Nettleman, M. Stommel, & R. Canady, Time

of Pregnancy Recognition and Prenatal Care Use: A Population-based Study in the United States 39 (2010) (Pregnancy Recognition). The dissent, which would retain the viability line, offers no justification for it either.

This Court's jurisprudence since *Casey,* moreover, has "eroded" the "underpinnings" of the viability line, such as they were. *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995). The viability line is a relic of a time when we recognized only two state interests warranting regulation of abortion: maternal health and protection of "potential life." *Roe*, 410 U. S., at 162–163. That changed with *Gonzales* v. *Carhart*, 550 U. S. 124 (2007). There, we recognized a broader array of interests, such as drawing "a bright line that clearly distinguishes abortion and infanticide," maintaining societal ethics, and preserving the integrity of the medical profession. *Id.,* at 157–160. The viability line has nothing to do with advancing such permissible goals. Cf. *id.,* at 171 (Ginsburg, J., dissenting) (*Gonzales* "blur[red] the line, firmly drawn in *Casey*, between previability and postviability abortions"); see also R. Beck, *Gonzales*, *Casey*, and the Viability Rule, 103 Nw. U. L. Rev. 249, 276–279 (2009).

Consider, for example, statutes passed in a number of jurisdictions that forbid abortions after twenty weeks of pregnancy, premised on the theory that a fetus can feel pain at that stage of development. See, *e.g.,* Ala. Code §26–23B–2 (2018). Assuming that prevention of fetal pain is a legitimate state interest after *Gonzales*, there seems to be no reason why viability would be relevant to the permissibility of such laws. The same is true of laws designed to "protect[] the integrity and ethics of the medical profession" and restrict procedures likely to "coarsen society" to the "dignity of human life." *Gonzales*, 550 U. S., at 157. Mississippi's law, for instance, was premised in part on the legislature's finding that the "dilation and evacuation" procedure is a "barbaric practice, dangerous for the maternal patient, and

demeaning to the medical profession." Miss. Code Ann. §41–41–191(2)(b)(i)(8). That procedure accounts for most abortions performed after the first trimester—two weeks before the period at issue in this case—and "involve[s] the use of surgical instruments to crush and tear the unborn child apart." *Ibid.*; see also *Gonzales*, 550 U. S., at 135. Again, it would make little sense to focus on viability when evaluating a law based on these permissible goals.

In short, the viability rule was created outside the ordinary course of litigation, is and always has been completely unreasoned, and fails to take account of state interests since recognized as legitimate. It is indeed "telling that other countries almost uniformly eschew" a viability line. *Ante,* at 53 (opinion of the Court). Only a handful of countries, among them China and North Korea, permit elective abortions after twenty weeks; the rest have coalesced around a 12–week line. See The World's Abortion Laws, Center for Reproductive Rights (Feb. 23, 2021) (online source archived at www.supremecourt.gov) (Canada, China, Iceland, Guinea-Bissau, the Netherlands, North Korea, Singapore, and Vietnam permit elective abortions after twenty weeks). The Court rightly rejects the arbitrary viability rule today.

## II

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

When the State petitioned for our review, its basic request was straightforward: "clarify whether abortion prohibitions before viability are always unconstitutional." Pet. for Cert. 14. The State made a number of strong arguments that the answer is no, *id.*, at 15–26—arguments that, as discussed, I find persuasive. And it went out of its way to make clear that it was *not* asking the Court to repudiate

entirely the right to choose whether to terminate a pregnancy: "To be clear, the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*." *Id.,* at 5. Mississippi tempered that statement with an oblique one-sentence footnote intimating that, if the Court could not reconcile *Roe* and *Casey* with current facts or other cases, it "should not retain erroneous precedent." Pet. for Cert. 5–6, n. 1. But the State never argued that we should grant review for that purpose.

After we granted certiorari, however, Mississippi changed course. In its principal brief, the State bluntly announced that the Court should overrule *Roe* and *Casey*. The Constitution does not protect a right to an abortion, it argued, and a State should be able to prohibit elective abortions if a rational basis supports doing so. See Brief for Petitioners 12–13.

The Court now rewards that gambit, noting three times that the parties presented "no half-measures" and argued that "we must either reaffirm or overrule *Roe* and *Casey*." *Ante,* at 5, 8, 72. Given those two options, the majority picks the latter.

This framing is not accurate. In its brief on the merits, Mississippi in fact argued at length that a decision simply rejecting the viability rule would result in a judgment in its favor. See Brief for Petitioners 5, 38–48. But even if the State had not argued as much, it would not matter. There is no rule that parties can confine this Court to disposing of their case on a particular ground—let alone when review was sought and granted on a different one. Our established practice is instead not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 450 (2008) (quoting *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring)); see also *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

Following that "fundamental principle of judicial restraint," *Washington State Grange*, 552 U. S., at 450, we should begin with the narrowest basis for disposition, proceeding to consider a broader one only if necessary to resolve the case at hand. See, *e.g., Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 423 (1990). It is only where there is no valid narrower ground of decision that we should go on to address a broader issue, such as whether a constitutional decision should be overturned. See *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 482 (2007) (declining to address the claim that a constitutional decision should be overruled when the appellant prevailed on its narrower constitutional argument).

Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all. See *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 518, 521 (1989) (plurality opinion) (rejecting *Roe*'s viability line as "rigid" and "indeterminate," while also finding "no occasion to revisit the holding of *Roe*" that, under the Constitution, a State must provide an opportunity to choose to terminate a pregnancy).

Of course, such an approach would not be available if the rationale of *Roe* and *Casey* was inextricably entangled with and dependent upon the viability standard. It is not. Our precedents in this area ground the abortion right in a woman's "right to choose." See *Carey* v. *Population Services Int'l*, 431 U. S. 678, 688–689 (1977) ("underlying foundation of the holdings" in *Roe* and *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), was the "right of decision in matters of childbearing"); *Maher* v. *Roe*, 432 U. S. 464, 473 (1977) (*Roe* and other cases "recognize a constitutionally protected interest in making certain kinds of important decisions free from governmental compulsion" (internal quotation marks

omitted)); *id.*, at 473–474 (*Roe* "did not declare an unqualified constitutional right to an abortion," but instead protected "the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy" (internal quotation marks omitted)); *Webster*, 492 U. S., at 520 (plurality opinion) (*Roe* protects "the claims of a woman to decide for herself whether or not to abort a fetus she [is] carrying"); *Gonzales*, 550 U. S., at 146 (a State may not "prohibit any woman from making the ultimate decision to terminate her pregnancy"). If that is the basis for *Roe*, *Roe*'s viability line should be scrutinized from the same perspective. And there is nothing inherent in the right to choose that requires it to extend to viability or any other point, so long as a real choice is provided. See *Webster*, 492 U. S., at 519 (plurality opinion) (finding no reason "why the State's interest in protecting potential human life should come into existence only at the point of viability").

To be sure, in reaffirming the right to an abortion, *Casey* termed the viability rule *Roe*'s "central holding." 505 U. S., at 860. Other cases of ours have repeated that language. See, *e.g., Gonzales*, 550 U. S., at 145–146. But simply declaring it does not make it so. The question in *Roe* was whether there was any right to abortion in the Constitution. See Brief for Appellants and Brief for Appellees, in *Roe* v. *Wade*, O. T. 1971, No. 70–18. How far the right extended was a concern that was separate and subsidiary, and—not surprisingly—entirely unbriefed.

The Court in *Roe* just chose to address both issues in one opinion: It first recognized a right to "choose to terminate [a] pregnancy" under the Constitution, see 410 U. S., at 129–159, and then, having done so, explained that a line should be drawn at viability such that a State could not proscribe abortion before that period, see *id.*, at 163. The viability line is a separate rule fleshing out the metes and bounds of *Roe*'s core holding. Applying principles of *stare decisis*, I would excise that additional rule—and only that

rule—from our jurisprudence.

The majority lists a number of cases that have stressed the importance of the viability rule to our abortion precedents. See *ante,* at 73–74. I agree that—whether it was originally holding or dictum—the viability line is clearly part of our "past precedent," and the Court has applied it as such in several cases since *Roe*. *Ante,* at 73. My point is that *Roe* adopted two distinct rules of constitutional law: one, that a woman has the right to choose to terminate a pregnancy; two, that such right may be overridden by the State's legitimate interests when the fetus is viable outside the womb. The latter is obviously distinct from the former. I would abandon that timing rule, but see no need in this case to consider the basic right.

The Court contends that it is impossible to address *Roe*'s conclusion that the Constitution protects the woman's right to abortion, without also addressing *Roe*'s rule that the State's interests are not constitutionally adequate to justify a ban on abortion until viability. See *ibid*. But we have partially overruled precedents before, see, *e.g., United States* v. *Miller*, 471 U. S. 130, 142–144 (1985); *Daniels* v. *Williams*, 474 U. S. 327, 328–331 (1986); *Batson* v. *Kentucky*, 476 U. S. 79, 90–93 (1986), and certainly have never held that a distinct holding defining the contours of a constitutional right must be treated as part and parcel of the right itself.

Overruling the subsidiary rule is sufficient to resolve this case in Mississippi's favor. The law at issue allows abortions up through fifteen weeks, providing an adequate opportunity to exercise the right *Roe* protects. By the time a pregnant woman has reached that point, her pregnancy is well into the second trimester. Pregnancy tests are now inexpensive and accurate, and a woman ordinarily discovers she is pregnant by six weeks of gestation. See A. Branum & K. Ahrens, Trends in Timing of Pregnancy Awareness Among US Women, 21 Maternal & Child Health J. 715, 722

(2017). Almost all know by the end of the first trimester. Pregnancy Recognition 39. Safe and effective abortifacients, moreover, are now readily available, particularly during those early stages. See I. Adibi et al., Abortion, 22 Geo. J. Gender & L. 279, 303 (2021). Given all this, it is no surprise that the vast majority of abortions happen in the first trimester. See Centers for Disease Control and Prevention, Abortion Surveillance—United States 1 (2020). Presumably most of the remainder would also take place earlier if later abortions were not a legal option. Ample evidence thus suggests that a 15-week ban provides sufficient time, absent rare circumstances, for a woman "to decide for herself" whether to terminate her pregnancy. *Webster*, 492 U. S., at 520 (plurality opinion).*

## III

Whether a precedent should be overruled is a question "entirely within the discretion of the court." *Hertz* v. *Woodman*, 218 U. S. 205, 212 (1910); see also *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991) (*stare decisis* is a "principle of policy"). In my respectful view, the sound exercise of that discretion should have led the Court to resolve the case on the narrower grounds set forth above, rather than overruling *Roe* and *Casey* entirely. The Court says there is no "principled basis" for this approach, *ante,* at 73, but in fact it is firmly grounded in basic principles of *stare decisis* and judicial restraint.

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*The majority contends that "nothing like [my approach] was recommended by either party." *Ante,* at 72. But as explained, Mississippi in fact pressed a similar argument in its filings before this Court. See Pet. for Cert. 15–26; Brief for Petitioners 5, 38–48 (urging the Court to reject the viability rule and reverse); Reply Brief 20–22 (same). The approach also finds support in prior opinions. See *Webster*, 492 U. S., at 518–521 (plurality opinion) (abandoning "key elements" of the *Roe* framework under *stare decisis* while declining to reconsider *Roe*'s holding that the Constitution protects the right to an abortion).

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

Our cases say that the effect of overruling a precedent on reliance interests is a factor to consider in deciding whether to take such a step, and respondents argue that generations of women have relied on the right to an abortion in organizing their relationships and planning their futures. Brief for Respondents 36–41; see also *Casey*, 505 U. S., at 856 (making the same point). The Court questions whether these concerns are pertinent under our precedents, see *ante,* at 64–65, but the issue would not even arise with a decision rejecting only the viability line: It cannot reasonably be argued that women have shaped their lives in part on the assumption that they would be able to abort up to viability, as opposed to fifteen weeks.

In support of its holding, the Court cites three seminal constitutional decisions that involved overruling prior precedents: *Brown* v. *Board of Education*, 347 U. S. 483 (1954), *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), and *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937). See *ante,* at 40–41. The opinion in *Brown* was unanimous and eleven pages long; this one is neither. *Barnette* was decided only three years after the decision it overruled, three Justices having had second thoughts. And *West Coast Hotel* was issued against a backdrop of unprecedented economic despair that focused attention on the fundamental flaws of existing precedent. It also was part of a sea change in this Court's interpretation of the Constitution, "signal[ing] the demise of an entire line of important precedents," *ante,* at 40—a feature the Court expressly disclaims in today's decision, see *ante,* at 32, 66. None of these leading cases, in short, provides a template for what the Court does today.

The Court says we should consider whether to overrule *Roe* and *Casey* now, because if we delay we would be forced to consider the issue again in short order. See *ante*, at 76–77. There would be "turmoil" until we did so, according to the Court, because of existing state laws with "shorter deadlines or no deadline at all." *Ante*, at 76. But under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent. And to the extent States have laws that set the cutoff date earlier than fifteen weeks, any litigation over that timeframe would proceed free of the distorting effect that the viability rule has had on our constitutional debate. The same could be true, for that matter, with respect to legislative consideration in the States. We would then be free to exercise our discretion in deciding whether and when to take up the issue, from a more informed perspective.

* * *

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

I therefore concur only in the judgment.

# SUPREME COURT OF THE UNITED STATES

No. 19–1392

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL., PETITIONERS *v.* JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2022]

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

For half a century, *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. See *Casey*, 505 U. S., at 853; *Gonzales* v. *Carhart*, 550 U. S. 124, 171–172 (2007) (Ginsburg, J., dissenting). Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

*Roe* and *Casey* well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans hold profoundly different views about the "moral[ity]" of "terminating a pregnancy, even in its earliest stage." *Casey*, 505 U. S., at 850. And the Court recognized that "the

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

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

within a few years of birth. States may even argue that a prohibition on abortion need make no provision for protecting a woman from risk of death or physical harm. Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child.

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

The majority tries to hide the geographically expansive effects of its holding. Today's decision, the majority says, permits "each State" to address abortion as it pleases. *Ante*, at 79. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. Above all others, women lacking financial resources will suffer from today's decision. In any event, interstate restrictions will also soon be in the offing. After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State. Some may criminalize efforts, including the provision of information or funding, to help women gain access to other States' abortion services. Most threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest. If that happens, "the views of [an individual State's] citizens" will not matter. *Ante*, at 1. The challenge for a woman will be to finance a

trip not to "New York [or] California" but to Toronto. *Ante*, at 4 (KAVANAUGH, J., concurring).

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." *Casey*, 505 U. S., at 856. But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972). In turn, those rights led, more recently,

to rights of same-sex intimacy and marriage. See *Lawrence* v. *Texas*, 539 U. S. 558 (2003); *Obergefell* v. *Hodges*, 576 U. S. 644 (2015). They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does "cast[s] doubt on precedents that do not concern abortion." *Ante*, at 66; cf. *ante*, at 3 (THOMAS, J., concurring) (advocating the overruling of *Griswold*, *Lawrence*, and *Obergefell*). But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. *Ante*, at 32. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain [contraceptives]." *Ante*, at 15. So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied

on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. *Casey* is a precedent about precedent. It reviewed the same arguments made here in support of overruling *Roe*, and it found that doing so was not warranted. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, "contributes to the actual and perceived integrity of the judicial process" by ensuring that decisions are "founded in the law rather than in the proclivities of individuals." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991); *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986). Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

## I

We start with *Roe* and *Casey*, and with their deep connections to a broad swath of this Court's precedents. To hear the majority tell the tale, *Roe* and *Casey* are aberrations: They came from nowhere, went nowhere—and so are easy to excise from this Nation's constitutional law. That is not true. After describing the decisions themselves, we explain how they are rooted in—and themselves led to—other rights giving individuals control over their bodies and their most personal and intimate associations. The majority does not wish to talk about these matters for obvious reasons; to do so would both ground *Roe* and *Casey* in this Court's precedents and reveal the broad implications of today's decision. But the facts will not so handily disappear. *Roe* and *Casey* were from the beginning, and are even more now, embedded

in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. So we do not (as the majority insists today) place everything within "the reach of majorities and [government] officials." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943). We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.

A

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

members of her family. *Ibid.* A State could not, "by adopting one theory of life," override all "rights of the pregnant woman." *Id.*, at 162.

At the same time, though, the Court recognized "valid interest[s]" of the State "in regulating the abortion decision." *Id.*, at 153. The Court noted in particular "important interests" in "protecting potential life," "maintaining medical standards," and "safeguarding [the] health" of the woman. *Id.*, at 154. No "absolut[ist]" account of the woman's right could wipe away those significant state claims. *Ibid.*

The Court therefore struck a balance, turning on the stage of the pregnancy at which the abortion would occur. The Court explained that early on, a woman's choice must prevail, but that "at some point the state interests" become "dominant." *Id.*, at 155. It then set some guideposts. In the first trimester of pregnancy, the State could not interfere at all with the decision to terminate a pregnancy. At any time after that point, the State could regulate to protect the pregnant woman's health, such as by insisting that abortion providers and facilities meet safety requirements. And after the fetus's viability—the point when the fetus "has the capability of meaningful life outside the mother's womb"—the State could ban abortions, except when necessary to preserve the woman's life or health. *Id.*, at 163–164.

In the 20 years between *Roe* and *Casey*, the Court expressly reaffirmed *Roe* on two occasions, and applied it on many more. Recognizing that "arguments [against *Roe*] continue to be made," we responded that the doctrine of *stare decisis* "demands respect in a society governed by the rule of law." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 419–420 (1983). And we avowed that the "vitality" of "constitutional principles cannot be allowed to yield simply because of disagreement with them." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 759 (1986). So the Court, over and

over, enforced the constitutional principles *Roe* had declared. See, *e.g.*, *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502 (1990); *Hodgson* v. *Minnesota*, 497 U. S. 417 (1990); *Simopoulos* v. *Virginia*, 462 U. S. 506 (1983); *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476 (1983); *H. L.* v. *Matheson*, 450 U. S. 398 (1981); *Bellotti* v. *Baird*, 443 U. S. 622 (1979); *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976).

Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*'s core precepts. *Casey* is in significant measure a precedent about the doctrine of precedent—until today, one of the Court's most important. But we leave for later that aspect of the Court's decision. The key thing now is the substantive aspect of the Court's considered conclusion that "the essential holding of *Roe* v. *Wade* should be retained and once again reaffirmed." 505 U. S., at 846.

Central to that conclusion was a full-throated restatement of a woman's right to choose. Like *Roe*, *Casey* grounded that right in the Fourteenth Amendment's guarantee of "liberty." That guarantee encompasses realms of conduct not specifically referenced in the Constitution: "Marriage is mentioned nowhere" in that document, yet the Court was "no doubt correct" to protect the freedom to marry "against state interference." 505 U. S., at 847–848. And the guarantee of liberty encompasses conduct today that was not protected at the time of the Fourteenth Amendment. See *id.*, at 848. "It is settled now," the Court said—though it was not always so—that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity." *Id.*, at 849 (citations omitted); see *id.*, at 851 (similarly describing the constitutional protection given to "personal decisions relating to marriage, procreation, contraception, [and] family relationships"). Especially

important in this web of precedents protecting an individual's most "personal choices" were those guaranteeing the right to contraception. *Ibid.*; see *id.*, at 852–853. In those cases, the Court had recognized "the right of the individual" to make the vastly consequential "decision whether to bear" a child. *Id.*, at 851 (emphasis deleted). So too, *Casey* reasoned, the liberty clause protects the decision of a woman confronting an unplanned pregnancy. Her decision about abortion was central, in the same way, to her capacity to chart her life's course. See *id.*, at 853.

In reaffirming the right *Roe* recognized, the Court took full account of the diversity of views on abortion, and the importance of various competing state interests. Some Americans, the Court stated, "deem [abortion] nothing short of an act of violence against innocent human life." 505 U. S., at 852. And each State has an interest in "the protection of potential life"—as *Roe* itself had recognized. 505 U. S., at 871 (plurality opinion). On the one hand, that interest was not conclusive. The State could not "resolve" the "moral and spiritual" questions raised by abortion in "such a definitive way that a woman lacks all choice in the matter." *Id.*, at 850 (majority opinion). It could not force her to bear the "pain" and "physical constraints" of "carr[ying] a child to full term" when she would have chosen an early abortion. *Id.*, at 852. But on the other hand, the State had, as *Roe* had held, an exceptionally significant interest in disallowing abortions in the later phase of a pregnancy. And it had an ever-present interest in "ensur[ing] that the woman's choice is informed" and in presenting the case for "choos[ing] childbirth over abortion." 505 U. S., at 878 (plurality opinion).

So *Casey* again struck a balance, differing from *Roe*'s in only incremental ways. It retained *Roe*'s "central holding" that the State could bar abortion only after viability. 505 U. S., at 860 (majority opinion). The viability line, *Casey* thought, was "more workable" than any other in marking

the place where the woman's liberty interest gave way to a State's efforts to preserve potential life. *Id.*, at 870 (plurality opinion). At that point, a "second life" was capable of "independent existence." *Ibid.* If the woman even by then had not acted, she lacked adequate grounds to object to "the State's intervention on [the developing child's] behalf." *Ibid.* At the same time, *Casey* decided, based on two decades of experience, that the *Roe* framework did not give States sufficient ability to regulate abortion prior to viability. In that period, *Casey* now made clear, the State could regulate not only to protect the woman's health but also to "promot[e] prenatal life." 505 U. S., at 873 (plurality opinion). In particular, the State could ensure informed choice and could try to promote childbirth. See *id.*, at 877–878. But the State still could not place an "undue burden"—or "substantial obstacle"—"in the path of a woman seeking an abortion." *Id.*, at 878. Prior to viability, the woman, consistent with the constitutional "meaning of liberty," must "retain the ultimate control over her destiny and her body." *Id.*, at 869.

We make one initial point about this analysis in light of the majority's insistence that *Roe* and *Casey*, and we in defending them, are dismissive of a "State's interest in protecting prenatal life." *Ante*, at 38. Nothing could get those decisions more wrong. As just described, *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman's liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment.[1] But what *Roe* and *Casey* also recognized—which today's majority does not—is that a woman's

[1] For this reason, we do not understand the majority's view that our analogy between the right to an abortion and the rights to contraception and same-sex marriage shows that we think "[t]he Constitution does not permit the States to regard the destruction of a 'potential life' as a matter

freedom and equality are likewise involved. That fact—the presence of countervailing interests—is what made the abortion question hard, and what necessitated balancing. The majority scoffs at that idea, castigating us for "repeatedly prais[ing] the 'balance'" the two cases arrived at (with the word "balance" in scare quotes). *Ante*, at 38. To the majority "balance" is a dirty word, as moderation is a foreign concept. The majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implicates a woman's rights to equality and freedom. Today's Court, that is, does not think there is anything of constitutional significance attached to a woman's control of her body and the path of her life. *Roe* and *Casey* thought that one-sided view misguided. In some sense, that is the difference in a nutshell between our precedents and the majority opinion. The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them. The constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's).

B

The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey*

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of any significance." *Ante*, at 38. To the contrary. The liberty interests underlying those rights are, as we will describe, quite similar. See *infra*, at 22–24. But only in the sphere of abortion is the state interest in protecting potential life involved. So only in that sphere, as both *Roe* and *Casey* recognized, may a State impinge so far on the liberty interest (barring abortion after viability and discouraging it before). The majority's failure to understand this fairly obvious point stems from its rejection of the idea of balancing interests in this (or maybe in any) constitutional context. Cf. *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. ___, ___, ___–___ (2022) (slip op., at 8, 15–17). The majority thinks that a woman has *no* liberty or equality interest in the decision to bear a child, so a State's interest in protecting fetal life necessarily prevails.

exist in "1868, the year when the Fourteenth Amendment was ratified"? *Ante*, at 23. The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.

Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century. See *ante*, at 17. But that turns out to be wheel-spinning. First, it is not clear what relevance such early history should have, even to the majority. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. ___, ___ (2022) (slip op., at 26) ("Historical evidence that long predates [ratification] may not illuminate the scope of the right"). If the early history obviously supported abortion rights, the majority would no doubt say that only the views of the Fourteenth Amendment's ratifiers are germane. See *ibid.* (It is "better not to go too far back into antiquity," except if olden "law survived to become our Founders' law"). Second—and embarrassingly for the majority—early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before "quickening"—the point when the fetus moved in the womb.[2] And early American law followed the common-law rule.[3] So the criminal law of that early time might be taken as roughly consonant with

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[2] See, *e.g.*, 1 W. Blackstone, Commentaries on the Laws of England 129–130 (7th ed. 1775) (Blackstone); E. Coke, Institutes of the Laws of England 50 (1644).

[3] See J. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800–1900, pp. 3–4 (1978). The majority offers no evidence to the contrary—no example of a founding-era law making pre-quickening abortion a crime (except when a woman died). See *ante*, at 20–21. And even in the mid-19th century, more than 10 States continued to allow pre-quickening abortions. See Brief for American Historical Association et al. as *Amici Curiae* 27, and n. 14.

*Roe*'s and *Casey*'s different treatment of early and late abortions. Better, then, to move forward in time. On the other side of 1868, the majority occasionally notes that many States barred abortion up to the time of *Roe*. See *ante*, at 24, 36. That is convenient for the majority, but it is window dressing. As the same majority (plus one) just informed us, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *New York State Rifle & Pistol Assn., Inc.*, 597 U. S., at ___–___ (slip op., at 27–28). Had the pre-*Roe* liberalization of abortion laws occurred more quickly and more widely in the 20th century, the majority would say (once again) that only the ratifiers' views are germane.

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. See *ante*, at 47 ("[T]he most important historical fact [is] how the States regulated abortion when the Fourteenth Amendment was adopted"); see also *ante*, at 5, 16, and n. 24, 23, 25, 28. If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—

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

*Casey* itself understood this point, as will become clear. See *infra*, at 23–24. It recollected with dismay a decision this Court issued just five years after the Fourteenth Amendment's ratification, approving a State's decision to deny a law license to a woman and suggesting as well that a woman had no legal status apart from her husband. See 505 U. S., at 896–897 (majority opinion) (citing *Bradwell* v. *State*, 16 Wall. 130 (1873)). "There was a time," *Casey* explained, when the Constitution did not protect "men and women alike." 505 U. S., at 896. But times had changed. A woman's place in society had changed, and constitutional law had changed along with it. The relegation of women to inferior status in either the public sphere or the family was "no longer consistent with our understanding" of the Constitution. *Id.*, at 897. Now, "[t]he Constitution protects all individuals, male or female," from "the abuse of governmental power" or "unjustified state interference." *Id.*, at 896, 898.

So how is it that, as *Casey* said, our Constitution, read

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

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

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of "liberty" and "equality" for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example *Obergefell* used a few years ago. The Court

there confronted a claim, based on *Washington* v. *Glucksberg*, 521 U. S. 702 (1997), that the Fourteenth Amendment "must be defined in a most circumscribed manner, with central reference to specific historical practices"—exactly the view today's majority follows. *Obergefell*, 576 U. S., at 671. And the Court specifically rejected that view.[4] In doing so, the Court reflected on what the proposed, historically circumscribed approach would have meant for interracial marriage. See *ibid.* The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving* v. *Virginia*, 388 U. S. 1 (1967), read the Fourteenth Amendment to embrace the Lovings' union. If, *Obergefell* explained, "rights were defined by who exercised them in the past, then received practices could serve as their own continued justification"—even when they conflict with "liberty" and "equality" as later and more broadly understood. 576 U. S., at 671. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." *Ante*, at 14. At least, that idea is what the majority *sometimes* tries to convey. At other times, the majority (or, rather, most of it) tries to assure the public that it has no designs on rights (for example, to contraception) that arose only in the back half of the 20th century—in other words,

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[4] The majority ignores that rejection. See *ante*, at 5, 13, 36. But it is unequivocal: The *Glucksberg* test, *Obergefell* said, "may have been appropriate" in considering physician-assisted suicide, but "is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy." 576 U. S., at 671.

that it is happy to pick and choose, in accord with individual preferences. See *ante*, at 32, 66, 71–72; *ante*, at 10 (KAVANAUGH, J., concurring); but see *ante*, at 3 (THOMAS, J., concurring). But that is a matter we discuss later. See *infra*, at 24–29. For now, our point is different: It is that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State's ban on contraceptive use. Judges, he said, are not "free to roam where unguided speculation might take them." *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961) (dissenting opinion). Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. *Ibid.* Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. That is why Americans, to go back to *Obergefell*'s example, have a right to marry across racial lines. And it is why, to go back to Justice Harlan's case, Americans have a right to use contraceptives so they can choose for themselves whether to have children.

All that is what *Casey* understood. *Casey* explicitly rejected the present majority's method. "[T]he specific practices of States at the time of the adoption of the Fourteenth Amendment," *Casey* stated, do not "mark[ ] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." 505 U. S., at 848.[5] To hold otherwise—as the majority does today—"would be inconsistent

[5] In a perplexing paragraph in its opinion, the majority declares that it need not say whether that statement from *Casey* is true. See *ante*, at 32–33. But how could that be? Has not the majority insisted for the prior 30 or so pages that the "specific practice[ ]" respecting abortion at the

with our law." *Id.*, at 847. Why? Because the Court has "vindicated [the] principle" over and over that (no matter the sentiment in 1868) "there is a realm of personal liberty which the government may not enter"—especially relating to "bodily integrity" and "family life." *Id.*, at 847, 849, 851. *Casey* described in detail the Court's contraception cases. See *id.*, at 848–849, 851–853. It noted decisions protecting the right to marry, including to someone of another race. See *id.*, at 847–848 ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference"). In reviewing decades and decades of constitutional law, *Casey* could draw but one conclusion: Whatever was true in 1868, "[i]t is settled now, as it was when the Court heard arguments in *Roe* v. *Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood." *Id.*, at 849.

And that conclusion still held good, until the Court's intervention here. It was settled at the time of *Roe*, settled at the time of *Casey*, and settled yesterday that the Constitution places limits on a State's power to assert control over an individual's body and most personal decisionmaking. A multitude of decisions supporting that principle led to *Roe*'s recognition and *Casey*'s reaffirmation of the right to choose; and *Roe* and *Casey* in turn supported additional protections for intimate and familial relations. The majority has em-

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time of the Fourteenth Amendment precludes its recognition as a constitutional right? *Ante*, at 33. It has. And indeed, it has given no other reason for overruling *Roe* and *Casey*. *Ante*, at 15–16. We are not mindreaders, but here is our best guess as to what the majority means. It says next that "[a]bortion is nothing new." *Ante*, at 33. So apparently, the Fourteenth Amendment might provide protection for things wholly unknown in the 19th century; maybe one day there could be constitutional protection for, oh, time travel. But as to anything that was known back then (such as abortion or contraception), no such luck.

barrassingly little to say about those precedents. It (literally) rattles them off in a single paragraph; and it implies that they have nothing to do with each other, or with the right to terminate an early pregnancy. See *ante*, at 31–32 (asserting that recognizing a relationship among them, as addressing aspects of personal autonomy, would ineluctably "license fundamental rights" to illegal "drug use [and] prostitution"). But that is flat wrong. The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination.

And eliminating that right, we need to say before further describing our precedents, is not taking a "neutral" position, as JUSTICE KAVANAUGH tries to argue. *Ante*, at 2–3, 5, 7, 11–12 (concurring opinion). His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being "scrupulously neutral" if it allowed New York and California to ban all the guns they want? *Ante*, at 3. If the Court allowed some States to use unanimous juries and others not? If the Court told the States: Decide for yourselves whether to put restrictions on church attendance? We could go on—and in fact we will. Suppose JUSTICE KAVANAUGH were to say (in line with the majority opinion) that the rights we just listed are more textually or historically grounded than the right to choose. What, then, of the right to contraception or same-sex marriage? Would it be "scrupulously neutral" for the Court to eliminate those rights too? The point of all these examples is that when it comes to rights, the Court does not act "neutrally" when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers. And to apply that point to the case here: When the Court decimates a right women have held for 50 years, the Court is

not being "scrupulously neutral." It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so. JUSTICE KAVANAUGH cannot obscure that point by appropriating the rhetoric of even-handedness. His position just is what it is: A brook-no-compromise refusal to recognize a woman's right to choose, from the first day of a pregnancy. And that position, as we will now show, cannot be squared with this Court's longstanding view that women indeed have rights (whatever the state of the world in 1868) to make the most personal and consequential decisions about their bodies and their lives.

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

*Casey* recognized the "doctrinal affinity" between those precedents and *Roe*. 505 U. S., at 857. And that doctrinal affinity is born of a factual likeness. There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth. For every woman, those experiences involve all manner of physical changes, medical treatments (including the possibility of a cesarean section), and

medical risk. Just as one example, an American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion. See *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 618 (2016). That women happily undergo those burdens and hazards of their own accord does not lessen how far a State impinges on a woman's body when it compels her to bring a pregnancy to term. And for some women, as *Roe* recognized, abortions are medically necessary to prevent harm. See 410 U. S., at 153. The majority does not say—which is itself ominous—whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment.

So too, *Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. See *Casey*, 505 U. S., at 851, 857; *Roe*, 410 U. S., at 152–153; see also *ante*, at 31–32 (listing the myriad decisions of this kind that *Casey* relied on). Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children—and crucially, whether and when to have children. In varied cases, the Court explained that those choices—"the most intimate and personal" a person can make—reflect fundamental aspects of personal identity; they define the very "attributes of personhood." *Casey*, 505 U. S., at 851. And they inevitably shape the nature and future course of a person's life (and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has

expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays. Compare *Obergefell*, 576 U. S., at 672–675, with *ante*, at 10–11. So before *Roe* and *Casey*, the Court expanded in successive cases those who could claim the right to marry—though their relationships would have been outside the law's protection in the mid-19th century. See, *e.g.*, *Loving*, 388 U. S. 1 (interracial couples); *Turner* v. *Safley*, 482 U. S. 78 (1987) (prisoners); see also, *e.g.*, *Stanley* v. *Illinois*, 405 U. S. 645, 651–652 (1972) (offering constitutional protection to untraditional "family unit[s]"). And after *Roe* and *Casey*, of course, the Court continued in that vein. With a critical stop to hold that the Fourteenth Amendment protected same-sex intimacy, the Court resolved that the Amendment also conferred on same-sex couples the right to marry. See *Lawrence*, 539 U. S. 558; *Obergefell*, 576 U. S. 644. In considering that question, the Court held, "[h]istory and tradition," especially as reflected in the course of our precedent, "guide and discipline [the] inquiry." *Id.*, at 664. But the sentiments of 1868 alone do not and cannot "rule the present." *Ibid.*

*Casey* similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. See *supra*, at 15. A woman then, *Casey* wrote, "had no legal existence separate from her husband." 505 U. S., at 897. Women were seen only "as the center of home and family life," without "full and independent legal status under the Constitution." *Ibid.* But that could not be true any longer: The State could not now insist on the historically dominant "vision of the woman's role." *Id.*, at 852. And equal citizenship, *Casey* realized, was inescapably con-

nected to reproductive rights. "The ability of women to participate equally" in the "life of the Nation"—in all its economic, social, political, and legal aspects—"has been facilitated by their ability to control their reproductive lives." *Id.*, at 856. Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.

For much that reason, *Casey* made clear that the precedents *Roe* most closely tracked were those involving contraception. Over the course of three cases, the Court had held that a right to use and gain access to contraception was part of the Fourteenth Amendment's guarantee of liberty. See *Griswold*, 381 U. S. 479; *Eisenstadt*, 405 U. S. 438; *Carey* v. *Population Services Int'l*, 431 U. S. 678 (1977). That clause, we explained, necessarily conferred a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt*, 405 U. S., at 453; see *Carey*, 431 U. S., at 684–685. *Casey* saw *Roe* as of a piece: In "critical respects the abortion decision is of the same character." 505 U. S., at 852. "[R]easonable people," the Court noted, could also oppose contraception; and indeed, they could believe that "some forms of contraception" similarly implicate a concern with "potential life." *Id.*, at 853, 859. Yet the views of others could not automatically prevail against a woman's right to control her own body and make her own choice about whether to bear, and probably to raise, a child. When an unplanned pregnancy is involved—because either contraception or abortion is outlawed—"the liberty of the woman is at stake in a sense unique to the human condition." *Id.*, at 852. No State could undertake to resolve the moral questions raised "in such a definitive way" as to deprive a woman of all choice. *Id.*, at 850.

Faced with all these connections between *Roe*/*Casey* and judicial decisions recognizing other constitutional rights,

the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) Today's decision, the majority first says, "does not undermine" the decisions cited by *Roe* and *Casey*—the ones involving "marriage, procreation, contraception, [and] family relationships"—"in any way." *Ante*, at 32; *Casey*, 505 U. S., at 851. Note that this first assurance does not extend to rights recognized after *Roe* and *Casey*, and partly based on them—in particular, rights to same-sex intimacy and marriage. See *supra*, at 23.[6] On its later tries, though, the majority includes those too: "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Ante*, at 66; see *ante*, at 71–72. That right is unique, the majority asserts, "because [abortion] terminates life or potential life." *Ante*, at 66 (internal quotation marks omitted); see *ante*, at 32, 71–72. So the majority depicts today's decision as "a restricted railroad ticket, good for this day and train only." *Smith* v. *Allwright*, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting). Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

The first problem with the majority's account comes from JUSTICE THOMAS's concurrence—which makes clear he is not with the program. In saying that nothing in today's opinion casts doubt on non-abortion precedents, JUSTICE THOMAS explains, he means only that they are not at issue

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[6] And note, too, that the author of the majority opinion recently joined a statement, written by another member of the majority, lamenting that *Obergefell* deprived States of the ability "to resolve th[e] question [of same-sex marriage] through legislation." *Davis* v. *Ermold*, 592 U. S. ___, ___ (2020) (statement of THOMAS, J.) (slip op., at 1). That might sound familiar. Cf. *ante*, at 44 (lamenting that *Roe* "short-circuited the democratic process"). And those two Justices hardly seemed content to let the matter rest: The Court, they said, had "created a problem that only it can fix." *Davis*, 592 U. S., at ___ (slip op., at 4).

in this very case. See *ante*, at 7 ("[T]his case does not present the opportunity to reject" those precedents). But he lets us know what he wants to do when they are. "[I]n future cases," he says, "we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." *Ante*, at 3; see also *supra*, at 25, and n. 6. And when we reconsider them? Then "we have a duty" to "overrul[e] these demonstrably erroneous decisions." *Ante*, at 3. So at least one Justice is planning to use the ticket of today's decision again and again and again.

Even placing the concurrence to the side, the assurance in today's opinion still does not work. Or at least that is so if the majority is serious about its sole reason for overturning *Roe* and *Casey*: the legal status of abortion in the 19th century. Except in the places quoted above, the state interest in protecting fetal life plays no part in the majority's analysis. To the contrary, the majority takes pride in not expressing a view "about the status of the fetus." *Ante*, at 65; see *ante*, at 32 (aligning itself with *Roe*'s and *Casey*'s stance of not deciding whether life or potential life is involved); *ante*, at 38–39 (similar). The majority's departure from *Roe* and *Casey* rests instead—and only—on whether a woman's decision to end a pregnancy involves any Fourteenth Amendment liberty interest (against which *Roe* and *Casey* balanced the state interest in preserving fetal life).[7]

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[7] Indulge a few more words about this point. The majority had a choice of two different ways to overrule *Roe* and *Casey*. It could claim that those cases underrated the State's interest in fetal life. Or it could claim that they overrated a woman's constitutional liberty interest in choosing an abortion. (Or both.) The majority here rejects the first path, and we can see why. Taking that route would have prevented the majority from claiming that it means only to leave this issue to the democratic process—that it does not have a dog in the fight. See *ante*, at 38–39, 65. And indeed, doing so might have suggested a revolutionary proposition: that the fetus is itself a constitutionally protected "person," such that an abortion ban is constitutionally *mandated*. The majority therefore chooses the second path, arguing that the Fourteenth Amendment does

According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines. It did not protect the right recognized in *Griswold* to contraceptive use. For that matter, it did not protect the right recognized in *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942), not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even "undermine"—any number of other constitutional rights. *Ante*, at 32.[8]

Nor does it even help just to take the majority at its word. Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. Scout's honor. Still, the future significance of today's opinion will be decided in the future. And law often has a way of evolving

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not conceive of the abortion decision as implicating liberty, because the law in the 19th century gave that choice no protection. The trouble is that the chosen path—which is, again, the solitary rationale for the Court's decision—provides no way to distinguish between the right to choose an abortion and a range of other rights, including contraception.

[8] The majority briefly (very briefly) gestures at the idea that some *stare decisis* factors might play out differently with respect to these other constitutional rights. But the majority gives no hint as to why. And the majority's (mis)treatment of *stare decisis* in this case provides little reason to think that the doctrine would stand as a barrier to the majority's redoing any other decision it considered egregiously wrong. See *infra*, at 30–57.

without regard to original intentions—a way of actually following where logic leads, rather than tolerating hard-to-explain lines. Rights can expand in that way. Dissenting in *Lawrence*, Justice Scalia explained why he took no comfort in the Court's statement that a decision recognizing the right to same-sex intimacy did "not involve" same-sex marriage. 539 U. S., at 604. That could be true, he wrote, "only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court." *Id.*, at 605. Score one for the dissent, as a matter of prophecy. And logic and principle are not one-way ratchets. Rights can contract in the same way and for the same reason—because whatever today's majority might say, one thing really does lead to another. We fervently hope that does not happen because of today's decision. We hope that we will not join Justice Scalia in the book of prophets. But we cannot understand how anyone can be confident that today's opinion will be the last of its kind.

Consider, as our last word on this issue, contraception. The Constitution, of course, does not mention that word. And there is no historical right to contraception, of the kind the majority insists on. To the contrary, the American legal landscape in the decades after the Civil War was littered with bans on the sale of contraceptive devices. So again, there seem to be two choices. See *supra*, at 5, 26–27. If the majority is serious about its historical approach, then *Griswold* and its progeny are in the line of fire too. Or if it is not serious, then . . . what *is* the basis of today's decision? If we had to guess, we suspect the prospects of this Court approving bans on contraception are low. But once again, the future significance of today's opinion will be decided in the future. At the least, today's opinion will fuel the fight to get contraception, and any other issues with a moral dimension, out of the Fourteenth Amendment and into state

legislatures.[9]

Anyway, today's decision, taken on its own, is catastrophic enough. As a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. Our law in this constitutional sphere, as in most, has for decades upon decades proceeded differently. It has considered fundamental constitutional principles, the whole course of the Nation's history and traditions, and the step-by-step evolution of the Court's precedents. It is disciplined but not static. It relies on accumulated judgments, not just the sentiments of one long-ago generation of men (who themselves believed, and drafted the Constitution to reflect, that the world progresses). And by doing so, it includes those excluded from that olden conversation, rather than perpetuating its bounds.

As a matter of constitutional substance, the majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command. Today's decision strips women of agency over what even the majority agrees is a

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[9] As this Court has considered this case, some state legislators have begun to call for restrictions on certain forms of contraception. See I. Stevenson, After *Roe* Decision, Idaho Lawmakers May Consider Restricting Some Contraception, Idaho Statesman (May 10, 2022), https://www.idahostatesman.com/news/politics-government/state-politics/article261207007.html; T. Weinberg, "Anything's on the Table": Missouri Legislature May Revisit Contraceptive Limits Post-*Roe*, Missouri Independent (May 20, 2022), https://www.missouriindependent.com/2022/05/20/anythings-on-the-table-missouri-legislature-may-revisit-contraceptive-limits-post-roe/.

contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty. Even before we get to *stare decisis*, we dissent.

## II

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

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

them.

That means the Court may not overrule a decision, even a constitutional one, without a "special justification." *Gamble* v. *United States*, 587 U. S. ___, ___ (2019) (slip op., at 11). *Stare decisis* is, of course, not an "inexorable command"; it is sometimes appropriate to overrule an earlier decision. *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009). But the Court must have a good reason to do so over and above the belief "that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014). "[I]t is not alone sufficient that we would decide a case differently now than we did then." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 455 (2015).

The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling *Roe* and *Casey*. But none does, as further described below and in the Appendix. See *infra*, at 61–66. In some, the Court only partially modified or clarified a precedent. And in the rest, the Court relied on one or more of the traditional *stare decisis* factors in reaching its conclusion. The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. (The majority is wrong when it says that we insist on a test of changed law or fact alone, although that is present in most of the cases. See *ante*, at 69.) None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives.

First, for all the reasons we have given, *Roe* and *Casey* were correct. In holding that a State could not "resolve" the debate about abortion "in such a definitive way that a woman lacks all choice in the matter," the Court protected women's liberty and women's equality in a way comporting with our Fourteenth Amendment precedents. *Casey*, 505

U. S., at 850. Contrary to the majority's view, the legal status of abortion in the 19th century does not weaken those decisions. And the majority's repeated refrain about "usurp[ing]" state legislatures' "power to address" a publicly contested question does not help it on the key issue here. *Ante*, at 44; see *ante*, at 1. To repeat: The point of a right is to shield individual actions and decisions "from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U. S., at 638; *supra*, at 7. However divisive, a right is not at the people's mercy.

In any event "[w]hether or not we . . . agree" with a prior precedent is the beginning, not the end, of our analysis—and the remaining "principles of *stare decisis* weigh heavily against overruling" *Roe* and *Casey*. *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000). *Casey* itself applied those principles, in one of this Court's most important precedents about precedent. After assessing the traditional *stare decisis* factors, *Casey* reached the only conclusion possible—that *stare decisis* operates powerfully here. It still does. The standards *Roe* and *Casey* set out are perfectly workable. No changes in either law or fact have eroded the two decisions. And tens of millions of American women have relied, and continue to rely, on the right to choose. So under traditional *stare decisis* principles, the majority has no special justification for the harm it causes.

And indeed, the majority comes close to conceding that point. The majority barely mentions any legal or factual changes that have occurred since *Roe* and *Casey*. It suggests that the two decisions are hard for courts to implement, but cannot prove its case. In the end, the majority says, all it must say to override *stare decisis* is one thing: that it believes *Roe* and *Casey* "egregiously wrong." *Ante*, at 70. That rule could equally spell the end of any precedent with which a bare majority of the present Court disagrees.

So how does that approach prevent the "scale of justice" from "waver[ing] with every new judge's opinion"? 1 Blackstone 69. It does not. It makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

A

Contrary to the majority's view, there is nothing unworkable about *Casey*'s "undue burden" standard. Its primary focus on whether a State has placed a "substantial obstacle" on a woman seeking an abortion is "the sort of inquiry familiar to judges across a variety of contexts." *June Medical Services L. L. C.* v. *Russo*, 591 U. S. ___, ___ (2020) (slip op., at 6) (ROBERTS, C. J., concurring in judgment). And it has given rise to no more conflict in application than many standards this Court and others unhesitatingly apply every day.

General standards, like the undue burden standard, are ubiquitous in the law, and particularly in constitutional adjudication. When called on to give effect to the Constitution's broad principles, this Court often crafts flexible standards that can be applied case-by-case to a myriad of unforeseeable circumstances. See *Dickerson*, 530 U. S., at 441 ("No court laying down a general rule can possibly foresee the various circumstances" in which it must apply). So, for example, the Court asks about undue or substantial burdens on speech, on voting, and on interstate commerce. See, *e.g.*, *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. 721, 748 (2011); *Burdick* v. *Takushi*, 504 U. S. 428, 433–434 (1992); *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). The *Casey* undue burden standard is the same. It also resembles general standards that courts

work with daily in other legal spheres—like the "rule of reason" in antitrust law or the "arbitrary and capricious" standard for agency decisionmaking. See *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 62 (1911); *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 42–43 (1983). Applying general standards to particular cases is, in many contexts, just what it means to do law.

And the undue burden standard has given rise to no unusual difficulties. Of course, it has provoked some disagreement among judges. *Casey* knew it would: That much "is to be expected in the application of any legal standard which must accommodate life's complexity." 505 U. S., at 878 (plurality opinion). Which is to say: That much is to be expected in the application of any legal standard. But the majority vastly overstates the divisions among judges applying the standard. We count essentially two. THE CHIEF JUSTICE disagreed with other Justices in the *June Medical* majority about whether *Casey* called for weighing the benefits of an abortion regulation against its burdens. See 591 U. S., at ___–___ (slip op., at 6–7); *ante*, at 59, 60, and n. 53.[10] We agree that the *June Medical* difference is a difference—but not one that would actually make a difference in the result of most cases (it did not in *June Medical*), and not one incapable of resolution were it ever to matter. As for lower courts, there is now a one-year-old, one-to-one Circuit split about how the undue burden standard applies to state laws that ban abortions for certain reasons, like fetal abnormality. See *ante*, at 61, and n. 57. That is about it, as far as we can see.[11] And that is not much. This Court

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[10] Some lower courts then differed over which opinion in *June Medical* was controlling—but that is a dispute not about the undue burden standard, but about the "*Marks* rule," which tells courts how to determine the precedential effects of a divided decision.

[11] The rest of the majority's supposed splits are, shall we say, unim-

mostly does not even grant certiorari on one-year-old, one-to-one Circuit splits, because we know that a bit of disagreement is an inevitable part of our legal system. To borrow an old saying that might apply here: Not one or even a couple of swallows can make the majority's summer.

Anyone concerned about workability should consider the majority's substitute standard. The majority says a law regulating or banning abortion "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Ante*, at 77. And the majority lists interests like "respect for and preservation of prenatal life," "protection of maternal health," elimination of certain "medical procedures," "mitigation of fetal pain," and others. *Ante*, at 78. This Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force

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pressive. The majority says that lower courts have split over how to apply the undue burden standard to parental notification laws. See *ante*, at 60, and n. 54. But that is not so. The state law upheld had an exemption for minors demonstrating adequate maturity, whereas the ones struck down did not. Compare *Planned Parenthood of Blue Ridge* v. *Camblos*, 155 F. 3d 352, 383–384 (CA4 1998), with *Planned Parenthood of Ind. & Ky., Inc.* v. *Adams*, 937 F. 3d 973, 981 (CA7 2019), cert. granted, judgment vacated, 591 U. S. ___ (2020), and *Planned Parenthood, Sioux Falls Clinic* v. *Miller*, 63 F. 3d 1452, 1460 (CA8 1995). The majority says there is a split about bans on certain types of abortion procedures. See *ante*, at 61, and n. 55. But the one court to have separated itself on that issue did so based on a set of factual findings significantly different from those in other cases. Compare *Whole Woman's Health* v. *Paxton*, 10 F. 4th 430, 447–453 (CA5 2021), with *EMW Women's Surgical Center, P.S.C.* v. *Friedlander*, 960 F. 3d 785, 798–806 (CA6 2020), and *West Ala. Women's Center* v. *Williamson*, 900 F. 3d 1310, 1322–1324 (CA11 2018). Finally, the majority says there is a split about whether an increase in travel time to reach a clinic is an undue burden. See *ante*, at 61, and n. 56. But the cases to which the majority refers predate this Court's decision in *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582 (2016), which clarified how to apply the undue burden standard to that context.

her to incur, before the Fourteenth Amendment's protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment's protection of liberty and equality? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? And how about the use of dilation and evacuation or medication for miscarriage management? See generally L. Harris, Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of *Roe* v. *Wade*, 386 New England J. Med. 2061 (2022).[12]

Finally, the majority's ruling today invites a host of questions about interstate conflicts. See *supra*, at 3; see generally D. Cohen, G. Donley, & R. Rebouché, The New Abortion Battleground, 123 Colum. L. Rev. (forthcoming 2023), https://ssrn.com/abstract=4032931. Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State inter-

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[12] To take just the last, most medical treatments for miscarriage are identical to those used in abortions. See Kaiser Family Foundation (Kaiser), G. Weigel, L. Sobel, & A. Salganicoff, Understanding Pregnancy Loss in the Context of Abortion Restrictions and Fetal Harm Laws (Dec. 4, 2019), https://www.kff.org/womens-health-policy/issue-brief/understanding-pregnancy-loss-in-the-context-of-abortion-restrictions-and-fetal-harm-laws/. Blanket restrictions on "abortion" procedures and medications therefore may be understood to deprive women of effective treatment for miscarriages, which occur in about 10 to 30 percent of pregnancies. See Health Affairs, J. Strasser, C. Chen, S. Rosenbaum, E. Schenk, & E. Dewhurst, Penalizing Abortion Providers Will Have Ripple Effects Across Pregnancy Care (May 3, 2022), https://www.healthaffairs.org/do/10.1377/forefront.20220503.129912/.

fere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so today's ruling will give rise to a host of new constitutional questions. Far from removing the Court from the abortion issue, the majority puts the Court at the center of the coming "interjurisdictional abortion wars." *Id.*, at ___ (draft, at 1).

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

B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision's original basis. A review of the Appendix to this dissent proves the point. See *infra*, at 61–66. Most "successful proponent[s] of overruling precedent," this Court once said, have carried "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez*, 474 U. S., at 266. Certainly, that was so of the main examples the majority cites: *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937). But it is not so today. Although nodding to some arguments others have made about "modern developments," the majority does not really rely on them, no doubt seeing their slimness. *Ante*, at 33; see *ante*, at 34. The majority briefly invokes the current controversy over abortion. See *ante*, at 70–71. But it has to acknowledge that the same dispute has existed for

decades: Conflict over abortion is not a change but a constant. (And as we will later discuss, the presence of that continuing division provides more of a reason to stick with, than to jettison, existing precedent. See *infra*, at 55–57.) In the end, the majority throws longstanding precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law. See *ante*, at 43.

1

Subsequent legal developments have only reinforced *Roe* and *Casey*. The Court has continued to embrace all the decisions *Roe* and *Casey* cited, decisions which recognize a constitutional right for an individual to make her own choices about "intimate relationships, the family," and contraception. *Casey*, 505 U. S., at 857. *Roe* and *Casey* have themselves formed the legal foundation for subsequent decisions protecting these profoundly personal choices. As discussed earlier, the Court relied on *Casey* to hold that the Fourteenth Amendment protects same-sex intimate relationships. See *Lawrence*, 539 U. S., at 578; *supra*, at 23. The Court later invoked the same set of precedents to accord constitutional recognition to same-sex marriage. See *Obergefell*, 576 U. S., at 665–666; *supra*, at 23. In sum, *Roe* and *Casey* are inextricably interwoven with decades of precedent about the meaning of the Fourteenth Amendment. See *supra*, at 21–24. While the majority might wish it otherwise, *Roe* and *Casey* are the very opposite of "'obsolete constitutional thinking.'" *Agostini* v. *Felton*, 521 U. S. 203, 236 (1997) (quoting *Casey*, 505 U. S., at 857).

Moreover, no subsequent factual developments have undermined *Roe* and *Casey*. Women continue to experience unplanned pregnancies and unexpected developments in pregnancies. Pregnancies continue to have enormous physical, social, and economic consequences. Even an uncompli-

cated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain. For some women, pregnancy and childbirth can mean life-altering physical ailments or even death. Today, as noted earlier, the risks of carrying a pregnancy to term dwarf those of having an abortion. See *supra*, at 22. Experts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase.[13] Pregnancy and childbirth may also impose large-scale financial costs. The majority briefly refers to arguments about changes in laws relating to healthcare coverage, pregnancy discrimination, and family leave. See *ante*, at 33–34. Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare services may be far away.[14] Women also continue to face pregnancy discrimination that interferes with their ability to earn a living. Paid family leave remains inaccessible to many who need it most. Only 20 percent of private-sector workers have access to paid family leave, including a mere 8 percent of workers in the bottom

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[13] See L. Harris, Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of *Roe* v. *Wade*, 386 New England J. Med. 2061, 2063 (2022). This projected racial disparity reflects existing differences in maternal mortality rates for black and white women. Black women are now three to four times more likely to die during or after childbirth than white women, often from preventable causes. See Brief for Howard University School of Law Human and Civil Rights Clinic as *Amicus Curiae* 18.

[14] See Centers for Medicare and Medicaid Services, Issue Brief: Improving Access to Maternal Health Care in Rural Communities 4, 8, 11 (Sept. 2019), https://www.cms.gov/About-CMS/Agency-Information/OMH/equity-initiatives/rural-health/09032019-Maternal-Health-Care-in-Rural-Communities.pdf. In Mississippi, for instance, 19 percent of women of reproductive age are uninsured and 60 percent of counties lack a single obstetrician-gynecologist. Brief for Lawyers' Committee for Civil Rights Under Law et al. as *Amici Curiae* 12–13.

quartile of wage earners.[15]

The majority briefly notes the growing prevalence of safe haven laws and demand for adoption, see *ante*, at 34, and nn. 45–46, but, to the degree that these are changes at all, they too are irrelevant.[16] Neither reduces the health risks or financial costs of going through pregnancy and childbirth. Moreover, the choice to give up parental rights after giving birth is altogether different from the choice not to carry a pregnancy to term. The reality is that few women denied an abortion will choose adoption.[17] The vast majority will continue, just as in *Roe* and *Casey*'s time, to shoulder the costs of childrearing. Whether or not they choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose.[18]

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[15] Dept. of Labor, National Compensation Survey: Employee Benefits in the United States, Table 31 (Sept. 2020), https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf#page=299.

[16] Safe haven laws, which allow parents to leave newborn babies in designated safe spaces without threat of prosecution, were not enacted as an alternative to abortion, but in response to rare situations in which birthing mothers in crisis would kill their newborns or leave them to die. See Centers for Disease Control and Prevention (CDC), R. Wilson, J. Klevens, D. Williams, & L. Xu, Infant Homicides Within the Context of Safe Haven Laws—United States, 2008–2017, 69 Morbidity and Mortality Weekly Report 1385 (2020).

[17] A study of women who sought an abortion but were denied one because of gestational limits found that only 9 percent put the child up for adoption, rather than parenting themselves. See G. Sisson, L. Ralph, H. Gould, & D. Foster, Adoption Decision Making Among Women Seeking Abortion, 27 Women's Health Issues 136, 139 (2017).

[18] The majority finally notes the claim that "people now have a new appreciation of fetal life," partly because of viewing sonogram images. *Ante*, at 34. It is hard to know how anyone would evaluate such a claim and as we have described above, the majority's reasoning does not rely on any reevaluation of the interest in protecting fetal life. See *supra*, at 26, and n. 7. It is worth noting that sonograms became widely used in

Mississippi's own record illustrates how little facts on the ground have changed since *Roe* and *Casey*, notwithstanding the majority's supposed "modern developments." *Ante*, at 33. Sixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from demonstrating proper contraceptive use.[19] The State neither bans pregnancy discrimination nor requires provision of paid parental leave. Brief for Yale Law School Information Society Project as *Amicus Curiae* 13 (Brief for Yale Law School); Brief for National Women's Law Center et al. as *Amici Curiae* 32. It has strict eligibility requirements for Medicaid and nutrition assistance, leaving many women and families without basic medical care or enough food. See Brief for 547 Deans, Chairs, Scholars and Public Health Professionals et al. as *Amici Curiae* 32–34 (Brief for 547 Deans). Although 86 percent of pregnancy-related deaths in the State are due to postpartum complications, Mississippi rejected federal funding to provide a year's worth of Medicaid coverage to women after giving birth. See Brief for Yale Law School 12–13. Perhaps unsurprisingly, health outcomes in Mississippi are abysmal for both women and children. Mississippi has the highest infant mortality rate in the country,

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the 1970s, long before *Casey*. Today, 60 percent of women seeking abortions have at least one child, and one-third have two or more. See CDC, K. Kortsmit et al., Abortion Surveillance—United States, 2019, 70 Morbidity and Mortality Weekly Report 6 (2021). These women know, even as they choose to have an abortion, what it is to look at a sonogram image and to value a fetal life.

[19] Guttmacher Institute, K. Kost, Unintended Pregnancy Rates at the State Level: Estimates for 2010 and Trends Since 2002, Table 1 (2015), https://www.guttmacher.org/sites/default/files/report_pdf/stateup10.pdf; Kaiser, State Requirements for Insurance Coverage of Contraceptives (May 1, 2022), https://www.kff.org/state-category/womens-health/family-planning; Miss. Code Ann. §37–13–171(2)(d) (Cum. Supp. 2021) ("In no case shall the instruction or program include any demonstration of how condoms or other contraceptives are applied").

and some of the highest rates for preterm birth, low birthweight, cesarean section, and maternal death.[20] It is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion. See Brief for 547 Deans 9–10. We do not say that every State is Mississippi, and we are sure some have made gains since *Roe* and *Casey* in providing support for women and children. But a state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in women's and children's health. See Brief for 547 Deans 23–34.

The only notable change we can see since *Roe* and *Casey* cuts in favor of adhering to precedent: It is that American abortion law has become more and more aligned with other nations. The majority, like the Mississippi Legislature, claims that the United States is an extreme outlier when it comes to abortion regulation. See *ante*, at 6, and n. 15. The global trend, however, has been toward increased provision of legal and safe abortion care. A number of countries, including New Zealand, the Netherlands, and Iceland, permit abortions up to a roughly similar time as *Roe* and *Casey* set. See Brief for International and Comparative Legal Scholars as *Amici Curiae* 18–22. Canada has decriminalized abortion at any point in a pregnancy. See *id.*, at 13–15. Most Western European countries impose restrictions on abor-

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[20] See CDC, Infant Mortality Rates by State (Mar. 3, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/infant_mortality_rates/infant_mortality.htm; Mississippi State Dept. of Health, Infant Mortality Report 2019 & 2020, pp. 18–19 (2021), https://www.msdh.ms.gov/msdhsite/_static/resources/18752.pdf; CDC, Percentage of Babies Born Low Birthweight by State (Feb. 25, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/lbw_births/lbw.htm; CDC, Cesarean Delivery Rate by State (Feb. 25, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/cesarean_births/cesareans.htm; Mississippi State Dept. of Health, Mississippi Maternal Mortality Report 2013–2016, pp. 5, 25 (Mar. 2021), https://www.msdh.ms.gov/msdhsite/_static/resources/8127.pdf.

tion after 12 to 14 weeks, but they often have liberal exceptions to those time limits, including to prevent harm to a woman's physical or mental health. See *id.*, at 24–27; Brief for European Law Professors as *Amici Curiae* 16–17, Appendix. They also typically make access to early abortion easier, for example, by helping cover its cost.[21] Perhaps most notable, more than 50 countries around the world—in Asia, Latin America, Africa, and Europe—have expanded access to abortion in the past 25 years. See Brief for International and Comparative Legal Scholars as *Amici Curiae* 28–29. In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today.

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

2

In support of its holding, see *ante*, at 40, the majority invokes two watershed cases overruling prior constitutional precedents: *West Coast Hotel Co.* v. *Parrish* and *Brown* v. *Board of Education*. But those decisions, unlike today's, responded to changed law and to changed facts and attitudes that had taken hold throughout society. As *Casey* recognized, the two cases are relevant only to show—by stark contrast—how unjustified overturning the right to choose is. See 505 U. S., at 861–864.

*West Coast Hotel* overruled *Adkins* v. *Children's Hospital*

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[21] See D. Grossman, K. Grindlay, & B. Burns, Public Funding for Abortion Where Broadly Legal, 94 Contraception 451, 458 (2016) (discussing funding of abortion in European countries).

*of D. C.*, 261 U. S. 525 (1923), and a whole line of cases beginning with *Lochner* v. *New York*, 198 U. S. 45 (1905). *Adkins* had found a state minimum-wage law unconstitutional because, in the Court's view, the law interfered with a constitutional right to contract. 261 U. S., at 554–555. But then the Great Depression hit, bringing with it unparalleled economic despair. The experience undermined—in fact, it disproved—*Adkins*'s assumption that a wholly unregulated market could meet basic human needs. As Justice Jackson (before becoming a Justice) wrote of that time: "The older world of *laissez faire* was recognized everywhere outside the Court to be dead." The Struggle for Judicial Supremacy 85 (1941). In *West Coast Hotel*, the Court caught up, recognizing through the lens of experience the flaws of existing legal doctrine. See also *ante*, at 11 (ROBERTS, C. J., concurring in judgment). The havoc the Depression had worked on ordinary Americans, the Court noted, was "common knowledge through the length and breadth of the land." 300 U. S., at 399. The *laissez-faire* approach had led to "the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living." *Ibid.* And since *Adkins* was decided, the law had also changed. In several decisions, the Court had started to recognize the power of States to implement economic policies designed to enhance their citizens' economic well-being. See, *e.g.*, *Nebbia* v. *New York*, 291 U. S. 502 (1934); *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251 (1931). The statements in those decisions, *West Coast Hotel* explained, were "impossible to reconcile" with *Adkins*. 300 U. S., at 398. There was no escaping the need for *Adkins* to go.

*Brown* v. *Board of Education* overruled *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), along with its doctrine of "separate but equal." By 1954, decades of Jim Crow had made clear what *Plessy*'s turn of phrase actually meant: "inherent[ ] [in]equal[ity]." *Brown*, 347 U. S., at 495. Segregation

was not, and could not ever be, consistent with the Reconstruction Amendments, ratified to give the former slaves full citizenship. Whatever might have been thought in *Plessy*'s time, the *Brown* Court explained, both experience and "modern authority" showed the "detrimental effect[s]" of state-sanctioned segregation: It "affect[ed] [children's] hearts and minds in a way unlikely ever to be undone." 347 U. S., at 494. By that point, too, the law had begun to reflect that understanding. In a series of decisions, the Court had held unconstitutional public graduate schools' exclusion of black students. See, *e.g.*, *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *Sipuel* v. *Board of Regents of Univ. of Okla.*, 332 U. S. 631 (1948) (*per curiam*); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938). The logic of those cases, *Brown* held, "appl[ied] with added force to children in grade and high schools." 347 U. S., at 494. Changed facts and changed law required *Plessy*'s end.

The majority says that in recognizing those changes, we are implicitly supporting the half-century interlude between *Plessy* and *Brown*. See *ante*, at 70. That is not so. First, if the *Brown* Court had used the majority's method of constitutional construction, it might not ever have overruled *Plessy*, whether 5 or 50 or 500 years later. *Brown* thought that whether the ratification-era history supported desegregation was "[a]t best . . . inconclusive." 347 U. S., at 489. But even setting that aside, we are not saying that a decision can *never* be overruled just because it is terribly wrong. Take *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, which the majority also relies on. See *ante*, at 40–41, 70. That overruling took place just three years after the initial decision, before any notable reliance interests had developed. It happened as well because individual Justices changed their minds, not because a new majority wanted to undo the decisions of their predecessors. Both *Barnette* and *Brown*, moreover, share another feature setting them apart from the Court's ruling today. They protected individual

rights with a strong basis in the Constitution's most fundamental commitments; they did not, as the majority does here, take away a right that individuals have held, and relied on, for 50 years. To take *that* action based on a new and bare majority's declaration that two Courts got the result egregiously wrong? And to justify that action by reference to *Barnette*? Or to *Brown*—a case in which the Chief Justice also wrote an (11-page) opinion in which the entire Court could speak with one voice? These questions answer themselves.

*Casey* itself addressed both *West Coast Hotel* and *Brown*, and found that neither supported *Roe*'s overruling. In *West Coast Hotel*, *Casey* explained, "the facts of economic life" had proved "different from those previously assumed." 505 U. S., at 862. And even though "*Plessy* was wrong the day it was decided," the passage of time had made that ever more clear to ever more citizens: "Society's understanding of the facts" in 1954 was "fundamentally different" than in 1896. *Id.*, at 863. So the Court needed to reverse course. "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations." *Id.*, at 864. And because such dramatic change had occurred, the public could understand why the Court was acting. "[T]he Nation could accept each decision" as a "response to the Court's constitutional duty." *Ibid.* But that would not be true of a reversal of *Roe*—"[b]ecause neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed." 505 U. S., at 864.

That is just as much so today, because *Roe* and *Casey* continue to reflect, not diverge from, broad trends in American society. It is, of course, true that many Americans, including many women, opposed those decisions when issued and do so now as well. Yet the fact remains: *Roe* and *Casey* were the product of a profound and ongoing change in women's roles in the latter part of the 20th century. Only a dozen years before *Roe*, the Court described women as "the center

of home and family life," with "special responsibilities" that precluded their full legal status under the Constitution. *Hoyt* v. *Florida*, 368 U. S. 57, 62 (1961). By 1973, when the Court decided *Roe*, fundamental social change was underway regarding the place of women—and the law had begun to follow. See *Reed* v. *Reed*, 404 U. S. 71, 76 (1971) (recognizing that the Equal Protection Clause prohibits sex-based discrimination). By 1992, when the Court decided *Casey*, the traditional view of a woman's role as only a wife and mother was "no longer consistent with our understanding of the family, the individual, or the Constitution." 505 U. S., at 897; see *supra*, at 15, 23–24. Under that charter, *Casey* understood, women must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions. Nothing since *Casey*—no changed law, no changed fact—has undermined that promise.

C

The reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests those decisions have created. The Court adheres to precedent not just for institutional reasons, but because it recognizes that stability in the law is "an essential thread in the mantle of protection that the law affords the individual." *Florida Dept. of Health and Rehabilitative Servs.* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 154 (1981) (Stevens, J., concurring). So when overruling precedent "would dislodge [individuals'] settled rights and expectations," *stare decisis* has "added force." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991). *Casey* understood that to deny individuals' reliance on *Roe* was to "refuse to face the fact[s]." 505 U. S., at 856. Today the majority refuses to face the facts. "The most striking feature of the [majority] is the absence of any serious discussion" of how

its ruling will affect women. *Ante*, at 37. By characterizing *Casey*'s reliance arguments as "generalized assertions about the national psyche," *ante*, at 64, it reveals how little it knows or cares about women's lives or about the suffering its decision will cause.

In *Casey*, the Court observed that for two decades individuals "have organized intimate relationships and made" significant life choices "in reliance on the availability of abortion in the event that contraception should fail." 505 U. S., at 856. Over another 30 years, that reliance has solidified. For half a century now, in *Casey*'s words, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Ibid.*; see *supra*, at 23–24. Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*'s and *Casey*'s protections.

The disruption of overturning *Roe* and *Casey* will therefore be profound. Abortion is a common medical procedure and a familiar experience in women's lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of American women will have an abortion before the age of 45.[22] Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. As *Casey* understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for

[22] See CDC, K. Kortsmit et al., Abortion Surveillance—United States, 2019, 70 Morbidity and Mortality Weekly Report 7 (2021); Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 9.

example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life. See Brief for Economists as *Amici Curiae* 13 (showing that abortion availability has "large effects on women's education, labor force participation, occupations, and earnings" (footnotes omitted)).

The majority's response to these obvious points exists far from the reality American women actually live. The majority proclaims that "'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.'" *Ante*, at 64 (quoting *Casey*, 505 U. S., at 856).[23] The facts are: 45 percent of pregnancies in the United States are unplanned. See Brief for 547 Deans 5. Even the most effective contraceptives fail, and effective contraceptives are not universally accessible.[24] Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. See Brief for Legal Voice et al. as *Amici Curiae* 18–19. The Mississippi law at issue here, for example, has no exception for rape or incest, even for underage women. Finally, the

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[23] Astoundingly, the majority casts this statement as a "conce[ssion]" from *Casey* with which it "agree[s]." *Ante*, at 64. In fact, *Casey* used this language as part of describing an argument that it *rejected*. See 505 U. S., at 856. It is only today's Court that endorses this profoundly mistaken view.

[24] See Brief for 547 Deans 6–7 (noting that 51 percent of women who terminated their pregnancies reported using contraceptives during the month in which they conceived); Brief for Lawyers' Committee for Civil Rights Under Law et al. as *Amici Curiae* 12–14 (explaining financial and geographic barriers to access to effective contraceptives).

majority ignores, as explained above, that some women decide to have an abortion because their circumstances change during a pregnancy. See *supra*, at 49. Human bodies care little for hopes and plans. Events can occur after conception, from unexpected medical risks to changes in family circumstances, which profoundly alter what it means to carry a pregnancy to term. In all these situations, women have expected that they will get to decide, perhaps in consultation with their families or doctors but free from state interference, whether to continue a pregnancy. For those who will now have to undergo that pregnancy, the loss of *Roe* and *Casey* could be disastrous.

That is especially so for women without money. When we "count[] the cost of [*Roe*'s] repudiation" on women who once relied on that decision, it is not hard to see where the greatest burden will fall. *Casey*, 505 U. S., at 855. In States that bar abortion, women of means will still be able to travel to obtain the services they need.[25] It is women who cannot afford to do so who will suffer most. These are the women most likely to seek abortion care in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line. See Brief for 547 Deans 7; Brief for Abortion Funds and Practical Support Organizations as *Amici Curiae* 8 (Brief for Abortion Funds).

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[25] This statement of course assumes that States are not successful in preventing interstate travel to obtain an abortion. See *supra*, at 3, 36–37. Even assuming that is so, increased out-of-state demand will lead to longer wait times and decreased availability of service in States still providing abortions. See Brief for State of California et al. as *Amici Curiae* 25–27. This is what happened in Oklahoma, Kansas, Colorado, New Mexico, and Nevada last fall after Texas effectively banned abortions past six weeks of gestation. See *United States* v. *Texas*, 595 U. S. ___, ___ (2021) (SOTOMAYOR, J., concurring in part and dissenting in part) (slip op., at 6).

Even with *Roe*'s protection, these women face immense obstacles to raising the money needed to obtain abortion care early in their pregnancy. See Brief for Abortion Funds 7–12.[26] After today, in States where legal abortions are not available, they will lose any ability to obtain safe, legal abortion care. They will not have the money to make the trip necessary; or to obtain childcare for that time; or to take time off work. Many will endure the costs and risks of pregnancy and giving birth against their wishes. Others will turn in desperation to illegal and unsafe abortions. They may lose not just their freedom, but their lives.[27]

Finally, the expectation of reproductive control is integral to many women's identity and their place in the Nation. See *Casey*, 505 U. S., at 856. That expectation helps define

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[26] The average cost of a first-trimester abortion is about $500. See Brief for Abortion Funds 7. Federal insurance generally does not cover the cost of abortion, and 35 percent of American adults do not have cash on hand to cover an unexpected expense that high. Guttmacher Institute, M. Donovan, In Real Life: Federal Restrictions on Abortion Coverage and the Women They Impact (Jan. 5, 2017), https://www.guttmacher.org/gpr/2017/01/real-life-federal-restrictions-abortion-coverage-and-women-they-impact#:~:text=Although%20the%20Hyde%20Amendment%20bars,provide%20abortion%20coverage%20to%20enrollees; Brief for Abortion Funds 11.

[27] Mississippi is likely to be one of the States where these costs are highest, though history shows that it will have company. As described above, Mississippi provides only the barest financial support to pregnant women. See *supra*, at 41–42. The State will greatly restrict abortion care without addressing any of the financial, health, and family needs that motivate many women to seek it. The effects will be felt most severely, as they always have been, on the bodies of the poor. The history of state abortion restrictions is a history of heavy costs exacted from the most vulnerable women. It is a history of women seeking illegal abortions in hotel rooms and home kitchens; of women trying to self-induce abortions by douching with bleach, injecting lye, and penetrating themselves with knitting needles, scissors, and coat hangers. See L. Reagan, When Abortion Was a Crime 42–43, 198–199, 208–209 (1997). It is a history of women dying.

a woman as an "equal citizen[]," with all the rights, privileges, and obligations that status entails. *Gonzales*, 550 U. S., at 172 (Ginsburg, J., dissenting); see *supra*, at 23–24. It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a sphere of freedom, in which a person has the capacity to make choices free of government control. As *Casey* recognized, the right "order[s]" her "thinking" as well as her "living." 505 U. S., at 856. Beyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right grants.

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

The Court's failure to perceive the whole swath of expectations *Roe* and *Casey* created reflects an impoverished view of reliance. According to the majority, a reliance interest must be "very concrete," like those involving "property" or "contract." *Ante*, at 64. While many of this Court's cases addressing reliance have been in the "commercial context," *Casey*, 505 U. S., at 855, none holds that interests must be analogous to commercial ones to warrant *stare de-*

*cisis* protection.[28] This unprecedented assertion is, at bottom, a radical claim to power. By disclaiming any need to consider broad swaths of individuals' interests, the Court arrogates to itself the authority to overrule established legal principles without even acknowledging the costs of its decisions for the individuals who live under the law, costs that this Court's *stare decisis* doctrine instructs us to privilege when deciding whether to change course.

The majority claims that the reliance interests women have in *Roe* and *Casey* are too "intangible" for the Court to consider, even if it were inclined to do so. *Ante*, at 65. This is to ignore as judges what we know as men and women. The interests women have in *Roe* and *Casey* are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and whether to try to become pregnant than they would have when *Roe* served as a backstop. Other women will carry pregnancies to term, with all the costs and risk of harm that involves, when they would previously have chosen to obtain an abortion. For millions of women, *Roe* and *Casey* have been critical in giving them control of their bodies and their lives. Closing our eyes to the suffering today's decision will impose will not make that suffering disappear. The majority cannot escape its obligation to "count[] the cost[s]" of its decision by invoking the "conflicting arguments" of "contending sides." *Casey*, 505 U. S., at 855; *ante*, at 65. *Stare decisis* requires that the Court calculate the costs of a decision's repudiation on those who have relied on the decision,

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[28] The majority's sole citation for its "concreteness" requirement is *Payne* v. *Tennessee*, 501 U. S. 808 (1991). But *Payne* merely discounted reliance interests in cases involving "procedural and evidentiary rules." *Id.*, at 828. Unlike the individual right at stake here, those rules do "not alter primary conduct." *Hohn* v. *United States*, 524 U. S. 236, 252 (1998). Accordingly, they generally "do not implicate the reliance interests of private parties" at all. *Alleyne* v. *United States*, 570 U. S. 99, 119 (2013) (SOTOMAYOR, J., concurring).

not on those who have disavowed it. See *Casey*, 505 U. S., at 855.

More broadly, the majority's approach to reliance cannot be reconciled with our Nation's understanding of constitutional rights. The majority's insistence on a "concrete," economic showing would preclude a finding of reliance on a wide variety of decisions recognizing constitutional rights—such as the right to express opinions, or choose whom to marry, or decide how to educate children. The Court, on the majority's logic, could transfer those choices to the State without having to consider a person's settled understanding that the law makes them hers. That must be wrong. All those rights, like the right to obtain an abortion, profoundly affect and, indeed, anchor individual lives. To recognize that people have relied on these rights is not to dabble in abstractions, but to acknowledge some of the most "concrete" and familiar aspects of human life and liberty. *Ante*, at 64.

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

After today, young women will come of age with fewer

rights than their mothers and grandmothers had. The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away. The majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision.

D

One last consideration counsels against the majority's ruling: the very controversy surrounding *Roe* and *Casey*. The majority accuses *Casey* of acting outside the bounds of the law to quell the conflict over abortion—of imposing an unprincipled "settlement" of the issue in an effort to end "national division." *Ante*, at 67. But that is not what *Casey* did. As shown above, *Casey* applied traditional principles of *stare decisis*—which the majority today ignores—in reaffirming *Roe*. *Casey* carefully assessed changed circumstances (none) and reliance interests (profound). It considered every aspect of how *Roe*'s framework operated. It adhered to the law in its analysis, and it reached the conclusion that the law required. True enough that *Casey* took notice of the "national controversy" about abortion: The Court knew in 1992, as it did in 1973, that abortion was a "divisive issue." *Casey*, 505 U. S., at 867–868; see *Roe*, 410 U. S., at 116. But *Casey*'s reason for acknowledging public conflict was the exact opposite of what the majority insinuates. *Casey* addressed the national controversy in order to emphasize how important it was, in that case of all cases, for the Court to stick to the law. Would that today's majority had done likewise.

Consider how the majority itself summarizes this aspect of *Casey*:

> "The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not 'social and political pressures.' There is a special

> danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial 'watershed' decision, such as *Roe*. A decision overruling *Roe* would be perceived as having been made 'under fire' and as a 'surrender to political pressure.'" *Ante*, at 66–67 (citations omitted).

That seems to us a good description. And it seems to us right. The majority responds (if we understand it correctly): well, yes, but we have to apply the law. See *ante*, at 67. To which *Casey* would have said: That is exactly the point. Here, more than anywhere, the Court needs to apply the law—particularly the law of *stare decisis*. Here, we know that citizens will continue to contest the Court's decision, because "[m]en and women of good conscience" deeply disagree about abortion. *Casey*, 505 U. S., at 850. When that contestation takes place—but when there is no legal basis for reversing course—the Court needs to be steadfast, to stand its ground. That is what the rule of law requires. And that is what respect for this Court depends on.

"The promise of constancy, once given" in so charged an environment, *Casey* explained, "binds its maker for as long as" the "understanding of the issue has not changed so fundamentally as to render the commitment obsolete." *Id.*, at 868. A breach of that promise is "nothing less than a breach of faith." *Ibid.* "[A]nd no Court that broke its faith with the people could sensibly expect credit for principle." *Ibid.* No Court breaking its faith in that way would *deserve* credit for principle. As one of *Casey*'s authors wrote in another case, "Our legitimacy requires, above all, that we adhere to *stare decisis*" in "sensitive political contexts" where "partisan controversy abounds." *Bush* v. *Vera*, 517 U. S. 952, 985 (1996) (opinion of O'Connor, J.).

Justice Jackson once called a decision he dissented from a "loaded weapon," ready to hand for improper uses. *Korematsu* v. *United States*, 323 U. S. 214, 246 (1944). We fear

that today's decision, departing from *stare decisis* for no legitimate reason, is its own loaded weapon. Weakening *stare decisis* threatens to upend bedrock legal doctrines, far beyond any single decision. Weakening *stare decisis* creates profound legal instability. And as *Casey* recognized, weakening *stare decisis* in a hotly contested case like this one calls into question this Court's commitment to legal principle. It makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, today's decision takes aim, we fear, at the rule of law.

## III

"Power, not reason, is the new currency of this Court's decisionmaking." *Payne*, 501 U. S., at 844 (Marshall, J., dissenting). *Roe* has stood for fifty years. *Casey*, a precedent about precedent specifically confirming *Roe*, has stood for thirty. And the doctrine of *stare decisis*—a critical element of the rule of law—stands foursquare behind their continued existence. The right those decisions established and preserved is embedded in our constitutional law, both originating in and leading to other rights protecting bodily integrity, personal autonomy, and family relationships. The abortion right is also embedded in the lives of women—shaping their expectations, influencing their choices about relationships and work, supporting (as all reproductive rights do) their social and economic equality. Since the right's recognition (and affirmation), nothing has changed to support what the majority does today. Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court.

Mississippi—and other States too—knew exactly what they were doing in ginning up new legal challenges to *Roe* and *Casey*. The 15-week ban at issue here was enacted in 2018. Other States quickly followed: Between 2019 and 2021, eight States banned abortion procedures after six to

eight weeks of pregnancy, and three States enacted all-out bans.[29] Mississippi itself decided in 2019 that it had not gone far enough: The year after enacting the law under review, the State passed a 6-week restriction. A state senator who championed both Mississippi laws said the obvious out loud. "[A] lot of people thought," he explained, that "finally, we have" a conservative Court "and so now would be a good time to start testing the limits of *Roe*."[30] In its petition for certiorari, the State had exercised a smidgen of restraint. It had urged the Court merely to roll back *Roe* and *Casey*, specifically assuring the Court that "the questions presented in this petition do not require the Court to overturn" those precedents. Pet. for Cert. 5; see *ante*, at 5–6 (ROBERTS, C. J., concurring in judgment). But as Mississippi grew ever more confident in its prospects, it resolved to go all in. It urged the Court to overrule *Roe* and *Casey*. Nothing but everything would be enough.

Earlier this Term, this Court signaled that Mississippi's stratagem would succeed. Texas was one of the fistful of States to have recently banned abortions after six weeks of pregnancy. It added to that "flagrantly unconstitutional" restriction an unprecedented scheme to "evade judicial

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[29] Guttmacher Institute, E. Nash, State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century (Dec. 16, 2021), https://www.guttmacher.org/article/2021/12/state-policy-trends-2021-worst-year-abortion-rights-almost-half-century; Guttmacher Institute, E. Nash, L. Mohammed, O. Cappello, & S. Naide, State Policy Trends 2020: Reproductive Health and Rights in a Year Like No Other (Dec. 15, 2020), https://www.guttmacher.org/article/2020/12/state-policy-trends-2020-reproductive-health-and-rights-year-no-other; Guttmacher Institute, E. Nash, L. Mohammed, O. Cappello, & S. Naide, State Policy Trends 2019: A Wave of Abortion Bans, But Some States Are Fighting Back (Dec. 10, 2019), https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back.

[30] A. Pittman, Mississippi's Six-Week Abortion Ban at 5th Circuit Appeals Court Today, Jackson Free Press (Oct. 7, 2019), https://www.jacksonfreepress.com/news/2019/oct/07/mississippis-six-week-abortion-ban-5th-circuit-app/.

scrutiny." *Whole Woman's Health* v. *Jackson*, 594 U. S. ___, ___ (2021) (SOTOMAYOR, J., dissenting) (slip op., at 1). And five Justices acceded to that cynical maneuver. They let Texas defy this Court's constitutional rulings, nullifying *Roe* and *Casey* ahead of schedule in the Nation's second largest State.

And now the other shoe drops, courtesy of that same five-person majority. (We believe that THE CHIEF JUSTICE's opinion is wrong too, but no one should think that there is not a large difference between upholding a 15-week ban on the grounds he does and allowing States to prohibit abortion from the time of conception.) Now a new and bare majority of this Court—acting at practically the first moment possible—overrules *Roe* and *Casey*. It converts a series of dissenting opinions expressing antipathy toward *Roe* and *Casey* into a decision greenlighting even total abortion bans. See *ante*, at 57, 59, 63, and nn. 61–64 (relying on former dissents). It eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court's legitimacy.

*Casey* itself made the last point in explaining why it would not overrule *Roe*—though some members of its majority might not have joined *Roe* in the first instance. Just as we did here, *Casey* explained the importance of *stare decisis*; the inappositeness of *West Coast Hotel* and *Brown*; the absence of any "changed circumstances" (or other reason) justifying the reversal of precedent. 505 U. S., at 864; see *supra*, at 30–33, 37–47. "[T]he Court," *Casey* explained, "could not pretend" that overruling *Roe* had any "justification beyond a present doctrinal disposition to come out differently from the Court of 1973." 505 U. S., at 864. And to overrule for that reason? Quoting Justice Stewart, *Casey*

explained that to do so—to reverse prior law "upon a ground no firmer than a change in [the Court's] membership"—would invite the view that "this institution is little different from the two political branches of the Government." *Ibid.* No view, *Casey* thought, could do "more lasting injury to this Court and to the system of law which it is our abiding mission to serve." *Ibid.* For overruling *Roe*, *Casey* concluded, the Court would pay a "terrible price." 505 U. S., at 864.

The Justices who wrote those words—O'Connor, Kennedy, and Souter—they were judges of wisdom. They would not have won any contests for the kind of ideological purity some court watchers want Justices to deliver. But if there were awards for Justices who left this Court better than they found it? And who for that reason left this country better? And the rule of law stronger? Sign those Justices up.

They knew that "the legitimacy of the Court [is] earned over time." *Id.*, at 868. They also would have recognized that it can be destroyed much more quickly. They worked hard to avert that outcome in *Casey*. The American public, they thought, should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new "doctrinal school," could "by dint of numbers" alone expunge their rights. *Id.*, at 864. It is hard—no, it is impossible—to conclude that anything else has happened here. One of us once said that "[i]t is not often in the law that so few have so quickly changed so much." S. Breyer, Breaking the Promise of *Brown*: The Resegregation of America's Schools 30 (2022). For all of us, in our time on this Court, that has never been more true than today. In overruling *Roe* and *Casey*, this Court betrays its guiding principles.

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

# APPENDIX

This Appendix analyzes in full each of the 28 cases the majority says support today's decision to overrule *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). As explained herein, the Court in each case relied on traditional *stare decisis* factors in overruling.

A great many of the overrulings the majority cites involve a prior precedent that had been rendered out of step with or effectively abrogated by contemporary case law in light of intervening developments in the broader doctrine. See *Ramos* v. *Louisiana*, 590 U. S. ___, ___ (2020) (slip op., at 22) (holding the Sixth Amendment requires a unanimous jury verdict in state prosecutions for serious offenses, and overruling *Apodaca* v. *Oregon*, 406 U. S. 404 (1972), because "in the years since *Apodaca*, this Court ha[d] spoken inconsistently about its meaning" and had undercut its validity "on at least eight occasions"); *Ring* v. *Arizona*, 536 U. S. 584, 608–609 (2002) (recognizing a Sixth Amendment right to have a jury find the aggravating factors necessary to impose a death sentence and, in so doing, rejecting *Walton* v. *Arizona*, 497 U. S. 639 (1990), as overtaken by and irreconcilable with *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000)); *Agostini* v. *Felton*, 521 U. S. 203, 235–236 (1997) (considering the Establishment Clause's constraint on government aid to religious instruction, and overruling *Aguilar* v. *Felton*, 473 U. S. 402 (1985), in light of several related doctrinal developments that had so undermined *Aguilar* and the assumption on which it rested as to render it no longer good law); *Batson* v. *Kentucky*, 476 U. S. 79, 93–96 (1986) (recognizing that a defendant may make a prima facie showing of purposeful racial discrimination in selection of a jury venire by relying solely on the facts in his case, and, based on subsequent developments in equal protection law, rejecting part of *Swain* v. *Alabama*, 380 U. S. 202 (1965), which had imposed a more demanding evidentiary

burden); *Brandenburg* v. *Ohio*, 395 U. S. 444, 447–448 (1969) (*per curiam*) (holding that mere advocacy of violence is protected by the First Amendment, unless intended to incite it or produce imminent lawlessness, and rejecting the contrary rule in *Whitney* v. *California*, 274 U. S. 357 (1927), as having been "thoroughly discredited by later decisions"); *Katz* v. *United States*, 389 U. S. 347, 351, 353 (1967) (recognizing that the Fourth Amendment extends to material and communications that a person "seeks to preserve as private," and rejecting the more limited construction articulated in *Olmstead* v. *United States*, 277 U. S. 438 (1928), because "we have since departed from the narrow view on which that decision rested," and "the underpinnings of *Olmstead* . . . have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling"); *Miranda* v. *Arizona*, 384 U. S. 436, 463–467, 479, n. 48 (1966) (recognizing that the Fifth Amendment requires certain procedural safeguards for custodial interrogation, and rejecting *Crooker* v. *California*, 357 U. S. 433 (1958), and *Cicenia* v. *Lagay*, 357 U. S. 504 (1958), which had already been undermined by *Escobedo* v. *Illinois*, 378 U. S. 478 (1964)); *Malloy* v. *Hogan*, 378 U. S. 1, 6–9 (1964) (explaining that the Fifth Amendment privilege against "self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States," and rejecting *Twining* v. *New Jersey*, 211 U. S. 78 (1908), in light of a "marked shift" in Fifth Amendment precedents that had "necessarily repudiated" the prior decision); *Gideon* v. *Wainwright*, 372 U. S. 335, 343–345 (1963) (acknowledging a right to counsel for indigent criminal defendants in state court under the Sixth and Fourteenth Amendments, and overruling the earlier precedent failing to recognize such a right, *Betts* v. *Brady*, 316 U. S.

455 (1942));[31] *Smith* v. *Allwright*, 321 U. S. 649, 659–662 (1944) (recognizing all-white primaries are unconstitutional after reconsidering in light of "the unitary character of the electoral process" recognized in *United States* v. *Classic*, 313 U. S. 299 (1941), and overruling *Grovey* v. *Townsend*, 295 U. S. 45 (1935)); *United States* v. *Darby*, 312 U. S. 100, 115–117 (1941) (recognizing Congress's Commerce Clause power to regulate employment conditions and explaining as "inescapable" the "conclusion . . . that *Hammer* v. *Dagenhart*, [247 U. S. 251 (1918)]," and its contrary rule had "long since been" overtaken by precedent construing the Commerce Clause power more broadly); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78–80 (1938) (applying state substantive law in diversity actions in federal courts and overruling *Swift* v. *Tyson*, 16 Pet. 1 (1842), because an intervening decision had "made clear" the "fallacy underlying the rule").

Additional cases the majority cites involved fundamental factual changes that had undermined the basic premise of the prior precedent. See *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 364 (2010) (expanding First Amendment protections for campaign-related speech and citing technological changes that undermined the distinctions of the earlier regime and made workarounds easy, and overruling *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990), and partially overruling *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93 (2003)); *Crawford* v. *Washington*, 541 U. S. 36, 62–65 (2004) (expounding on the Sixth Amendment right to confront witnesses and rejecting the prior framework, based on its practical failing to keep

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[31] We have since come to understand *Gideon* as part of a larger doctrinal shift—already underway at the time of *Gideon*—where "the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments." *McDonald* v. *Chicago*, 561 U. S. 742, 763 (2010); see also *id.*, at 766.

out core testimonial evidence, and overruling *Ohio* v. *Roberts*, 448 U. S. 56 (1980)); *Mapp* v. *Ohio*, 367 U. S. 643, 651–652 (1961) (holding that the exclusionary rule under the Fourth Amendment applies to the States, and overruling the contrary rule of *Wolf* v. *Colorado*, 338 U. S. 25 (1949), after considering and rejecting "the current validity of the factual grounds upon which *Wolf* was based").

Some cited overrulings involved *both* significant doctrinal developments *and* changed facts or understandings that had together undermined a basic premise of the prior decision. See *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ___, ___, ___–___ (2018) (slip op., at 42, 47–49) (holding that requiring public-sector union dues from nonmembers violates the First Amendment, and overruling *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), based on "both factual and legal" developments that had "eroded the decision's underpinnings and left it an outlier among our First Amendment cases" (internal quotation marks omitted)); *Obergefell* v. *Hodges*, 576 U. S. 644, 659–663 (2015) (holding that the Fourteenth Amendment protects the right of same-sex couples to marry in light of doctrinal developments, as well as fundamentally changed social understanding); *Lawrence* v. *Texas*, 539 U. S. 558, 572–578 (2003) (overruling *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), after finding anti-sodomy laws to be inconsistent with the Fourteenth Amendment in light of developments in the legal doctrine, as well as changed social understanding of sexuality); *United States* v. *Scott*, 437 U. S. 82, 101 (1978) (overruling *United States* v. *Jenkins*, 420 U. S. 358 (1975), three years after it was decided, because of developments in the Court's double jeopardy case law, and because intervening practice had shown that government appeals from midtrial dismissals requested by the defendant were practicable, desirable, and consistent with double jeopardy values); *Craig* v. *Boren*, 429 U. S. 190, 197–199, 210, n. 23 (1976) (holding that sex-based classifications are subject to intermediate

scrutiny under the Fourteenth Amendment's Equal Protection Clause, including because *Reed* v. *Reed*, 404 U. S. 71 (1971), and other equal protection cases and social changes had overtaken any "inconsistent" suggestion in *Goesaert* v. *Cleary*, 335 U. S. 464 (1948)); *Taylor* v. *Louisiana*, 419 U. S. 522, 535–537 (1975) (recognizing as "a foregone conclusion from the pattern of some of the Court's cases over the past 30 years, as well as from legislative developments at both federal and state levels," that women could not be excluded from jury service, and explaining that the prior decision approving such practice, *Hoyt* v. *Florida*, 368 U. S. 57 (1961), had been rendered inconsistent with equal protection jurisprudence).

Other overrulings occurred very close in time to the original decision so did not engender substantial reliance and could not be described as having been "embedded" as "part of our national culture." *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000); see *Payne* v. *Tennessee*, 501 U. S. 808 (1991) (revising procedural rules of evidence that had barred admission of certain victim-impact evidence during the penalty phase of capital cases, and overruling *South Carolina* v. *Gathers*, 490 U. S. 805 (1989), and *Booth* v. *Maryland*, 482 U. S. 496 (1987), which had been decided two and four years prior, respectively); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996) (holding that Congress cannot abrogate state-sovereign immunity under its Article I commerce power, and rejecting the result in *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 (1989), seven years later; the decision in *Union Gas* never garnered a majority); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 531 (1985) (holding that local governments are not constitutionally immune from federal employment laws, and overruling *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), after "eight years" of experience under that regime showed *Usery*'s standard was unworkable and, in practice, undermined the federalism principles the decision sought

to protect).

The rest of the cited cases were relatively minor in their effect, modifying part or an application of a prior precedent's test or analysis. See *Montejo* v. *Louisiana*, 556 U. S. 778 (2009) (citing workability and practical concerns with additional layers of prophylactic procedural safeguards for defendants' right to counsel, as had been enshrined in *Michigan* v. *Jackson*, 475 U. S. 625 (1986)); *Illinois* v. *Gates*, 462 U. S. 213, 227–228 (1983) (replacing a two-pronged test under *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and *Spinelli* v. *United States*, 393 U. S. 410 (1969), in favor of a traditional totality-of-the-circumstances approach to evaluate probable cause for issuance of a warrant); *Wesberry* v. *Sanders*, 376 U. S. 1, 4 (1964), and *Baker* v. *Carr*, 369 U. S. 186, 202 (1962) (clarifying that the "political question" passage of the minority opinion in *Colegrove* v. *Green*, 328 U. S. 549 (1946), was not controlling law).

In sum, none of the cases the majority cites is analogous to today's decision to overrule 50- and 30-year-old watershed constitutional precedents that remain unweakened by any changes of law or fact.

Theodore Roosevelt American Inn of Court *Dobbs* CLE Program
Outline of Associate Dean Rodger Citron
November 14, 2022

I. The Concurrences in *Dobbs v. Jackson Women's Health Organization*

A. Chief Justice Roberts

Would have upheld the Mississippi law but not decided more.

"[T]hat is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." 142 S.Ct. at 2311. Roberts elaborated: "Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*." Id.

Quintessential Roberts – as concerned with the Court's long-term institutional legitimacy as with the reasoning and outcome in the particular case.

B. Justice Thomas

The Court should continue its campaign against substantive due process.

"For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." 142 S.Ct. at 2301. See also *id*. at 2304 ("Substantive due process conflicts with [the] textual command [of the Due Process Clause] and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity").

Quintessential Thomas – unyielding and inexorable Originalism.

C. Justice Kavanaugh

Reiterated the Court's holding that abortion is a matter to be resolved through the "democratic process" and provided his views on "the future implications" of the Court's decision. 142 S.Ct. at 2304-05.

As to the former: "The Court's decision today *does not outlaw* abortion throughout the United States. On the contrary, the Court's decision properly leaves the question of abortion for the people and their elected representatives in the democratic process. Through that democratic process, the people and their representatives may decide to allow or limit abortion." 142 S.Ct. at 2305.

As to the latter:

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

142 S.Ct. at 2309 (citation omitted).

Quintessential Kavanaugh – on this Court, he has offered ameliorative rhetoric in controversial cases while nevertheless voting with his most conservative colleagues. See also *New York State Rifle & Pistol Association Inc. v. Bruen*, 142 S.Ct. 2111, 2161 (2022) (concurring with Roberts, C.J., "to underscore two important points about the limits of the Court's decision" invalidating "discretionary licensing regimes" under the Second Amendment). Like Roberts, Kavanaugh is concerned about the long-term institutional legitimacy.

*Roe, Dobbs, and the Elevation of History*

Tiffany C. Graham

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court of the United States overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. The Court held, among other things, that the right to terminate a pregnancy was not a fundamental right protected by the Due Process Clause, and further, that fundamental rights had to be "deeply rooted in [the] Nation's history and tradition and implicit in the concept of ordered liberty," a test that came from the 1997 decision, *Washington v. Glucksberg*, and was much narrower than the approaches described in more recent decisions like *Lawrence v. Texas* and *Obergefell v. Hodges*. Reactions to the decision varied from elation on the right to rage and mitigated shock (because of an astonishing leak of the opinion that was published approximately a month and a half earlier)on the left. For supporters of abortion rights, the anger was fueled by a sense that a significant aspect of women's equality had been eliminated and the case for the full civic equality of women had suffered an enormous setback. In the coming years, there will be endless discussion about the meaning of this opinion, but in the immediate moment, two of the most troublingimplications of the Court's backward-looking approach to fundamental rights are the impact this will have on lawyers and judges, most of whom are not trained historians, and the impact this might have on other protected liberties which cannot claim a long historical pedigree.

Attention to history and tradition in the context of fundamental rights analysis is not new. Turning to both is a standard technique that the Court has employed on a regular basis. The difference, however, is the precision of *Dobbs'* focus and the lack of room for dynamic interpretation of a Constitution that grows to meet the challenges before it. History certainly mattered, but so, too, did progress: as the Court said in *Moore v. East Cleveland*, it was also important to honor "the basic values that underlie our society."

Even more than that, there have been times when the Court did not rely on history and tradition at all when analyzing fundamental rights claims. *Lawrence*, for instance, based the protection of adult sexual intimacy on the autonomous and dignitary interests of persons. Similarly, *Obergefell* held that history and tradition should not limit fundamental rights analysis, noting that instead, courts were also called upon to exercise reasoned judgment in the name of advancing liberty. Yet, *Dobbs* has imposed precisely this limit on fundamental rights jurisprudence going forward. *Dobbs'* insistence on constraining unenumerated rights to those which existed in the past is not without support; it is simply wildly incomplete.

The dangers of this narrow approach to fundamental rights jurisprudence are significant. One of them was highlighted by Justice Thomas in his concurrence, where he argued that the majority opinion (in his view, appropriately) undermined the continued vitality of *Griswold*, *Lawrence*, and *Obergefell*. A long-time critic of substantive due process, Justice Thomas would prefer to ground such claims, if at all, in the Privileges or Immunities Clause of the Fourteenth Amendment. By contrast, Justice Alito in the majority opinion, and Justice Kavanaugh in his concurrence, assured readers that overruling those cases was not next on the Court's "to-do" list. Even if all of this is true, some lower court judges might accept the invitation that the logic of the *Dobbs* majority extends. Establishing protection for same-sex marriage and the right of adults – especially same-sex adults – to engage in intimate behavior is neither rooted in history nor honored by tradition. Whether or not courts go this far, the implication of Justice Thomas' commentary – that activist groups should find and file test cases - nonetheless destabilizes the grip that marginalized groups like the LGBTQ+ community have on full membership within ourpolitical community.

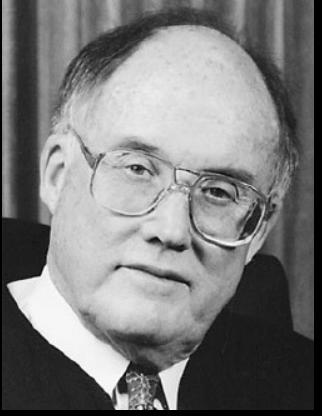
Another danger that may arise from this singular focus on history is the way it requires lawyers and judges to adopt the role of professional historians, something that most are not prepared to do. The field of history is not one that can be conquered simply by reading enough books and articles. Professional historians spend years in training so they can develop the kind of expertise which allows them to provide a complex, nuanced, and sophisticated set of understandings about the past. As a result of this training, they have an extensive grasp on such matters as the way interpretive schools of thought have risen and fallen over time, which impacts the way historical materials are collected, understood, and explained; they rely on multiple resources to explain unique events as well as trendlines across time; they know how to engage in the (often time-consuming) methods which allow them to identify and locate the resources that will support their interpretation of past events; they may have significant exposure to overlapping areas of scholarship which allows them to see the impact of larger societal forces on their specific area(s)of expertise; and the depth of their knowledge allows them to comprehend, and when appropriate, discard competing interpretations of the past based on the strengths and weaknesses that each assessment reflects.

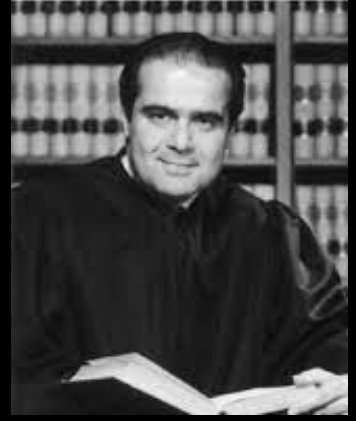
Law school and law practice prepare lawyers and judges to do *none* of this. Moreover, the Supreme Court justices are not obviously better equipped to engage on these terms (Justice Kagan's master's degree in philosophy and Justice Gorsuch's doctorate in legal philosophy – both from Oxford – notwithstanding).

The current majority would argue that this argument amounts to nothing more than the following objection: doing history is hard. "*Of course,* it is hard," they would claim, but that does not justify a decision to avoid the inquiry. By limiting protection for unenumerated rights only to those located in past legal and social practices, they would argue, courts operate within their appropriately-defined, small "d" democratic boundaries and do not impose on the public the values and preferences that arise from their own consciences.

The problem with this argument, of course, is the knowledge that we have from experience – including the experience of watching the Court handle history during *the most recent Term*.Judges can still exceed their limits when they rule based on history, especially if they have an incomplete grasp of it, or when they emphasize favorable historical facts and disregard the inconvenient ones. By way of example, in *Dobbs*, the majority opinion emphasized legal authorities that pushed to criminalize abortion during the nineteenth century for the sake of the child, while professional historians who filed an amicus brief highlighted the context within which many of those laws were passed – evidence showed that legislators and the public supported the new restrictions because they were concerned about the health of *mothers* who might be victimized by unscrupulous individuals (especially those who botched the procedure). So, what does history tell us here? Yes, there were numerous laws criminalizing abortion at some stage of a pregnancy during the nineteenth century, but does the *justification* behind many of those laws matter when telling a story about the impact of that history on individual rights? Which account of the record should prevail, and why? Is our profession now doomed to engage in what others have derisively called "law office history?"

The *Dobbs* decision will be discussed, dissected, supported, and reviled for years to come as the legal profession and the wider public read it, reread it, and start to see how it shapes both the law itself, as well as the lives of women on the ground. The Court's decision to wall off fundamental rights analysis to the matters we have protected in the past is simply one of those issues whose full meaning we will only appreciate with the passage of time.




# The Personnel Dominos that take us to Dobbs.

Roosevelt American Inn of Court







505 U.S. 833 PLANNED PARENTHOOD v. CASEY 2791
Cite as 112 S.Ct. 2791 (1992)

Justice O'CONNOR, Justice KENNEDY, and Justice SOUTER delivered the opinion of the Court

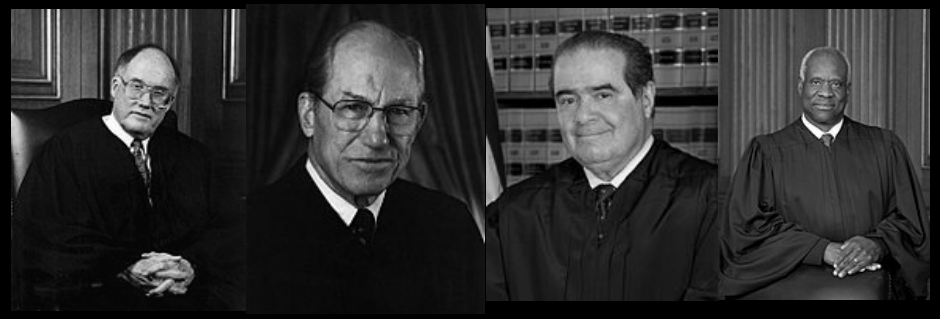


In a bitter 5-to-4 decision, the Court again reaffirmed Roe, but it upheld most of the Pennsylvania provisions. For the first time, the justices imposed a new standard to determine the validity of laws restricting abortions. The new standard asks whether a state abortion regulation has the purpose or effect of imposing an "**undue burden**," which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."

concurring

Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter

dissenting



Justices Rehnquist, White, Scalia, and Thomas

**Ronald Reagan Presidency:**

**George H.W. Bush Presidency:**

**January 20, 1981**

**January 20, 1989**

**January 20, 1989**

**January 20, 1993**

**August 19, 1981:**
President Reagan nominates Sandra Day O'Connor to the Supreme Court.

**November 12, 1987:**
President Reagan Nominates Anthony Kennedy to the Supreme Court.


**July 25, 1990:**
President Bush Nominates David Souter to the Supreme Court.

# O'Connor-Alito Personnel Change
# Major Domino #1:

**July 1, 2005:**
Justice O'Connor announces her retirement

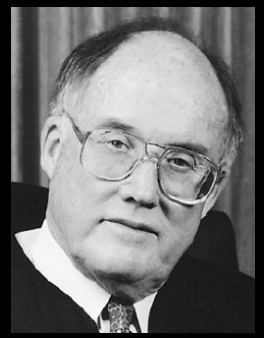
Dear President Bush:

This is to inform you of my decision to retire from my position as an Associate Justice of the Supreme Court of the United States effective upon the nomination and confirmation of my successor. It has been a great privilege, indeed, to have served as a member of the Court for 24 Terms. I will leave it with enormous respect for the integrity of the Court and its role under our Constitutional structure.

Sincerely,

Sandra Day O'Connor

President Bush nominates John Roberts



**September 3, 2005:**
Chief Justice Rehnquist dies

**September 5, 2005:**
President Bush withdraws John Roberts as Justice O'Connor's replacement, and resubmits him for the Chief Justice Position

**October 31, 2005:**
President Bush nominates Samuel Alito for Justice O'Connor's Position.
(Confirmed January 31, 2006)

# The Obama Presidency Justices:

**Presidential Term:**
January 20, 2009 – January 20, 2017

**2009**: Justice Souter announces his retirement, and is replaced by Justice Sotomayor

**2010**: Justice Stevens announces his retirement, and is replaced by Justice Kagan

Los Angeles Times

# Much depends on Ginsburg

BY ERWIN CHEMERINSKY

MARCH 15, 2014 1:44 PM PT

Justice Ruth Bader Ginsburg should retire from the Supreme Court after the completion of the current term in June. She turned 81 on Saturday and by all accounts she is healthy and physically and mentally able to continue. But only by resigning this summer can she ensure that a Democratic president will be able to choose a successor who shares her views and values.

Moreover, there is a distinct possibility that Democrats will not keep the Senate in the November 2014 elections. The current Senate has 53 Democrats, two independents who vote with the Democrats and 45 Republicans. But in the November 2014 elections, Republicans have a far greater likelihood of gaining seats in the Senate than the Democrats. One recent study identified nine seats held by Democrats that could be won by Republicans, but only two seats occupied by Republicans that might be taken by Democrats.

I do not minimize how hard it will be for Justice Ginsburg to step down from a job that she loves and has done so well since 1993. But the best way for her to advance all the things she has spent her life working for is to ensure that a Democratic president picks her successor. The way to facilitate that is for her to resign this summer.

# Party Breakdown

In the 113th Congress, the current party alignments as of November 24, 2014, are

- House of Representatives: 234 Republicans, 207 Democrats (including the 5 Delegates and the Resident Commissioner), and 3 vacant seats.
- Senate: 53 Democrats; 2 Independents, who caucus with the Democrats; and 45 Republicans.

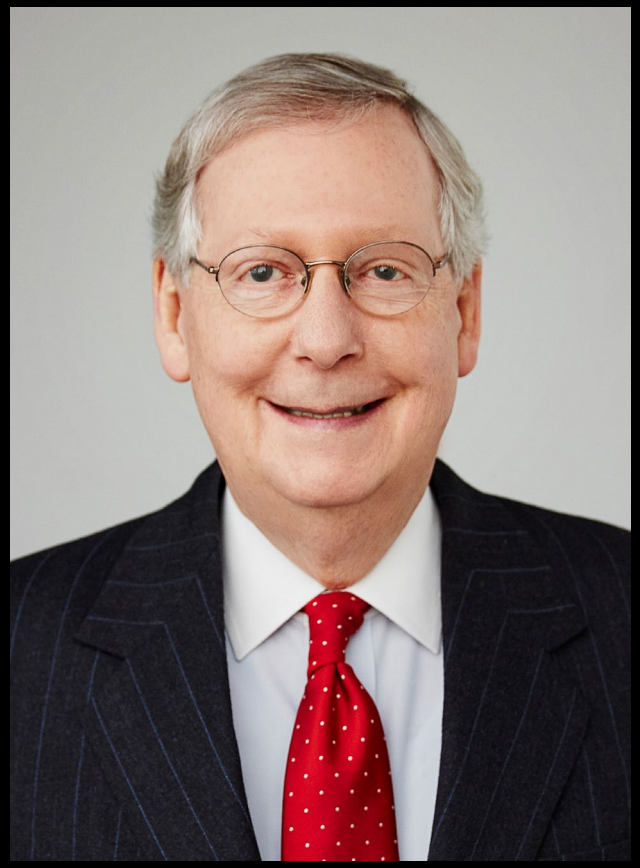
As of **January 2015**, the Senate sat at 54 Republicans, and 46 Democrats.

# Death of Supreme Court Justice Antonin Scalia

**February 13, 2016** (270 days before the election) Justice Antonin Scalia dies unexpectedly.

**March 16, 2016**, President Obama nominates Merrick Garland to fill Justice Scalia's spot on the Supreme Court.

# Enter Mitch McConnell

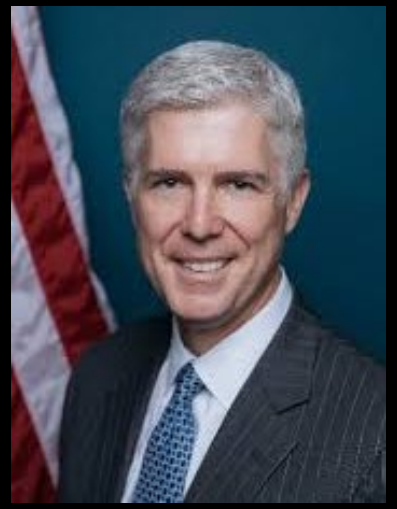


**February 13, 2016*:** "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president.“ ***Hours after the death of Justice Scalia**

**August 2016:** “One of my proudest moments was when I looked Barack Obama in the eye and I said, ‘Mr. President, you will not fill the Supreme Court vacancy.’”

# November 2016: Trump Defeats Clinton

Promptly fills the Scalia seat with Neil Gorsuch (2017)



**Summer of 2018**: Brett Kavanaugh is nominated to fill the seat vacated by the retirement of Justice Kennedy

# Ruth Bader Ginsburg dies at age 87

**September 18, 2020** – Ruth Bader Ginsburg dies only 47 days before the election. Eight days later, Donald Trump announces his intent to nominate Amy Coney Barrett

# McConnell says he'll allow Senate vote on Trump's Supreme Court nominee

Senate didn't hold nomination hearing following Scalia's death

Antonin Scalia

President Barack Obama **Democrat**

Senate Majority Leader Mitch McConnell **Republican**

Feb. 13

2016

Days until election

**270**

Days until inauguration

**73**

Ruth Bader Ginsburg

President Donald Trump **Republican**

Senate Majority Leader Mitch McConnell **Republican**

Sept. 18

2020

Days until election

**47**

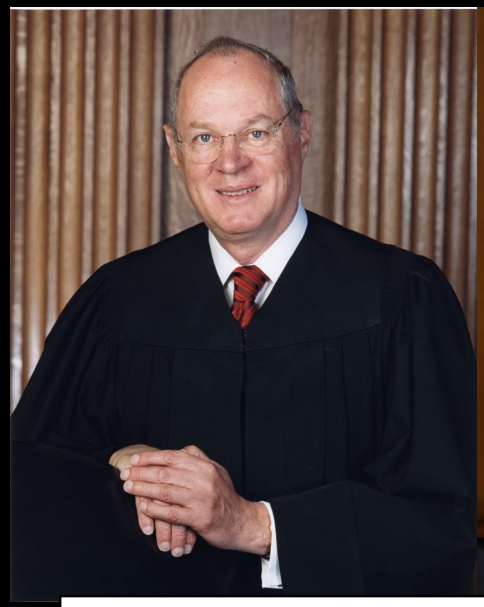
Days until inauguration

**78**

USA TODAY

# Key Shifts:

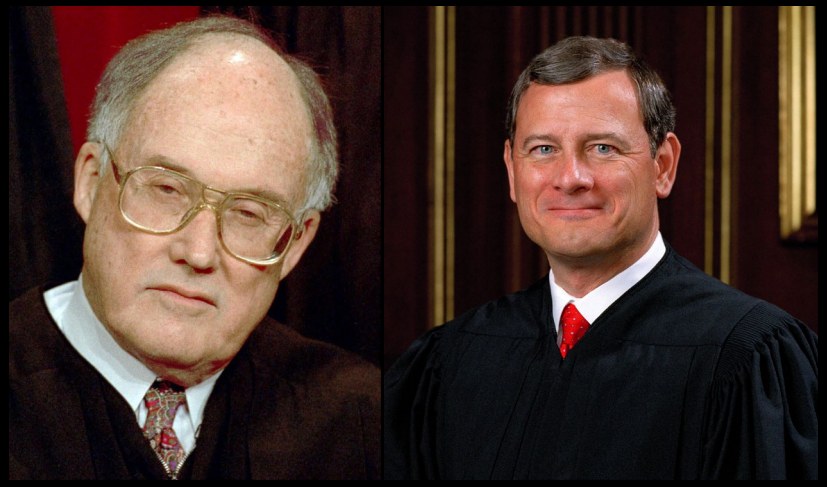
**Justice O'Connor to Justice Alito**



**Justice Kennedy to Justice Kavanaugh**

**Justice Ginsburg to Justice Coney Barret**

# Key Non-Shifts:



Chief Justice Rehnquist to Chief Justice Roberts

Justice Souter to Justice Sotomayor

Justice Scalia to Justice Gorsuch*
(*Not Garland )

Justice Stevens to Justice Kagan

# *ARTICLE: Roe May Be the First Domino to Fall in the Series of Fundamental Rights*

December 2, 2021

**Reporter**
2021 Harv. C.R.-C.L. L. Rev. Amicus 1 *

**Length:** 2414 words

**Author:** by Christina Coleburn

Christina Coleburn is a J.D. candidate at Harvard Law School.

## Text

**[*1]** The Supreme Court heard oral arguments on Dec. 1 in a case that legal observers predict will be the nail in *Roe v. Wade*'s gradually hollowed coffin. A majority of justices seemed poised to rule for the plaintiff-appellees in *Dobbs v. Jackson Women's Health Organization*, which concerns a Mississippi law that would outlaw almost all abortions after 15 weeks of pregnancy. The petitioners have asked the Court to overrule *Roe*, a landmark case holding that the Fourteenth Amendment provides a fundamental right to privacy that protects the right to have an abortion. Fundamental rights are currently constitutionally protected from government interference via **[*2]** substantive due process doctrine and reviewed with the highest level of scrutiny. The *Washington v. Glucksberg* criterion is used to identify fundamental rights. The standard holds that a fundamental right must be "deeply rooted in this [n]ation's history and tradition" and include a "careful description" of the asserted liberty interest. However, the Supreme Court can later retract the fundamental right status. Beyond invalidating *Roe*, already narrowed in 1992 by *Planned Parenthood v. Casey, Dobbs* could transform decades of jurisprudence about fundamental rights conferred by the Fourteenth Amendment's inferred right to privacy and liberty interest doctrine. Constitutional claims outside of the abortion context have been affirmed using this privacy framework and could be subverted should *Roe* and *Casey* fall. Precedents regarding the rights to marriage, parenting, childrearing, individual control of medical decisions, contraception, and sexual intimacy may also be at risk.

*Roe*'s critics contest this jurisprudence in several rationales. Debates over originalism, a theory that constitutional text should be interpreted with the original public meaning at the time of ratification, offer one such insight. Justice William Rehnquist's dissent in *Roe* and opinion in *Casey* showcase these disputes. They contend that the Constitution does not protect the right to terminate a pregnancy as states limited abortion when the Fourteenth Amendment was adopted in 1868. The originalist view rejects arguments that abortion is constitutionally protected through a fundamental right to privacy "implicit in the concept of ordered liberty[.]" Opponents of *Roe* also claim that abortion was not specified as a fundamental right and merits only rational basis review, the lowest scrutiny level. An article in the conservative *Georgetown Journal of Law and Public Policy* drafted a hypothetical opinion overruling *Roe* with this rationale. "This Court did not actually hold in *Roe* that abortion was a 'fundamental constitutional right, but instead stated: 'Where certain 'fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.'... nowhere mentions abortion as a fundamental right, or strict scrutiny analysis, or the need to 'narrowly tailor' regulations." The 2018 article concludes that stare decisis should not protect the precedent, writing that *"Roe v. Wade* is forty-five years old, but we have overruled decisions of much longer duration... Despite forty-five years, *Roe* has never become settled."

Other Fourteenth Amendment decisions that run afoul of originalism, face skepticism as fundamental rights, or infer rights based on privacy grounds remain on the books. Among them are: *Loving v. Virginia*, which struck down interracial marriage bans; *Obergefell v. Hodges*, which recognized same-sex marriage *; Griswold v. Connecticut*, which protected married couples' liberty to use birth control without government encroachment; *Eisenstadt v. Baird*, which recognized the right of unmarried people to possess contraception; *Lawrence v. Texas*, which shielded private and consensual **[*3]** sexual acts; *Meyer v. Nebraska*, which affirmed parental rights over children's education; and *Cruzan v. Director, Mo. Dept. of Health*, which enshrined the right to decline medical treatment. Overturning *Roe* could potentially threaten these rulings if state or private actors challenged the rights they protect.

Some legal spectators consider these possibilities hyperbolic and say the likelihood that these rulings could be in danger is slim. One argument against concern is that lawsuits that could imperil these rulings are unlikely to be initiated. As an example, a future prohibition on interracial marriage or a ban on birth control would seem inconceivable in modern times. Government officials would not enact laws that their constituents disapprove of -- or, more cynically, representatives would not propose legislation that could hurt them politically. Skeptics also contend that as the federal judiciary and Supreme Court fear that they will lose legitimacy or become irreparably politicized, they will self-police with internal constraints to avoid these perceptions. Another counterargument distinguishes *Roe* from other fundamental rights cases, claiming that other rulings correctly identify fundamental rights or should survive without originalist theory. These theories are plausible, but some are weaker than others. It is credible that some battles, like fighting laws against interracial marriage, have been won. Many politicians are strategic in how to choose their battles and some justices have actively tried to combat the perception the legal institution is broken. However, there are pitfalls to these claims. Other legal fights, like those involving discrimination against LGBTQ people, are at a fever pitch. There is no shortage of politicians who actively act against their constituents' interests. While some judges are deeply concerned about legitimacy, others would be enthusiastic to enact ideological ambitions without concern for it.

The most powerful repudiation of the skeptics came from the architect of SB8, the Texas abortion law that criminalizes abortion after six weeks of pregnancy absent life-threatening circumstances. In a brief supporting the Mississippi law at issue in *Dobbs*, the potential to undermine precedents decided on the basis similar to *Roe* was explicitly recognized -- and invited the Court not to hesitate should it feel necessary.

"Supporters of *Roe* have correctly observed that this Court has recognized and enforced other supposed constitutional 'rights' that have no basis in constitutional text or historical practice... there are other court-imposed 'substantive due process' rights whose textual and historical provenance are equally dubious... *Griswold... Lawrence... Obergefell*," the brief states. "This is not to say that the Court should announce the overruling of *Lawrence* and *Obergefell* if it decides to overrule *Roe* and *Casey* in this case. But neither should the Court hesitate to write an opinion that leaves those decisions hanging by a thread. *Lawrence* and *Obergefell*, while far less hazardous to human life, are as lawless as *Roe*."

**[*4]** Threats to substantive due process rulings are real -- the question is whether they become *reality*.

106 S.Ct. 2841, 92 L.Ed.2d 140, 54 USLW 4919

KeyCite Red Flag - Severe Negative Treatment
Overruled by Lawrence v. Texas, U.S., June 26, 2003

106 S.Ct. 2841
Supreme Court of the United States

Michael J. BOWERS, Attorney
General of Georgia, Petitioner
v.
Michael HARDWICK, and John and Mary Doe.

No. 85–140.
|
Argued March 31, 1986.
|
Decided June 30, 1986.
|
Rehearing Denied Sept. 11, 1986.
|
See 478 U.S. 1039, 107 S.Ct. 29.

**Synopsis**

Practicing homosexual brought action challenging constitutionality of Georgia sodomy statute. The United States District Court for the Northern District of Georgia, Robert H. Hall, J., granted defendants' motion to dismiss for failure to state claim upon which relief could be granted, and plaintiff appealed. The Court of Appeals, 760 F.2d 1202, reversed and remanded. After rehearing was denied, 765 F.2d 1123, defendants petitioned for certiorari. The Supreme Court, Justice White, held that Georgia's sodomy statute did not violate the fundamental rights of homosexuals.

Reversed.

Chief Justice Burger and Justice Powell filed concurring opinions.

Justice Blackmun, filed dissenting opinion in which Justices Brennan, Marshall, and Stevens joined.

Justice Stevens filed dissenting opinion in which Justice Brennan and Justice Marshall joined.

**Procedural Posture(s):** On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

West Headnotes (4)

[1] **Sex Offenses** Sodomy and deviate sexual conduct in general

Georgia's sodomy statute did not violate the fundamental rights of homosexuals. O.C.G.A. § 16–6–2; U.S.C.A. Const.Amends. 5, 14.

231 Cases that cite this headnote

[2] **Constitutional Law** Sex and procreation

Federal Constitution does not confer fundamental right upon homosexuals to engage in sodomy. U.S.C.A. Const.Amends. 5, 14.

232 Cases that cite this headnote

[3] **Constitutional Law** Rights and interests protected; fundamental rights

There should be great resistance to expand substantive reach of due process clauses of Fifth and Fourteenth Amendments, particularly if it requires redefining category of rights deemed to be fundamental. U.S.C.A. Const.Amends. 5, 14.

184 Cases that cite this headnote

[4] **Sex Offenses** Sodomy and deviate sexual conduct in general

Presumed belief of majority of Georgia electorate that homosexual sodomy is immoral and unacceptable provided rational basis for Georgia's sodomy statute. O.C.G.A. § 16–6–2; U.S.C.A. Const.Amends. 5, 14.

141 Cases that cite this headnote

****2841 *186** *Syllabus* *

After being charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of his home, respondent Hardwick (respondent) brought suit in Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. The court granted the defendants' motion to dismiss for failure to state a claim. The Court of Appeals reversed and remanded, holding that the Georgia statute violated respondent's fundamental rights.

*Held:* The Georgia statute is constitutional. Pp. 2843–2847.

(a) The Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. None of the fundamental rights announced in this Court's prior cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case. And any claim that those cases stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally ****2842** insulated from state proscription is unsupportable. Pp. 2843–2844.

(b) Against a background in which many States have criminalized sodomy and still do, 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. Pp. 2844–2846.

(c) There should be great resistance to expand the reach of the Due Process Clauses to cover new fundamental rights. Otherwise, the Judiciary necessarily would take upon itself further authority to govern the country without constitutional authority. The claimed right in this case falls far short of overcoming this resistance. P. 2846.

(d) The fact that homosexual conduct occurs in the privacy of the home does not affect the result. *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, distinguished. Pp. 2846–2847.

(e) Sodomy laws should not be invalidated on the asserted basis that majority belief that sodomy is immoral is an inadequate rationale to support the laws. P. 2847.

760 F.2d 1202 (C.A.11 1985), reversed.

***187** WHITE, J., delivered the opinion of the Court, in which BURGER, C.J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C.J., *post,* p. 2847, and POWELL, J., *post,* p. 2847, filed concurring opinions. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post,* p. 2848. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 2856.

**Attorneys and Law Firms**

*Michael E. Hobbs,* Senior Assistant Attorney General of Georgia, argued the cause for petitioner. With him on the briefs were *Michael J. Bowers,* Attorney General, *pro se, Marion O. Gordon,* First Assistant Attorney General, and *Daryl A. Robinson,* Senior Assistant Attorney General.

*Laurence H. Tribe* argued the cause for respondent Hardwick. With him on the brief were *Kathleen M. Sullivan* and *Kathleen L. Wilde.**

* Briefs of *amici curiae* urging reversal were filed for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Rutherford Institute et al. by *W. Charles Bundren, Guy O. Farley, Jr., George M. Weaver, William B. Hollberg, Wendell R. Bird, John W. Whitehead, Thomas O. Kotouc,* and *Alfred Lindh;* and for David Robinson, Jr., *pro se.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Robert Abrams,* Attorney General of New York, *Robert Hermann,* Solicitor General, *Lawrence S. Kahn, Howard L. Zwickel, Charles R. Fraser,* and *Sanford M. Cohen,* Assistant Attorneys General, and *John Van de Kamp,* Attorney General of California; for the American Jewish Congress by *Daniel D. Levenson, David Cohen,* and *Frederick Mandel;* for the American Psychological Association et al. by *Margaret Farrell Ewing, Donald N. Bersoff, Anne Simon, Nadine Taub,* and *Herbert Semmel;* for the Association of the Bar of the City of New York by *Steven A. Rosen;* for the National Organization for Women by *John S. L. Katz;* and for the Presbyterian Church (U.S.A.) et al. by *Jeffrey O. Bramlett.*

Briefs of *amici curiae* were filed for the Lesbian Rights Project et al. by *Mary C. Dunlap;* and for the National Gay Rights Advocates et al. by *Edward P. Errante, Leonard Graff,* and *Jay Kohorn.*

**Opinion**

Justice WHITE delivered the opinion of the Court.

In August 1982, respondent Hardwick (hereafter respondent) was charged with violating the Georgia statute criminalizing ***188** sodomy [1] by committing that act with another adult male in the bedroom of respondent's home. After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. [2] He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution. The District Court granted the defendants' motion to dismiss for failure to state a claim, relying on *Doe v. Commonwealth's Attorney for the City of Richmond,* 403 F.Supp. 1199 (ED Va.1975), which this Court summarily affirmed, ****2843** 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976).

***189** A divided panel of the Court of Appeals for the Eleventh Circuit reversed. 760 F.2d 1202 (1985). The court first held that, because *Doe* was distinguishable and in any event had been undermined by later decisions, our summary affirmance in that case did not require affirmance of the District Court. Relying on our decisions in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); and *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the court went on to hold that the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. The case was remanded for trial, at which, to prevail, the State would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end.

**[1]** Because other Courts of Appeals have arrived at judgments contrary to that of the Eleventh Circuit in this case, [3] we granted the Attorney General's petition for certiorari questioning the holding that the sodomy statute violates the fundamental rights of homosexuals. We agree with petitioner that the Court of Appeals erred, and hence reverse its judgment. [4]

***190** **[2]** This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. 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 for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in *Carey v. Population Services International,* 431 U.S. 678, 685, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977). *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), were described as dealing with child rearing and education; *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), with family relationships; *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535,

62 S.Ct. 1110, 86 L.Ed. 1655 (1942), with procreation; *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), with marriage; *Griswold v. Connecticut, supra,* and *Eisenstadt v. Baird, supra,* with contraception; and **2844 *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. *Carey v. Population Services International, supra,* 431 U.S., at 688–689, 97 S.Ct., at 2017–2018.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the *191 claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far. 431 U.S., at 688, n. 5, 694, n. 17, 97 S.Ct., at 2018, n. 5, 2021, n. 17.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. *Meyer, Prince,* and *Pierce* fall in this category, as do the privacy cases from *Griswold* to *Carey.*

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut,* 302 U.S. 319, 325, 326, 58 S.Ct. 149, 151, 152, 82 L.Ed. 288 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither *192 liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.,* at 503, 97 S.Ct., at 1938 (POWELL, J.). See also *Griswold v. Connecticut,* 381 U.S., at 506, 85 S.Ct., at 1693.

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. See generally, Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U.Miami L.Rev. 521, 525 (1986). Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. [5] In 1868, when the **2845 Fourteenth Amendment was *193 ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. [6] In fact, until 1961, [7] all 50 States outlawed sodomy, and today, **2846 24 States and the District of Columbia *194 continue to provide criminal penalties for sodomy performed in private and between consenting adults. See Survey, U.Miami L.Rev., *supra,* at 524, n. 9. 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.

**[3]** Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is 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 design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation ***195** of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), where the Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of one's home: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." *Id.,* at 565, 89 S.Ct., at 1248.

*Stanley* did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. *Id.,* at 568, n. 11, 89 S.Ct., at 1249, n. 11. And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct ***196** while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

**[4]** Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, 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. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that ****2847** the sodomy laws of some 25 States should be invalidated on this basis. [8]

Accordingly, the judgment of the Court of Appeals is

*Reversed.*

Chief Justice BURGER, concurring.
I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.

As the Court notes, *ante,* at 2844, the proscriptions against sodomy have very "ancient roots." 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. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality ***197** and the Western Christian Tradition 70–81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, Commentaries *215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of

homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.

Justice POWELL, concurring.

I join the opinion of the Court. I agree with the Court that there is no fundamental right—*i.e.,* no substantive right under the Due Process Clause—such as that claimed by respondent Hardwick, and found to exist by the Court of Appeals. This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case, Ga.Code Ann. § 16–6–2 (1984), authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a ***198** felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, § 16–5–24, first-degree arson, § 16–7–60, and robbery, § 16–8–40. [1]

****2848** In this case, however, respondent has not been tried, much less convicted and sentenced. [2] Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons this constitutional argument is not before us.

***199** Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, *ante,* at 2844, than *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), was about a fundamental right to watch obscene movies, or *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

The statute at issue, Ga.Code Ann. § 16–6–2 (1984), denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that § 16–6–2 is valid essentially because "the laws of ... many States ... still make such conduct illegal and have done so for a very long time." *Ante,* at 2843. But the fact that the moral judgments expressed by statutes like § 16–6–2 may be " 'natural and familiar ... ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.' " *Roe v. Wade,* 410 U.S. 113, 117, 93 S.Ct. 705, 709, 35 L.Ed.2d 147 (1973), quoting *Lochner v. New York,* 198 U.S. 45, 76, 25 S.Ct. 539, 547, 49 L.Ed. 937 (1905) (Holmes, J., dissenting). Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv.L.Rev. 457, 469 (1897). I believe we must analyze Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimateaspects ***200** of their lives, it must do more than assert that the choice they have made is an " 'abominable crime not fit to be named among Christians.' " *Herring v. State,* 119 Ga. 709, 721, 46 S.E. 876, 882 (1904).

I

In its haste to reverse the Court of Appeals and hold that the Constitution does not "confe[r] a fundamental right upon homosexuals to engage in sodomy," *ante,* at 2843, the Court relegates the actual statute being challenged to a footnote and ignores the procedural posture of the case before ****2849** it. A fair reading of the statute and of the complaint clearly

reveals that the majority has distorted the question this case presents.

First, the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens. Cf. *ante,* at 2842, n. 2. Rather, Georgia has provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Ga.Code Ann. § 16–6–2(a) (1984). The sex or status of the persons who engage in the act is irrelevant as a matter of state law. In fact, to the extent I can discern a legislative purpose for Georgia's 1968 enactment of § 16–6–2, that purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity. [1] I therefore see no basis for the ***201** Court's decision to treat this case as an "as applied" challenge to § 16–6–2, see *ante,* at 2842, n. 2, or for Georgia's attempt, both in its brief and at oral argument, to defend § 16–6–2 solely on the grounds that it prohibits homosexual activity. Michael Hardwick's standing may rest in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals. See Tr. of Oral Arg. 4–5; cf. 760 F.2d 1202, 1205–1206 (CA11 1985). But his claim that § 16–6–2 involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.

Second, I disagree with the Court's refusal to consider whether § 16–6–2 runs afoul of the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment. *Ante,* at 2846, n. 8. Respondent's complaint expressly invoked the Ninth Amendment, see App. 6, and he relied heavily before this Court on *Griswold v. Connecticut,* 381 U.S. 479, 484, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510 (1965), which identifies that Amendment as one of the specific constitutional provisions giving "life and substance" to our understanding of privacy. See Brief for Respondent Hardwick 10–12; Tr. of Oral Arg. 33. More importantly, the procedural posture of the case requires that we affirm the Court of Appeals' judgment if there is *any* ground on which respondent may be entitled to relief. This case is before us on petitioner's motion to dismiss for failure to state a claim, Fed.Rule Civ.Proc. 12(b)(6). See App. 17. It is a well-settled principle of law that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." ***202** *Bramlet v. Wilson,* 495 F.2d 714, 716 (CA8 1974); see *Parr v. Great Lakes Express Co.,* 484 F.2d 767, 773 (CA7 1973); *Due v. Tallahassee Theatres, Inc.,* 333 F.2d 630, 631 (CA5 1964); *United States v. Howell,* 318 F.2d 162, 166 (CA9 1963); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357, pp. 601–602 (1969); see also *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–102, 2 L.Ed.2d 80 (1957). Thus, even if respondent did not advance claims based on the Eighth or Ninth Amendments, or on the ****2850** Equal Protection Clause, his complaint should not be dismissed if any of those provisions could entitle him to relief. I need not reach either the Eighth Amendment or the Equal Protection Clause issues because I believe that Hardwick has stated a cognizable claim that § 16–6–2 interferes with constitutionally protected interests in privacy and freedom of intimate association. But neither the Eighth Amendment nor the Equal Protection Clause is so clearly irrelevant that a claim resting on either provision should be peremptorily dismissed. [2] The Court's cramped reading of the ***203** issue before it makes for a short opinion, but it does little to make for a persuasive one.

II

"Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747, 772, 106 S.Ct. 2169, 2184, 90 L.Ed.2d 779 (1986). In construing the right to privacy, the Court has proceeded along two somewhat distinct, ***204** albeit complementary, lines. First, it has recognized a privacy interest with reference to certain *decisions* ****2851** that are

properly for the individual to make. *E.g.,* *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Second, it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged. *E.g.,* *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984); *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Rios v. United States,* 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960). The case before us implicates both the decisional and the spatial aspects of the right to privacy.

A

The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." *Ante,* at 2844. While it is true that these cases may be characterized by their connection to protection of the family, see *Roberts v. United States Jaycees,* 468 U.S. 609, 619, 104 S.Ct. 3244, 3250, 82 L.Ed.2d 462 (1984), the Court's conclusion that they extend no further than this boundary ignores the warning in *Moore v. East Cleveland,* 431 U.S. 494, 501, 97 S.Ct. 1932, 1936, 52 L.Ed.2d 531 (1977) (plurality opinion), against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.' " *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S., at 777, n. 5, 106 S.Ct., at 2187, n. 5 (STEVENS, J., concurring), quoting Fried, Correspondence, 6 Phil. & Pub. Affairs 288–289 (1977). And so we protect the decision whether to ***205** marry precisely because marriage "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." *Griswold v. Connecticut,* 381 U.S., at 486, 85 S.Ct., at 1682. We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. Cf. *Thornburgh v. American College of Obstetricians & Gynecologists, supra,* 476 U.S., at 777, n. 6, 106 S.Ct., at 2188, n. 6 (STEVENS, J., concurring). And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. Cf. *Moore v. East Cleveland,* 431 U.S., at 500–506, 97 S.Ct., at 1936–1939 (plurality opinion). The Court recognized in *Roberts,* 468 U.S., at 619, 104 S.Ct., at 3250, that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others." *Ibid.*

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality," *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 63, 93 S.Ct. 2628, 2638, 37 L.Ed.2d 446 (1973); see also *Carey v. Population Services International,* 431 U.S. 678, 685, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977). The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely ****2852** personal bonds. See Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 637 (1980); cf. *Eisenstadt v. Baird,* 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349 (1972); *Roe v. Wade,* 410 U.S., at 153, 93 S.Ct., at 726.

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose ***206** how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest

in public education should give way to a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Wisconsin v. Yoder,* 406 U.S. 205, 223–224, 92 S.Ct. 1526, 1537, 32 L.Ed.2d 15 (1972). The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

B

The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court's treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. Even when our understanding of the contours of the right to privacy depends on "reference to a 'place,' " *Katz v. United States,* 389 U.S., at 361, 88 S.Ct., at 516 (Harlan, J., concurring), "the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefeasible right of personal security, personal liberty and private property.' " *California v. Ciraolo,* 476 U.S. 207, 226, 106 S.Ct. 1809, 1819, 90 L.Ed.2d 210 (1986) (POWELL, J., dissenting), ***207** quoting *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886).

The Court's interpretation of the pivotal case of *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), is entirely unconvincing. *Stanley* held that Georgia's undoubted power to punish the public distribution of constitutionally unprotected, obscene material did not permit the State to punish the private possession of such material. According to the majority here, *Stanley* relied entirely on the First Amendment, and thus, it is claimed, sheds no light on cases not involving printed materials. *Ante,* at 2846. But that is not what *Stanley* said. Rather, the *Stanley* Court anchored its holding in the Fourth Amendment's special protection for the individual in his home:

> " 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.'
>
> "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home." 394 U.S., at 564–565, 89 S.Ct., at 1248, quoting *Olmstead* ****2853** *v. United States,* 277 U.S., at 478, 48 S.Ct., at 572 (Brandeis, J., dissenting).

The central place that *Stanley* gives Justice Brandeis' dissent in *Olmstead,* a case raising *no* First Amendment claim, shows that *Stanley* rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Indeed, in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), the Court suggested that reliance on the Fourth ***208** Amendment not only supported the Court's outcome in *Stanley* but actually was *necessary* to it: "If obscene material unprotected by the First Amendment in itself carried with it a 'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the 'privacy of the home,' which was hardly more than a reaffirmation that 'a man's home is his castle.' " 413 U.S., at 66, 93 S.Ct., at 2640. "The right of the people to be secure in their ... houses," expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy, and thus

I cannot agree with the Court's statement that "[t]he right pressed upon us here has no ... support in the text of the Constitution," *ante,* at 2846. Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy.

III

The Court's failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight the question whether petitioner, on behalf of the State, has justified Georgia's infringement on these interests. I believe that neither of the two general justifications for § 16–6–2 that petitioner has advanced warrants dismissing respondent's challenge for failure to state a claim.

First, petitioner asserts that the acts made criminal by the statute may have serious adverse consequences for "the general public health and welfare," such as spreading communicable diseases or fostering other criminal activity. Brief for Petitioner 37. Inasmuch as this case was dismissed by the District Court on the pleadings, it is not surprising that the record before us is barren of any evidence to support petitioner's claim.[3] In light of the state of the record, I see ***209** no justification for the Court's attempt to equate the private, consensual sexual activity at issue here with the "possession in the home of drugs, firearms, or stolen goods," *ante,* at 2846, to which *Stanley* refused to extend its protection. 394 U.S., at 568, n. 11, 89 S.Ct., at 1249, n. 11. None of the behavior so mentioned in *Stanley* can properly be viewed as "[v]ictimless," *ante,* at 2846: drugs and weapons are inherently dangerous, see, *e.g., McLaughlin v. United States,* 476 U.S. 16, 106 S.Ct. 1677, 90 L.Ed.2d 15 (1986), and for property to be "stolen," someone must have been wrongfully deprived of it. Nothing in the record before the Court provides any justification for finding the activity forbidden by § 16–6–2 to be physically dangerous, either to the persons engaged in it or to others.[4]

***210** ****2854** The core of petitioner's defense of § 16–6–2, however, is that respondent and others who engage in the conduct prohibited by § 16–6–2 interfere with Georgia's exercise of the " 'right of the Nation and of the States to maintain a decent society,' " *Paris Adult Theatre I v. Slaton,* 413 U.S., at 59–60, 93 S.Ct., at 2636, quoting *Jacobellis v. Ohio,* 378 U.S. 184, 199, 84 S.Ct. 1676, 1684, 12 L.Ed.2d 793 (1964) (Warren, C.J., dissenting). Essentially, petitioner argues, and the Court agrees, that the fact that the acts described in § 16–6–2 "for hundreds of years, if not thousands, have been uniformly condemned as immoral" is a sufficient reason to permit a State to ban them today. Brief for Petitioner 19; see *ante,* at 2843,2844–2846,2847.

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny. See, *e.g., Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).[5] As Justice Jackson wrote so eloquently ***211** for the Court in *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 641–642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943), "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.... [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." See also Karst, 89 Yale L.J., at 627. It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved, Brief for Petitioner 20, cannot provide an adequate justification for § 16–6–2. ****2855** That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity

to religious doctrine. See, *e.g.*, *McGowan v. Maryland,* 366 U.S. 420, 429–453, 81 S.Ct. 1101, 1106–1119, 6 L.Ed.2d 393 (1961); *Stone v. Graham,* 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980). Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that § 16–6–2 represents a legitimate use of secular coercive power.[6] A State can no more punish private behavior because ***212** of religious intolerance than it can punish such behavior because of racial animus. "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." *Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984). No matter how uncomfortable a certain group may make the majority of this Court, we have held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *O'Connor v. Donaldson,* 422 U.S. 563, 575, 95 S.Ct. 2486, 2494, 45 L.Ed.2d 396 (1975). See also *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 2825, 37 L.Ed.2d 782 (1973).

Nor can § 16–6–2 be justified as a "morally neutral" exercise of Georgia's power to "protect the public environment," *Paris Adult Theatre I,* 413 U.S., at 68–69, 93 S.Ct., at 2641. Certainly, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." H.L.A. Hart, Immorality and Treason, reprinted in The Law as Literature 220, 225 (L. Blom-Cooper ed. 1961). Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning ***213** public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. See *Paris Adult Theatre I,* 413 U.S., at 66, n. 13, 93 S.Ct., at 2640, n. 13 ("marital intercourse on a street corner or a theater stage" can be forbidden despite the constitutional protection identified in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)).[7]

****2856** This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, cf. *Diamond v. Charles,* 476 U.S. 54, 65–66, 106 S.Ct. 1697, 1705, 90 L.Ed.2d 48 (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

IV

It took but three years for the Court to see the error in its analysis in ***214** *Minersville School District v. Gobitis,* 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940), and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. See *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

Like the statute that is challenged in this case,[1] the rationale of the Court's opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes.[2] Sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law.[3] ***215** That condemnation was equally damning for heterosexual and homosexual sodomy.[4] Moreover, it ****2857** provided no special exemption for married couples.[5] The license to cohabit and to produce legitimate offspring simply did not include any permission to engage in sexual conduct that was considered a "crime against nature."

The history of the Georgia statute before us clearly reveals this traditional prohibition of heterosexual, as well as homosexual, sodomy.[6] Indeed, at one point in the 20th century, Georgia's law was construed to permit certain sexual conduct between homosexual women even though such conduct was prohibited between heterosexuals.[7] The history of the statutes cited by the majority as proof for the proposition that sodomy is not constitutionally protected, *ante,* at 2844–2845, ***216** and nn. 5 and 6, similarly reveals a prohibition on heterosexual, as well as homosexual, sodomy.[8]

Because the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it, I believe that a proper analysis of its constitutionality requires consideration of two questions: First, may a State totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? If not, may the State save the statute by announcing that it will only enforce the law against homosexuals? The two questions merit separate discussion.

I

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 attack.[9] 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. *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Moreover, this protection extends to intimate choices by unmarried as well as married persons. *Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

***217** In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern. As I wrote some years ago:

> "These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. ****2858** They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases." *Fitzgerald v. Porter Memorial Hospital,* 523 F.2d 716, 719–720 (CA7 1975) (footnotes omitted), cert. denied, 425 U.S. 916, 96 S.Ct. 1518, 47 L.Ed.2d 768 (1976).

Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It also may prevent an individual from interfering with, or violating,

a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and disadvantages of different forms of intimate expression. But when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them —not the ***218** State—to decide. [10] The essential "liberty" that animated the development of the law in cases like *Griswold, Eisenstadt,* and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.

Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within "the sacred precincts of marital bedrooms," *Griswold,* 381 U.S., at 485, 85 S.Ct., at 1682, or, indeed, between unmarried heterosexual adults. *Eisenstadt,* 405 U.S., at 453, 92 S.Ct., at 1038. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by § 16–6–2 of the Georgia Criminal Code.

II

If the Georgia statute cannot be enforced as it is written—if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia's citizens—the State must assume the burden of justifying a selective application of its law. Either the persons to whom Georgia seeks to apply its statute do not have the same interest in "liberty" that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.

The first possibility is plainly unacceptable. Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary ***219** associations with his companions. State intrusion into the private conduct of either is equally burdensome.

The second possibility is similarly unacceptable. A policy of selective application must be supported by a neutral and legitimate ****2859** interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case. The Court has posited as a justification for the Georgia statute "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." *Ante,* at 2846. But the Georgia electorate has expressed no such belief—instead, its representatives enacted a law that presumably reflects the belief that *all sodomy* is immoral and unacceptable. Unless the Court is prepared to conclude that such a law is constitutional, it may not rely on the work product of the Georgia Legislature to support its holding. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.

Nor, indeed, does the Georgia prosecutor even believe that all homosexuals who violate this statute should be punished. This conclusion is evident from the fact that the respondent in this very case has formally acknowledged in his complaint and in court that he has engaged, and intends to continue to engage, in the prohibited conduct, yet the State has elected not to process criminal charges against him. As Justice POWELL points out, moreover, Georgia's prohibition on private, consensual sodomy has not been enforced for decades. [11] The record of nonenforcement, in this case and in the last several decades, belies the Attorney General's representations ***220** about the importance of the State's selective application of its generally applicable law. [12]

Both the Georgia statute and the Georgia prosecutor thus completely fail to provide the Court with any support for the conclusion that homosexual sodomy, *simpliciter,* is considered unacceptable conduct in that State, and that the burden of justifying a selective application of the generally applicable law has been met.

III

The Court orders the dismissal of respondent's complaint even though the State's statute prohibits all sodomy; even though that prohibition is concededly unconstitutional with respect to heterosexuals; and even though the State's *post hoc*

explanations for selective application are belied by the State's own actions. At the very least, I think it clear at this early stage of the litigation that respondent has alleged a constitutional claim sufficient to withstand a motion to dismiss. [13]

I respectfully dissent.

**All Citations**

478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140, 54 USLW 4919

## Footnotes

* 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.

1 Georgia Code Ann. § 16–6–2 (1984) provides, in pertinent part, as follows:

"(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another....

"(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years...."

2 John and Mary Doe were also plaintiffs in the action. They alleged that they wished to engage in sexual activity proscribed by § 16–6–2 in the privacy of their home, App. 3, and that they had been "chilled and deterred" from engaging in such activity by both the existence of the statute and Hardwick's arrest. *Id.,* at 5. The District Court held, however, that because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action. *Id.,* at 18. The Court of Appeals affirmed the District Court's judgment dismissing the Does' claim for lack of standing, 760 F.2d 1202, 1206–1207 (CA11 1985), and the Does do not challenge that holding in this Court.

The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.

3 See *Baker v. Wade,* 769 F.2d 289, reh'g denied, 774 F.2d 1285 (CA5 1985) (en banc); *Dronenburg v. Zech,* 239 U.S.App.D.C. 229, 741 F.2d 1388, reh'g denied, 241 U.S.App.D.C. 262, 746 F.2d 1579 (1984).

4 Petitioner also submits that the Court of Appeals erred in holding that the District Court was not obligated to follow our summary affirmance in *Doe.* We need not resolve this dispute, for we prefer to give plenary consideration to the merits of this case rather than rely on our earlier action in *Doe.* See *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 14, 96 S.Ct. 2882, 2891, 49 L.Ed.2d 752 (1976); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 309, n. 1, 96 S.Ct. 2562, 2565, n. 1, 49 L.Ed.2d 520 (1976);

*Edelman v. Jordan,* 415 U.S. 651, 671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 662 (1974). Cf. *Hicks v. Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

5 Criminal sodomy laws in effect in 1791:

Connecticut: 1 Public Statute Laws of the State of Connecticut, 1808, Title LXVI, ch. 1, § 2 (rev. 1672).

Delaware: 1 Laws of the State of Delaware, 1797, ch. 22, § 5 (passed 1719).

Georgia had no criminal sodomy statute until 1816, but sodomy was a crime at common law, and the General Assembly adopted the common law of England as the law of Georgia in 1784. The First Laws of the State of Georgia, pt. 1, p. 290 (1981).

Maryland had no criminal sodomy statute in 1791. Maryland's Declaration of Rights, passed in 1776, however, stated that "the inhabitants of Maryland are entitled to the common law of England," and sodomy was a crime at common law. 4 W. Swindler, Sources and Documents of United States Constitutions 372 (1975).

Massachusetts: Acts and Laws passed by the General Court of Massachusetts, ch. 14, Act of Mar. 3, 1785.

New Hampshire passed its first sodomy statute in 1718. Acts and Laws of New Hampshire 1680–1726, p. 141 (1978).

Sodomy was a crime at common law in New Jersey at the time of the ratification of the Bill of Rights. The State enacted its first criminal sodomy law five years later. Acts of the Twentieth General Assembly, Mar. 18, 1796, ch. DC, § 7.

New York: Laws of New York, ch. 21 (passed 1787).

At the time of ratification of the Bill of Rights, North Carolina had adopted the English statute of Henry VIII outlawing sodomy. See Collection of the Statutes of the Parliament of England in Force in the State of North Carolina, ch. 17, p. 314 (Martin ed. 1792).

Pennsylvania: Laws of the Fourteenth General Assembly of the Commonwealth of Pennsylvania, ch. CLIV, § 2 (passed 1790).

Rhode Island passed its first sodomy law in 1662. The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647–1719, p. 142 (1977).

South Carolina: Public Laws of the State of South Carolina, p. 49 (1790).

At the time of the ratification of the Bill of Rights, Virginia had no specific statute outlawing sodomy, but had adopted the English common law. 9 Hening's Laws of Virginia, ch. 5, § 6, p. 127 (1821) (passed 1776).

6 Criminal sodomy statutes in effect in 1868:

Alabama: Ala.Rev.Code § 3604 (1867).

Arizona (Terr.): Howell Code, ch. 10, § 48 (1865).

Arkansas: Ark.Stat., ch. 51, Art. IV, § 5 (1858).

California: 1 Cal.Gen.Laws, ¶ 1450, § 48 (1865).

Colorado (Terr.): Colo.Rev.Stat., ch. 22, §§ 45, 46 (1868).

Connecticut: Conn.Gen.Stat., Tit. 122, ch. 7, § 124 (1866).

Delaware: Del.Rev.Stat., ch. 131, § 7 (1893).

Florida: Fla.Rev.Stat., div. 5, § 2614 (passed 1868) (1892).

Georgia: Ga.Code §§ 4286, 4287, 4290 (1867).

Kingdom of Hawaii: Haw.Penal Code, ch. 13, § 11 (1869).

Illinois: Ill.Rev.Stat., div. 5, §§ 49, 50 (1845).

Kansas Terr.: Kan.Stat., ch. 53, § 7 (1855).

Kentucky: 1 Ky.Rev.Stat., ch. 28, Art. IV, § 11 (1860).

Louisiana: La.Rev.Stat., Crimes and Offences, § 5 (1856).

Maine: Me.Rev.Stat., Tit. XII, ch. 160, § 4 (1840).

Maryland:  1 Md.Code, Art. 30, § 201 (1860).

Massachusetts: Mass.Gen.Stat., ch. 165, § 18 (1860).

Michigan: Mich.Rev.Stat., Tit. 30, ch. 158, § 16 (1846).

Minnesota: Minn.Stat., ch. 96, § 13 (1859).

Mississippi: Miss.Rev.Code, ch. 64, § LII, Art. 238 (1857).

Missouri: 1 Mo.Rev.Stat., ch. 50, Art. VIII, § 7 (1856).

Montana (Terr.): Mont.Acts, Resolutions, Memorials, Criminal Practice Acts, ch. IV, § 44 (1866).

Nebraska (Terr.): Neb.Rev.Stat., Crim.Code, ch. 4, § 47 (1866).

Nevada (Terr.): Nev.Comp.Laws, 1861–1900, Crimes and Punishments, § 45.

New Hampshire: N.H.Laws, Act of June 19, 1812, § 5 (1815).

New Jersey: N.J.Rev.Stat., Tit. 8, ch. 1, § 9 (1847).

New York: 3 N.Y.Rev.Stat., pt. 4, ch. 1, Tit. 5, § 20 (5th ed. 1859).

North Carolina: N.C.Rev.Code, ch. 34, § 6 (1854).

Oregon: Laws of Ore., Crimes—Against Morality, etc., ch. 7, § 655 (1874).

Pennsylvania: Act of Mar. 31, 1860, § 32, Pub.L. 392, in 1 Digest of Statute Law of Pa. 1700–1903, p. 1011 (Purdon 1905).

Rhode Island: R.I.Gen.Stat., ch. 232, § 12 (1872).

South Carolina: Act of 1712, in 2 Stat. at Large of S.C. 1682–1716, p. 493 (1837).

Tennessee: Tenn.Code, ch. 8, Art. 1, § 4843 (1858).

Texas: Tex.Rev.Stat., Tit. 10, ch. 5, Art. 342 (1887) (passed 1860).

Vermont: Acts and Laws of the State of Vt. (1779).

Virginia: Va.Code, ch. 149, § 12 (1868).

West Virginia: W.Va.Code, ch. 149, § 12 (1860)W.Va.Code, ch. 149, § 12 (1860).

Wisconsin (Terr.): Wis.Stat. § 14, p. 367 (1839).

7 In 1961, Illinois adopted the American Law Institute's Model Penal Code, which decriminalized adult, consensual, private, sexual conduct. Criminal Code of 1961, §§ 11–2, 11–3, 1961 Ill. Laws, pp. 1985, 2006 (codified as amended at Ill.Rev.Stat., ch. 38, ¶¶ 11–2, 11–3 (1983) (repealed 1984)). See American Law Institute, Model Penal Code § 213.2 (Proposed Official Draft 1962).

8 Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.

1 Among those States that continue to make sodomy a crime, Georgia authorizes one of the longest possible sentences. See Ala.Code § 13A–6–65(a)(3) (1982) (1-year maximum); Ariz.Rev.Stat.Ann. §§ 13–1411, 13–1412 (West Supp.1985) (30 days); Ark.Stat.Ann. § 41–1813 (1977) (1-year maximum); D.C.Code § 22–3502 (1981) (10-year maximum); Fla.Stat. § 800.02 (1985) (60-day maximum); Ga.Code Ann. § 16–6–2 (1984) (1 to 20 years); Idaho Code § 18–6605 (1979) (5-year minimum); Kan.Stat.Ann. § 21–3505 (Supp.1985) (6-month maximum); Ky.Rev.Stat. § 510.100 (1985) (90 days to 12 months); La.Rev.Stat.Ann. § 14:89 (West 1986) (5-year maximum); Md.Ann.Code, Art. 27, §§ 553–554 (1982) (10-year maximum); Mich.Comp.Laws § 750.158 (1968) (15-year maximum), 750.338a–750.338b (1968) (5-year maximum); Minn.Stat. § 609.293 (1984) (1-year maximum); Miss.Code Ann. § 97–29–59 (1973) (10-year maximum); Mo.Rev.Stat. § 566.090 (Supp.1984) (1-year maximum); Mont.Code Ann. § 45–5–505 (1985) (10-year maximum); Nev.Rev.Stat. § 201.190 (1985) (6-year maximum); N.C.Gen.Stat. § 14–177 (1981) (10-year maximum); Okla.Stat., Tit. 21, § 886 (1981) (10-year maximum); R.I.Gen.Laws § 11–10–1 (1981) (7 to 20 years); S.C.Code § 16–15–120 (1985) (5-year maximum); Tenn.Code Ann. § 39–2–612 (1982) (5 to 15 years); Tex.Penal Code Ann. § 21.06 (1974) ($200 maximum fine); Utah Code Ann. § 76–5–403 (1978) (6-month maximum); Va.Code § 18.2–361 (1982) (5-year maximum).

2 It was conceded at oral argument that, prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several

decades. See *Thompson v. Aldredge,* 187 Ga. 467, 200 S.E. 799 (1939). Moreover, the State has declined to present the criminal charge against Hardwick to a grand jury, and this is a suit for declaratory judgment brought by respondents challenging the validity of the statute. The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct. Some 26 States have repealed similar statutes. But the constitutional validity of the Georgia statute was put in issue by respondents, and for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right.

1 Until 1968, Georgia defined sodomy as "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga.Crim.Code § 26–5901 (1933). In *Thompson v. Aldredge,* 187 Ga. 467, 200 S.E. 799 (1939), the Georgia Supreme Court held that § 26–5901 did not prohibit lesbian activity. And in *Riley v. Garrett,* 219 Ga. 345, 133 S.E.2d 367 (1963), the Georgia Supreme Court held that § 26–5901 did not prohibit heterosexual cunnilingus. Georgia passed the act-specific statute currently in force "perhaps in response to the restrictive court decisions such as *Riley,*" Note, The Crimes Against Nature, 16 J.Pub.L. 159, 167, n. 47 (1967).

2 In *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), the Court held that the Eighth Amendment barred convicting a defendant due to his "status" as a narcotics addict, since that condition was "apparently an illness which may be contracted innocently or involuntarily." *Id.,* at 667, 82 S.Ct., at 1420. In *Powell v. Texas,* 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), where the Court refused to extend *Robinson* to punishment of public drunkenness by a chronic alcoholic, one of the factors relied on by Justice MARSHALL, in writing the plurality opinion, was that Texas had not "attempted to regulate appellant's behavior in the privacy of his own home." *Id.,* at 532, 88 S.Ct., at 2154. Justice WHITE wrote separately:

"Analysis of this difficult case is not advanced by preoccupation with the label 'condition.' In *Robinson* the Court dealt with 'a statute which makes the "status" of narcotic addiction a criminal offense....' 370 U.S., at 666 [82 S.Ct., at 1420]. By precluding criminal conviction for such a 'status' the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values.... If it were necessary to distinguish between 'acts' and 'conditions' for purposes of the Eighth Amendment, I would adhere to the concept of 'condition' implicit in the opinion in *Robinson*.... The proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts are sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.' " *Id.,* 392 U.S., at 550–551, n. 2, 88 S.Ct., at 2163, n. 2.

Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a "disease" or disorder. See Brief for American Psychological Association and American Public Health Association as *Amici Curiae* 8–11. But, obviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality. Consequently, under Justice WHITE's analysis in *Powell,* the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on that attraction regardless of the circumstances. An individual's ability to make constitutionally protected "decisions concerning sexual relations," *Carey v. Population Services International,* 431 U.S. 678, 711, 97 S.Ct. 2010, 2029, 52 L.Ed.2d 675 (1977) (POWELL, J., concurring in

part and concurring in judgment), is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy.

With respect to the Equal Protection Clause's applicability to § 16–6–2, I note that Georgia's exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement, questions that cannot be disposed of before this Court on a motion to dismiss. See *Yick Wo v. Hopkins,* 118 U.S. 356, 373–374, 6 S.Ct. 1064, 1072–1073, 30 L.Ed. 220 (1886). The legislature having decided that the sex of the participants is irrelevant to the legality of the acts, I do not see why the State can defend § 16–6–2 on the ground that individuals singled out for prosecution are of the same sex as their partners. Thus, under the circumstances of this case, a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class. See, *e.g., Rowland v. Mad River Local School District,* 470 U.S. 1009, 105 S.Ct. 1373, 84 L.Ed.2d 392 (1985) (BRENNAN, J., dissenting from denial of certiorari); Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv.L.Rev. 1285 (1985).

3 Even if a court faced with a challenge to § 16–6–2 were to apply simple rational-basis scrutiny to the statute, Georgia would be required to show an actual connection between the forbidden acts and the ill effects it seeks to prevent. The connection between the acts prohibited by § 16–6–2 and the harms identified by petitioner in his brief before this Court is a subject of hot dispute, hardly amenable to dismissal under Federal Rule of Civil Procedure 12(b)(6). Compare, *e.g.,* Brief for Petitioner 36–37 and Brief for David Robinson, Jr., as *Amicus Curiae* 23–28, on the one hand, with *People v. Onofre,* 51 N.Y.2d 476, 489, 434 N.Y.S.2d 947, 951–952, 415 N.E.2d 936, 941 (1980); Brief for the Attorney General of the State of New York, joined by the Attorney General of the State of California, as *Amici Curiae* 11–14; and Brief for the American Psychological Association and American Public Health Association as *Amici Curiae* 19–27, on the other.

4 Although I do not think it necessary to decide today issues that are not even remotely before us, it does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific “sexual crimes” to which the majority points, *ante,* at 2846), on the other. For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the contracting parties to a variety of governmentally provided benefits. A State might define the contractual commitment necessary to become eligible for these benefits to include a commitment of fidelity and then punish individuals for breaching that contract. Moreover, a State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs. With respect to incest, a court might well agree with respondent that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity is warranted. See Tr. of Oral Arg. 21–22. Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or, indeed, with oral or anal sex within marriage.

5 The parallel between *Loving* and this case is almost uncanny. There, too, the State relied on a religious justification for its law. Compare 388 U.S., at 3, 87 S.Ct., at 1819 (quoting trial court's statement that “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents.... The fact that he separated the races shows that he did not intend for the races to mix”), with Brief

for Petitioner 20–21 (relying on the Old and New Testaments and the writings of St. Thomas Aquinas to show that "traditional Judeo-Christian values proscribe such conduct"). There, too, defenders of the challenged statute relied heavily on the fact that when the Fourteenth Amendment was ratified, most of the States had similar prohibitions. Compare Brief for Appellee in *Loving v. Virginia,* O.T. 1966, No. 395, pp. 28–29, with *ante,* at 2844–2845, and n. 6. There, too, at the time the case came before the Court, many of the States still had criminal statutes concerning the conduct at issue. Compare 388 U.S., at 6, n. 5, 87 S.Ct., at 1820, n. 5 (noting that 16 States still outlawed interracial marriage), with *ante,* at 2844–2845 (noting that 24 States and the District of Columbia have sodomy statutes). Yet the Court held, not only that the invidious racism of Virginia's law violated the Equal Protection Clause, see 388 U.S., at 7–12, 87 S.Ct., at 1821–1823, but also that the law deprived the Lovings of due process by denying them the "freedom of choice to marry" that had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.,* at 12, 87 S.Ct., at 1824.

6 The theological nature of the origin of Anglo-American antisodomy statutes is patent. It was not until 1533 that sodomy was made a secular offense in England. 25 Hen. VIII, ch. 6. Until that time, the offense was, in Sir James Stephen's words, "merely ecclesiastical." 2 J. Stephen, A History of the Criminal Law of England 429–430 (1883). Pollock and Maitland similarly observed that "[t]he crime against nature... was so closely connected with heresy that the vulgar had but one name for both." 2 F. Pollock & F. Maitland, The History of English Law 554 (1895). The transfer of jurisdiction over prosecutions for sodomy to the secular courts seems primarily due to the alteration of ecclesiastical jurisdiction attendant on England's break with the Roman Catholic Church, rather than to any new understanding of the sovereign's interest in preventing or punishing the behavior involved. Cf. 6 E. Coke, Institutes, ch. 10 (4th ed. 1797).

7 At oral argument a suggestion appeared that, while the Fourth Amendment's special protection of the home might prevent the State from enforcing § 16–6–2 against individuals who engage in consensual sexual activity there, that protection would not make the statute invalid. See Tr. of Oral Arg. 10–11. The suggestion misses the point entirely. If the law is not invalid, then the police *can* invade the home to enforce it, provided, of course, that they obtain a determination of probable cause from a neutral magistrate. One of the reasons for the Court's holding in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), was precisely the possibility, and repugnancy, of permitting searches to obtain evidence regarding the use of contraceptives. *Id.,* at 485–486, 85 S.Ct., at 1682. Permitting the kinds of searches that might be necessary to obtain evidence of the sexual activity banned by § 16–6–2 seems no less intrusive, or repugnant. Cf. *Winston v. Lee,* 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985); *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1274 (CA7 1983).

1 See Ga.Code Ann. § 16–6–2(a) (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another").

2 The Court states that 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 for a very long time." *Ante,* at 2843. In reality, however, it is the indiscriminate prohibition of sodomy, heterosexual as well as homosexual, that has been present "for a very

long time." See nn. 3, 4, and 5, *infra.* Moreover, the reasoning the Court employs would provide the same support for the statute as it is written as it does for the statute as it is narrowly construed by the Court.

3 See, *e.g.,* 1 W. Hawkins, Pleas of the Crown 9 (6th ed. 1787) ("All unnatural carnal copulations, whether with man or beast, seem to come under the notion of sodomy, which was felony by the antient common law, and punished, according to some authors, with burning; according to others, ... with burying alive"); 4 W. Blackstone, Commentaries * 215 (discussing "the infamous *crime against nature,* committed either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished").

4 See 1 E. East, Pleas of the Crown 480 (1803) ("This offence, concerning which the least notice is the best, consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast"); J. Hawley & M. McGregor, The Criminal Law 287 (3d ed. 1899) ("Sodomy is the carnal knowledge against the order of nature by two persons with each other, or of a human being with a beast.... The offense may be committed between a man and a woman, or between two male persons, or between a man or a woman and a beast").

5 See J. May, The Law of Crimes § 203 (2d ed. 1893) ("Sodomy, otherwise called buggery, bestiality, and the crime against nature, is the unnatural copulation of two persons with each other, or of a human being with a beast.... It may be committed by a man with a man, by a man with a beast, or by a woman with a beast, or by a man with a woman—his wife, in which case, if she consent, she is an accomplice").

6 The predecessor of the current Georgia statute provided: "Sodomy is the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga.Code, Tit. 1, Pt. 4, § 4251 (1861). This prohibition of heterosexual sodomy was not purely hortatory. See, *e.g.,* *Comer v. State,* 21 Ga.App. 306, 94 S.E. 314 (1917) (affirming prosecution for consensual heterosexual sodomy).

7 See *Thompson v. Aldredge,* 187 Ga. 467, 200 S.E. 799 (1939).

8 A review of the statutes cited by the majority discloses that, in 1791, in 1868, and today, the vast majority of sodomy statutes do not differentiate between homosexual and heterosexual sodomy.

9 See *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Interestingly, miscegenation was once treated as a crime similar to sodomy. See Hawley & McGregor, The Criminal Law, at 287 (discussing crime of sodomy); *id.,* at 288 (discussing crime of miscegenation).

10 Indeed, the Georgia Attorney General concedes that Georgia's statute would be unconstitutional if applied to a married couple. See Tr. of Oral Arg. 8 (stating that application of the statute to a married couple "would be unconstitutional" because of the "right of marital privacy as identified by the Court in Griswold"). Significantly, Georgia passed the current statute three years after the Court's decision in *Griswold.*

11 *Ante,* at 2848, n. 2 (POWELL, J., concurring). See also Tr. of Oral Arg. at 4–5 (argument of Georgia Attorney General) (noting, in response to question about prosecution "where the activity took place in a private residence," the "last case I can recall was back in the 1930's or 40's").

12 It is, of course, possible to argue that a statute has a purely symbolic role. Cf. *Carey v. Population Services International,* 431 U.S. 678, 715, n. 3, 97 S.Ct. 2010, 2031, n. 3, 52 L.Ed.2d 675 (1977) (STEVENS, J., concurring in part and concurring in judgment) ("The fact that the State admittedly has never brought a

prosecution under the statute ... is consistent with appellants' position that the purpose of the statute is merely symbolic"). Since the Georgia Attorney General does not even defend the statute as written, however, see n. 10, *supra,* the State cannot possibly rest on the notion that the statute may be defended for its symbolic message.

13 Indeed, at this stage, it appears that the statute indiscriminately authorizes a policy of selective prosecution that is neither limited to the class of homosexual persons nor embraces all persons in that class, but rather applies to those who may be arbitrarily selected by the prosecutor for reasons that are not revealed either in the record of this case or in the text of the statute. If that is true, although the text of the statute is clear enough, its true meaning may be "so intolerably vague that evenhanded enforcement of the law is a virtual impossibility." *Marks v. United States,* 430 U.S. 188, 198, 97 S.Ct. 990, 996, 51 L.Ed.2d 260 (1977) (STEVENS, J., concurring in part and dissenting in part).

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## Document (1)

1. *Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682*
   **Client/Matter:** -None-
   **Search Terms:** burwell v. hobby lobby
   **Search Type:** Natural Language
   **Narrowed by:**

| Content Type | Narrowed by |
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| Cases | -None- |

# ***Burwell v. Hobby Lobby Stores, Inc.***

Supreme Court of the United States

March 25, 2014, Argued [*]; June 30, 2014, Decided

No. 13-354; 13-356

[*] Together with No. 13-356, *Conestoga Wood Specialties Corp. et al.* v. *Burwell, Secretary of Health and Human Services, et al.*, on certiorari to the United States Court of Appeals for the Third Circuit.

**Reporter**
573 U.S. 682 *; 134 S. Ct. 2751 **; 189 L. Ed. 2d 675 ***; 2014 U.S. LEXIS 4505 ****; 82 U.S.L.W. 4636; 123 Fair Empl. Prac. Cas. (BNA) 621; 2014-2 U.S. Tax Cas. (CCH) P50,341; 24 Fla. L. Weekly Fed. S 965; 2014 WL 2921709

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, et al., Petitioners (No. 13-354) v. HOBBY LOBBY STORES, INC., et al. CONESTOGA WOOD SPECIALTIES CORPORATION et al., Petitioners (No. 13-356) v. SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.

**Notice:** The LEXIS pagination of this document is subject to change pending release of the final published version.

**Prior History:** **[****1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

*Conestoga Wood Specialties Corp. v. Sec'y of the United States HHS, 724 F.3d 377, 2013 U.S. App. LEXIS 15238 (3d Cir. Pa., 2013)*
*Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 2013 U.S. App. LEXIS 13316 (2013)*

**Disposition:** *No. 13-354, 723 F. 3d 1114*, affirmed; *No. 13-356, 724 F. 3d 377*, reversed and remanded.

## Case Summary

### Procedural Posture

Plaintiff owners of closely held corporations with sincere religious beliefs about contraception sued arguing that regulations requiring them to provide health insurance coverage for certain contraception violated the Religious Freedom Restoration Act of 1993 (RFRA), *42 U.S.C.S. § 2000bb et seq.* The U.S. Court of Appeals for the Third and Tenth Circuits rendered opposite rulings regarding these claims. The U.S. Supreme Court granted certiorari.

### Overview

The issue was whether the RFRA permitted the U.S. Department of Health and Human Services (HHS) to require that these corporations provide health insurance coverage for contraception that violated the sincerely held religious beliefs of the companies' owners. The U.S. Supreme Court held that the regulations violated the RFRA, which prohibited the federal government from taking any action that substantially burdened the exercise of religion unless it constituted the least restrictive means of serving a compelling government interest. The Court rejected HHS's argument that the owners of the companies forfeited all RFRA protection when they organized their businesses as corporations. The Court concluded that the challenged HHS regulations substantially burdened the exercise of religion because compliance was contrary to the owners' religious objections to abortion and there was a heavy financial penalty for noncompliance. Assuming that the regulations served a compelling government interest, the Court found that they were not the least restrictive means of serving that interest because there were other ways to ensure that every woman had cost-free access to certain contraceptives.

### Outcome

Decisions affirmed in part and reversed and remanded in part. 5-4 Decision; 1 Concurrence; 2 Dissents.

## Syllabus

**[*682]** 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 (ACA), which, as relevant here, requires **[***682]** 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)*. **[****2]** 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 religious 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 **[*683]** 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 **[****3]** 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 **[****4]** 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. 705-736, 189 L. Ed. 2d, at 694-714*.

(a) RFRA applies to regulations that govern the activities of closely held for-profit corporations like Conestoga, Hobby Lobby, and Mardel. *Pp. 705-719, 189 L. Ed. 2d, at 694-703*.

(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 **[***683]** 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 **[****5]** the free-exercise rights of closely held corporations **[*684]** thus protects the religious liberty of the humans who own and control them. *Pp. 705-707, 189 L. Ed. 2d, at 694-696*.

(2) HHS and the dissent make several unpersuasive arguments. *Pp. 707-717, 189 L. Ed. 2d, at 696-703*.

(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 Espirita 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. 707-709, 189 L. Ed. 2d, at 696-697*.

(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 **[****6]** 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. 709-713, 189 L. Ed. 2d, at 697-700*.

(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 **[****7]** 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 **[***684]** 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. **[*685]** 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. 713-717, 189 L. Ed. 2d, at 700-702*.

(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 **[****8]** 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. 717-719, 189 L. Ed. 2d, at 702-703*.

(b) HHS's contraceptive mandate substantially burdens the exercise of religion. *Pp. 719-726, 189 L. Ed. 2d, at 703-707*.

(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. *P. 720, 189 L. Ed. 2d, at 703*.

(2) *Amici* supporting HHS argue that the $2,000 per-employee penalty is less than the average **[****9]** 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. 720-723, 189 L. Ed. 2d, at 704-705*.

(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 **[***685]** choose the coverage and **[*686]** 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 **[****10]** 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, 67 L. Ed. 2d 624*, 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. 723-726, 189 L. Ed. 2d, at 705-707*.

(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. 726-736, 189 L. Ed. 2d, at 707-714*.

(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. 726-728, 189 L. Ed. 2d, at 708-709*.

(2) The Government **[****11]** 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. 728-732, 189 L. Ed. 2d, at 709-711*.

(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 **[****12]** of Social Security taxes despite an employer's religious objection, is not **[*687]** 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 **[***686]** to pay taxes. Here, there is an alternative to the contraceptive mandate. *Pp. 732-736, 189 L. Ed. 2d, at 711-714*.

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

**Counsel: Paul D. Clement** argued the cause for private parties.

**Donald B. Verrilli, Jr.** argued the cause for the federal government.

**Judges:** 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, *post*, p. ___. 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, *post*, p. ___. Breyer and Kagan, JJ., filed a dissenting opinion, *post*, p. ___.

**Opinion by:** ALITO

## Opinion

**[*688]** **[**2759]** Justice **Alito** delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA or Act), 107 Stat. 1488, **[*689]** *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 **[****13]** of contraception that violate the sincerely **[*690]** 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 **[*691]** 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 **[****14]** 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 **[*692]** 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 Food and Drug Administration (FDA)-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious **[***687]** 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 **[****15]** 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 **[**2760]** 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 **[****16]** with their sincerely held religious beliefs." **[*693]** *Post, at 739-740, 189 L. Ed. 2d, at 716* (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 740, 189 L. Ed. 2d, at 716*. 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." *Ibid.* [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)*, **[****17]** 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,

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[1] See also *post, at 745-746, 189 L. Ed. 2d, at 720* ("The exemption sought by Hobby Lobby and Conestoga . . . would deny [their employees] access to contraceptive coverage that the ACA would otherwise secure")

**[***688]** 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., **[*694]** at 408-409, 83 S. Ct. 1790, 10 L. Ed. 2d 965*. 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, 32 L. Ed. 2d 15*.

In *Smith*, however, the Court rejected "the balancing test set forth in *Sherbert*." *494 U.S., at 883, 110 S. Ct. 1595, 108 L. Ed. 2d 876*. *Smith* concerned two members of the Native American Church who were fired for **[****18]** 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, 108 L. Ed. 2d 876*.

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 constitutionally **[**2761]** required religious exemptions from civic obligations of almost every conceivable kind." *494 U.S., at 888, 110 S. Ct. 1595, 108 L. Ed. 2d 876*. 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)*.

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)*. [1] In order to ensure broad protection for religious liberty, **[****19]** 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 **[*695]** 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 **[***689]** and the States, but the constitutional **[****20]** 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, 138 L. Ed. 2d 624*. 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 533-53, 117 S. Ct. 2157, 138 L. Ed. 2d 6244*. See also *id., at 532, 117 S. Ct. 2157, 138 L. Ed. 2d 624*.

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.* [3] 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 **[****21]** most relevant for present purposes, **[*696]** RLUIPA amended RFRA's definition of the "exercise of religion." See *§2000bb-2(4)* (importing RLUIPA definition). Before

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[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 535, 117 S. Ct. 2157, 138 L. Ed. 2d 624*. 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 (CA2 2006)*; *Guam v. Guerrero, 290 F. 3d 1210, 1220 (CA9 2002)*.

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 **[**2762]** 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 (ACA), *124 Stat. 119*. [4] 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 **[*697]** group-health-plan requirements, the employer may be required **[***690]** 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 **[****23]** year for each of its full-time employees. §§4980H(a), (c)(1).

[5] 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, [6] 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 approved contraceptive **[****24]** 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 **[**2763]** developing any further by inhibiting **[*698]** 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]

[7] HHS also authorized **[****25]** 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

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[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 748-749, n. 10, 189 L. Ed. 2d, at 721. That argument is plainly wrong. Under this rule of construction, the phrase "exercise of religion," as it appears in RLUIPA, must be interpreted **[****22]** 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.

[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.

churches," as well as "the exclusively religious activities of any religious order." See 45 CFR §147.131(a) (citing 26 U.S.C. §§6033(a)(3)(A)(i), (iii)). In its Guidelines, the HRSA exempted these organizations from the requirement to cover contraceptive services. See http://hrsa.gov/ womensguidelines.

In addition, [8] HHS has effectively exempted certain religious nonprofit organizations, described under HHS regulations as "eligible organizations," from the contraceptive mandate. **[***691]** 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 **[****26]** this provision, the issuer must then exclude contraceptive **[*699]** 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 **[**2764]** 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 ACA's requirements, including the contraceptive mandate. 42 U.S.C. §§18011(a), (e). And employers with fewer than 50 employees **[****28]** are not required to provide health insurance at all. 26 U.S.C. §4980H(c)(2).

**[*700]** All told, the contraceptive mandate "presently does not apply to tens of millions of people." *Hobby Lobby Stores, Inc. v. Sebelius, 723 F. 3d 1114, 1143 (CA10 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 and 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 **[***692]** 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 . . .

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[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 **[****27]** 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 U.S. 1171, 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 / **[****29]** documents / health _ reform_for_small_businesses.pdf.

shares humanity with those who conceived it." [12]

Fifty years ago, Norman Hahn started a woodworking 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 **[*701]** 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 Chief Executive Officer (CEO).

The Hahns believe that they are required to run their business "in accordance with their religious beliefs and moral principles." *Conestoga Wood Specialties Corp. v Sebelius, 917 F. Supp. 2d 394, 402 (ED Pa. 2013)*. To that end, the company's mission, as they see it, is to "operate in a professional environment founded upon the **[****30]** 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." **[**2765]** *Conestoga Wood Specialties Corp. v Secretary of HHS, 724 F. 3d 377, 382, and n. 5 (CA3 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 **[****31]** coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg. [13] These include two forms of **[***693]** emergency contraception **[*702]** 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 **[****32]** 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 **[*703]** three children serve as the president, vice president, and vice CEO. See Brief for Respondents in No. 13-354, p. 8. [15]

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

[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

**[**2766]** 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. *Ibid.*; 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).

**[***694]** Like the Hahns, the Greens believe that life begins at conception and that it would violate their **[****34]** 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 **[*704]** mandate under RFRA and the *Free Exercise Clause*. [16] The District Court denied a preliminary injunction, see *870 F. Supp. 2d 1278 (WD 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," *id., at 1146*, the court reversed and remanded for the District Court to consider the remaining factors of the preliminary-injunction test, *id., at 1147*. [17]

**[*705]** **[**2767]** We granted certiorari sub nom. *Sebelius v. Hobby Lobby Stores, Inc., 571 U.S. 1067, 134 S. Ct. 678, 187 L. Ed. 2d 544 (2013)*.

III

A

[9] 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 **[***695]** 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

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management trust, of which each member **[****33]** of the family serves as trustee. ***Hobby Lobby Stores, Inc. v. Sebelius, 723 F. 3d 1114, 1122 (CA10 2013)***. The family provided that the trust would also be governed according to their religious principles. *Ibid.*

[16] They also raised a claim under the Administrative Procedure **[****35]** Act, *5 U.S.C. §553*.

[17] Given its **[****36]** 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 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).

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 **[****37]** 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), **[*706]** 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 **[****38]** 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, [10] 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 **[**2768]** RFRA's text, to which we turn in the next part of this opinion, reveals that Congress did no such thing.

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 **[***696]** 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 **[*707]** 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 **[****40]** 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 "for-profit, secular 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.

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[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 749-750, 189 L. Ed. 2d, at 722*. For present purposes, it is unnecessary to adjudicate this dispute. Even if RFRA simply restored the **[****39]** 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 714-717, 189 L. Ed. 2d, at 700-702*.

As we noted above, [11] 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 **[****41]** the Dictionary Act, "the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as **[*708]** individuals." *Ibid.*; see FCC v. AT&T Inc., 562 U.S. 397, 404, 405, 131 S. Ct. 1177, 1183, 179 L. Ed. 2d 132, 139 (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 Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) (RFRA); **[**2769]** Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012) (Free Exercise); Church of 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 **[****42]** the meaning of **[***697]** 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. [12] 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. **[*709]** 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 752, 189 L. Ed. 2d, at 724 (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 **[****44]** 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]

If the corporate form is not enough, what about the

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[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 **[****43]** 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 Amosprovides 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 715-717, 189 L. Ed. 2d, at 700-701.

profit-making objective? In *Braunfeld, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563*, we entertained **[*710]** the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and **[***698]** the Court never even hinted that this objective precluded their **[**2770]** claims. As the Court explained in a later case, [13] 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, 108 L. Ed. 2d 876*. Business practices that are compelled or limited by the tenets of a religious **[****45]** 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, 6 L. Ed. 2d 563*; 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?

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 **[*711]** flies in the face of modern corporate law. [14] "Each American jurisdiction today either expressly or by implication **[****46] [***699]** authorizes corporations to be formed under its general corporation act **[**2771]** 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 C. Jones (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 **[*712]** 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

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[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 756, 189 L. Ed. 2d, at 726* (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.*, *Conestoga Wood Specialties Corp. v. Sec., HHS, 724 F. 3d 337, 385 (CA3 2013)* ("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 (CA7 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 (CA7 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 "for-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 756, 189 L. Ed. 2d, at 726* (internal quotation marks omitted). **[****48]** 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 756, 189 L. Ed. 2d, at 726*. 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 **[****49]** 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."

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 **[****47]** 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 **[****50]** half of the States, for instance, now recognize the "benefit corporation," **[*713]** 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 **[***700]** 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 **[**2772]** 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" **[****52]** 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.

**[*714]** First, [15] 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, **[****53]** 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

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[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, **[****51]** 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* (2013 Cum. Supp.), *33-3-101* (2006), *33-38-130* (2013 Cum. Supp.) (similar).

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 **[*715]** (1961), the Massachusetts Sunday closing law was challenged **[****54]** by a kosher market that was organized as a for-profit corporation, by customers of the market, and by a rabbi. The **[***701]** 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 **[**2773]** 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, 6 L. Ed. 2d 536*. 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, 6 L. Ed. 2d 536* (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, supra, at 521-522, 578-579, 81 S. Ct. 1101, 6 L. Ed. 2d 393*. **[****55]** 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 **[*716]** 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 **[****56]** 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

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[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").

[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 753, n. 15, 189 L. Ed. 2d, at 725*. The dissent takes this to mean that RFRA did not, in fact, "ope[n] **[****57]** 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." *Post, at 754, n. 15, 189 L. Ed. 2d, at 725*.

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

similar **[*717]** **[**2774]** laws show anything, **[***702]** 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 **[****58]** 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.

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 **[*718]** 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 **[***703]** that Congress limited RFRA's reach out of concern for the seemingly less difficult task of doing the same in corporate cases. And **[****60]** 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 **[**2775]** the conduct of business. 3 Treatise on 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 **[****61]** how a corporation can establish its governing structure. See, *e.g.*, *ibid.*; *id.*, §3:2; Del. Code Ann., Tit. 8, §351 **[*719]** (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 [17] a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA. [30]

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

[28] [16] To qualify for RFRA's protection, an asserted **[****59]** 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 (CA10 2010).

[29] See, *e.g.*, Ochs v. Thalacker, 90 F. 3d 293, 296 (CA8 1996); Green v. White, 525 F. Supp. 81, 83-84 (ED Mo. 1981); Abate v. Walton, 1996 U.S. App. LEXIS 624, 1996 WL 5320, *5 (CA9, Jan. 5, 1996); Winters v. State, 549 N.W.2d 819-820 (Iowa 1996).

[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

IV

Because RFRA applies in these cases, we **[****63]** 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.

**[*720]** A

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 **[***704]** 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 **[**2776]** 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 **[****64]** 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

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, **[*721]** 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. [18] 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)*; **[****65]** *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, 1961 C.B. 34, 1961-1 C.B. 34 (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

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insurance provider to deny coverage based on its asserted religious beliefs or moral convictions." *Post, at 744, 189 L. Ed. 2d, at 719*. 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 **[****62]** allow any employer to deny any health service to any American for virtually any reason—*not just for religious objections*." 158 Cong. Rec. 2626 (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.

[31] Indeed, one of HHS's stated reasons for establishing the religious accommodation was to "encourag[e] eligible

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.

**[***705]** 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 **[****66]** 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.

**[*722]** 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 **[**2777]** 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 **[****67]** 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]

**[*723]** 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 **[***706]** 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. **[****69]** Brief for HHS in 13-354, pp. 31-34; *post, at 760, 189 L. Ed. 2d, at 729*. 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.*

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organizations to *continue* to offer health coverage." *78 Fed. Reg. 39882* (emphasis added).

[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 **[****68]** 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

**[*724] [**2778]** 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 **[****71]** 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, 108 L. Ed. 2d 876* ([19] "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 United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 450, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969)*.

**[*725] [***707]** Moreover, in *Thomas v. Review Bd. of Ind. Employment Security Div., 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981)*, **[****72]** 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, 67 L. Ed. 2d 624*. 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, 67 L. Ed. 2d 624*. [35]

**[**2779]** 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, **[****73]** 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, 67 L. Ed. 2d 624*, 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 **[*726]** 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, 29 L. Ed. 2d 790* (plurality opinion); see *Allen, supra, at 249,*

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plans of certain religious employers, 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 **[****70]** 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*.

88 S. Ct. 1923, 20 L. Ed. 2d 1060 ("[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 **[****74]** 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 **[***708]** 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

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: [20] It "requires the Government to demonstrate that the compelling interest test is satisfied through application of the **[****75]** 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, 163 L. Ed. 2d 1017 (quoting §2000bb-1(b)). This requires us to "loo[k] beyond broadly formulated interests" and to "scrutiniz[e] the asserted harm of granting specific **[*727]** 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, 163 L. Ed. 2d 1017.

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 **[**2780]** 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 **[****76]** 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.*

**[*728]** We find it unnecessary to adjudicate this issue. We will assume **[****77]** that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within **[***709]** 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

[21] The least-restrictive-means standard is exceptionally demanding, see City of Boerne, 521 U.S., at 532, 117 S. Ct. 2157, 138 L. Ed. 2d 624, 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 **[****78]** 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 **[*729]** has HHS told us that it is unable to provide such **[**2781]** 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, **[****79]** 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.

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 No. 13-354, at 15. [37] But we see nothing in RFRA that supports **[*730]** this argument, and drawing the line between the "creation of an entirely new program" and the modification of an existing **[***710]** 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."). **[****80]** 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 **[**2782]** program in order **[****82]** 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

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[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 [22] 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 **[****81]** 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 733-734, 189 L. Ed. 2d, at 710-711, 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.

religious objections. See *supra, at 698-699, and nn. 8-9, 189 L. Ed. 2d, at 690-691*. **[*731]** 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]

**[***711]** 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 **[****84]** HHS's stated interests equally well. [40]

**[*732]** 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 765, 189 L. Ed. 2d, at 732* (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. **[**2783]** *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 **[****85]** benefit,'" *post, at 765, 189 L. Ed. 2d, at 732*, 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 **[*733]** in existence **[****86]** 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.

**[***712]** It is HHS's apparent belief that no insurance-coverage mandate would violate RFRA—no matter how

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[38] HHS has concluded that insurers **[****83]** 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 767, 189 L. Ed. 2d, at 733*. 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 767, n. 27, 189 L. Ed. 2d, at 733*, 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 United States as *Amicus Curiae* in *Holt* v. *Hobbs*, No. 13-6827, p. 10, now pending before the Court.

[42] Cf. *42 U.S.C. §1396s* (federal "[p]rogram for distribution of pediatric vaccines" for some uninsured and underinsured children).

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 **[****87]** 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 769-770, 189 L. Ed. 2d, at 734-735*. 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 **[*734]** 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 **[****88]** objection of an employer, but these **[**2784]** 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, 71 L. Ed. 2d 127*. 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, 163 L. Ed. 2d 1017*.

*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 **[****89]** restrictive alternative to the categorical requirement to pay taxes. Because **[***713]** 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 **[*735]** funds." *Post, at 760, 189 L. Ed. 2d, at 729*. 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. **[****90]** [43]

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[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, 71 L. Ed. 2d 127*. *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

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 **[****91]** applicable laws, and the dissent expresses a desire to keep the courts out of this business. See *post, at 769-772, 189 L. Ed. 2d, at 734-736*. 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, 108 L. Ed. 2d 876* (applying the *Sherbert* test to all free-exercise **[**2785]** 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 **[*736]** 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.

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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.

**[***714]** The judgment of the Tenth Circuit in No. 13-354 is affirmed; the judgment of the Third **[****92]** Circuit in No. 13-356 is reversed, and that case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

**Concur by:** KENNEDY

## Concur

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 694-695, 189 L. Ed. 2d, at 688-689*; *post, at 746-747, 189 L. Ed. 2d, at 720* (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, **[*737]** 60 S. Ct. 900, 84 L. Ed. 1213 (1940)*. It means, too, the right to express **[****93]** 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 695, 189 L. Ed. 2d, at 689* (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 **[****94]** the health of **[**2786]** female employees, coverage that is significantly more costly than for a male employee. *Ante, at 727, 189 L. Ed. 2d, at 708*; 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 47. It is

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obligations that substantially burden their exercise of religion. Rather, the Government can impose such a burden only if the strict RFRA test is met.

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 728, 189 L. Ed. 2d, at 708*.

**[***715]** 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 **[*738]** 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 699, and n. 9, 730-731, 189 L. Ed. 2d, at 690-691, 710-711*.

The means the Government chose is the imposition of a direct mandate on the employers in these **[****95]** cases. *Ante, at 698-699, 189 L. Ed. 2d, at 690*. 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 699, and n. 9, 730-731, 189 L. Ed. 2d, at 690-691, 710-711*. 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 731, 189 L. Ed. 2d, at 711*.

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 fis one that HHS has itself devised,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. **[****96]** 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 728-730, 189 L. Ed. 2d, at 709-710*. The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government **[*739]** 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 730-731, 189 L. Ed. 2d, at 710-711*.

"[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. 565, 628, 134 S. Ct. 1811, 1849, 188 L. Ed. 2d 835, 878 (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 **[**2787]** same exercise unduly restrict other persons, such as employees, in protecting **[***716]** their **[****97]** 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 733, 189 L. Ed. 2d, at 711-712*.

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

**Dissent by:** GINSBURG; KAGAN

## Dissent

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 **[*740]** (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. See *ante, at 705-736, 189 L. Ed. 2d, at 694-714*. Compelling governmental **[****98]** 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 728-731, 189 L. Ed. 2d, at 709-710*. [1]

The Court does not pretend **[****99]** 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 744-746, 189 L. Ed. 2d, at 719-720*. 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.

**[*741]** **[***717]** 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." **[**2788]** *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)*. Congress acted on that understanding when, as part of a nationwide insurance program intended to **[****100]** 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 **[*742]** 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

[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 692-693, 189 L. Ed. 2d, at 687*. 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 693, 189 L. Ed. 2d, at 687*. 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 731, 189 L. Ed. 2d, at 711* ("We do not decide today whether an approach of this type complies with RFRA . . . .").

[2] See *42 U.S.C. §300gg-13(a)(1)-(3)* **[****101]** (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").

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 **[****102]** 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 **[***718]** 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 **[**2789]** evaluating the efficacy of a number of preventive services. IOM, Clinical Preventive Services for Women: Closing the Gaps 2 (2011) (hereinafter IOM Report). Consistent with the findings of "[n]umerous health professional **[*743]** associations" and other organizations, the IOM experts determined that preventive coverage should include the "full range" of FDA-approved contraceptive methods. **[****103]** *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); **[****104]** *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 **[*744]** to certain exceptions, described *infra, at 763-764, 189 L. Ed. 2d, at 730-731*. [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 **[***719]** 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

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[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).

[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)* **[****105]** (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).

**[**2790]** 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 **[****106]** dismissed from their jobs and denied unemployment benefits because they ingested peyote at, and as an essential element of, a **[*745]** 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, 108 L. Ed. 2d 876*; see *id., at 878-879, 110 S. Ct. 1595, 108 L. Ed. 2d 876* ("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 **[***720]** significant interests of the corporations' employees **[*746]** 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 requested **[**2791]** 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 **[****109]** 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 União 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

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[7] As the Court explains, see *ante, at 700-705, 189 L. Ed. 2d, at 692-694*, 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 **[****107]** 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 **[****108]** 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, 161 L. Ed. 2d 1020* ("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.

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 **[*747]** also *§2000bb(a)(5)* ("[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for **[****110]** striking sensible balances between religious liberty and competing prior governmental interests."); *ante, at 736, 189 L. Ed. 2d, at 713* (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 **[***721]** 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 **[****111]** 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-*Smith* **[**2792]** jurisprudence. See *ante, at 695, n. 3, 696, 706, 714-716, 189 L. Ed. 2d, at 688, 689, 695, 700-701*. 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 **[*748]** 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 695-696, 189 L. Ed. 2d, at 689*. As **[****112]** 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 696, 189 L. Ed. 2d, at 689*.

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, 385 U.S. App. D.C. 318 (CADC 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, 407 U.S. App. D.C. 30 (CADC 2013)* **[****113]** (RFRA, as amended, "provides us with no helpful definition of 'exercise of religion.'"); *Henderson v. Kennedy, 265 F. 3d 1072, 1073, 347 U.S. App. D.C. 340 (CADC 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]

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[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).

[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 695-696, 714, 189 L. Ed. 2d, at 689, 700*. RFRA incorporates RLUIPA's definition of "exercise of religion," as RLUIPA does, but contains no omnibus rule of construction governing the statute in its

**[*749]** Next, the Court highlights RFRA's requirement that the government, if its action substantially burdens a person's religious observance, must demonstrate **[***722]** 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 706, n. 18, 189 L. Ed. 2d, at 695* (citing *City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)*). **[****114]** See also *ante, at 695, n. 3, 189 L. Ed. 2d, at 688*. 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 746-747, 189 L. Ed. 2d, at 720*. 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 **[**2793]** 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*, **[****115]** 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 695, n. 3, 706, n. 18, 189 L. Ed. 2d, at 688, 695*. As just indicated, however, that statement does not accurately convey the Court's pre-*Smith* **[*750]** jurisprudence. See *Sherbert, 374 U.S., at 407, 83 S. Ct. 1790, 10 L. Ed. 2d 965* ("[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 Ind. 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 **[***723]** 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?

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

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RFRA's compelling interest test, as noted, see *supra, at 746, 189 L. Ed. 2d, at 720*, applies to government actions that "substantially burden *a person's exercise of religion* ." *42 U.S.C. §2000bb-1(a)* (emphasis **[****117]** 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 707-709, 189 L. Ed. 2d, at 696-697*. The Dictionary Act's definition, however, controls only where "context" does not "indicat[e] otherwise." *§1*. Here, context does so indicate. RFRA

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entirety.

[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 706, n. 18, 189 L. Ed. 2d, at 695*. Concerning that observation, **[****116]** 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, 1948-1 C.B. 117 (1948)* (dissenting opinion).

speaks of "a person's *exercise of religion*." 42 U.S.C. §2000bb-1(a) (emphasis added). See also §§2000bb-2(4), **[**2794]** 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 [*752] 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. **[***724]** 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, 17 U.S. 518, 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 **[****119]** 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 **[****120]** 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 **[*753]** rights of religious organizations," **[**2795]** *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 189, 132 S. Ct. 694, 706, 181 L. Ed. 2d 650, 664 (2012)*, however, is just that. No such solicitude is traditional for commercial organizations. [15] Indeed, until

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[12] As earlier explained, see *supra, at 748, 189 L. Ed. 2d, at 721-722*, 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). **[****118]** But cf. *ante, at 714, 189 L. Ed. 2d, at 700*. 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 714, 189 L. Ed. 2d, at 700-701*. See also *ante, at 714, n. 21, 189 L. Ed. 2d, at 697*. 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. 1144, 6 L. Ed. 2d 563*.

[14] See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012)*; *Gonzales v. O Centro Espírita Beneficente União 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)*.

[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, **[****121]** 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 716-717, 189 L. Ed. 2d, at 701*.

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 717, 189 L. Ed. 2d,*

today, **[*754]** religious exemptions had never been extended to any entity operating in "the commercial, **[***725]** profit-making world." *Amos, 483 U.S., at 337, 107 S. Ct. 2862, 97 L. Ed. 2d 273*. [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)* **[****124]** (Title VII requires reasonable accommodation of an employee's religious exercise, but such accommodation must not come "at the expense of other[ employees]"). **[**2796]** 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.

**[*755]** 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* **[****125]** 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 (CA10 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).

**[***726]** The Court notes that for-profit corporations may support charitable causes and use their funds for religious ends, and therefore questions the distinction

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*at 702*. 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 716, n. 27, 189 L. Ed. 2d, at 701* ("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)* **[****122]** ("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***. **[****123]** 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 716, 189 L. Ed. 2d, at 701*. 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.

[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 737, 189 L. Ed. 2d, at 714* (concurring opinion). See also *ante, at 733, 189 L. Ed. 2d, at 711-712* (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.

between such corporations and religious nonprofit organizations. See ante, at 709-713, 189 L. Ed. 2d, at 697-700. See also ante, at 738, 189 L. Ed. 2d, at 715 (Kennedy, J., concurring) **[****126]** (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 **[*756]** 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, 13 U.S. 43, 9 Cranch 43, 49, 3 L. Ed. 650 (1815) (describing religious corporations); Trustees of Dartmouth College, 17 U.S. 518, 4 Wheat., at 645, 4 L. Ed. 629 (discussing "eleemosynary" corporations, including those "created for the promotion of religion"). To reiterate, "for-profit **[**2797]** 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 **[****127]** 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 710, 189 L. Ed. 2d, at 698 (footnote omitted). See also ante, at 705-706, 189 L. Ed. 2d, at 694-695. 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, **[****128]** 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.

**[***727]** The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although **[*757]** the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. [19] Little

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[18] According to the Court, the Government "concedes" that "nonprofit corporation[s]" are protected by RFRA. Ante, at 708, 189 L. Ed. 2d, at 696. See also ante, at 709, 712, 718, 189 L. Ed. 2d, at 697, 699, 703. That is not an accurate description of the Government's position, which encompasses only "churches," "*religious* institutions," and "*religious* non-profits." 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.").

[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 **[****129]** on that, the Court says, for "it seems unlikely" that large corporations "will often assert RFRA claims." Ante, at 717, 189 L. Ed. 2d, at 702. 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 718, 189 L. Ed. 2d, at 703, but the authorities cited in support of that proposition are hardly helpful. See Del. Code Ann., Tit. 8, §351 (2011) (certificates **[****130]** 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 intracorporate controversy to resolve the

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 **[*758]** that the contraceptive coverage requirement **[**2798]** "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 **[****131]** 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 724, 189 L. Ed. 2d, at 706*. [20] I agree with the Court that the Green **[***728]** and Hahn families' religious convictions regarding contraception are sincerely held. See *Thomas, 450 U.S., at 715, 101 S. Ct. 1425, 67 L. Ed. 2d 624* (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 **[*759]** 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 **[****132]** conclusion . . . that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake. *Kaemmerling v. Lappin, 553 F. 3d 669, 679, 384 U.S. App. D.C. 240 (CADC 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, 90 L. Ed. 2d 735*. 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 **[**2799]** supply the frame of reference." *Id., at 700-701, n. 6, 106 S. Ct. 2147, 90 L. Ed. 2d 735*. 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 **[****134]** 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 **[*760]** one"). Inattentive to this guidance, today's decision elides entirely the distinction between the sincerity of a challenger's religious belief and the

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disagreement, given this Court's instruction that "courts have no business addressing [whether an asserted religious belief] is reasonable," *ante, at 724, 189 L. Ed. 2d, at 706*?

[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 720-722, 189 L. Ed. 2d, at 704-705*. 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 724, 189 L. Ed. 2d, at 706*. 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 ___, 189 L. Ed. 2d, at 706* (internal quotation marks omitted), but whether accommodating that claim **[****133]** risks depriving others of rights accorded them by the laws of the United States. See *supra, at 745-746, 189 L. Ed. 2d, at 719-720*; *infra, at 765-766, 189 L. Ed. 2d, at 731*.

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 **[***729]** 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 741-744, 189 L. Ed. 2d, at 717-718*, 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 **[****135]** 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 (CA7 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 **[*761]** 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 **[****136]** 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-approved **[**2800]** 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. **[****137]** See id., at 105. [22] Moreover, the Court's **[*762]** 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 **[***730]** 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 728, 189 L. Ed. 2d, at 708*. [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 **[****138]** Guttmacher Institute et al. as *Amici Curiae* 16; that almost one-third of women would change their contraceptive method if

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[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 726-728, 189 L. Ed. 2d, at 708-709*, one Member of the **[****139]** 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 737, 189 L. Ed. 2d, at 714* (opinion of Kennedy, J.).

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 **[*763]** 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 726-728, 189 L. Ed. 2d, at 708-709*.

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 **[**2801]** governs employers with 20 or more employees); Americans With Disabilities Act of 1990, *42 U.S.C. §12111(5)(A)* (applicable to employers with 15 or more **[****140]** 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).

**[***731]** The ACA's grandfathering provision, *42 U.S.C. §18011*, allows a phasing-in period for compliance with a number of the ACA'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 **[*764]** 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 **[****141]** 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 729, n. 37, 189 L. Ed. 2d, at 709* (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 **[****142]** would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect. Cf. *supra, at 745-746, 189 L. Ed. 2d, at 719-720*; *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.").

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After assuming the existence of compelling government interests, the Court holds that the contraceptive

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[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.

coverage **[*765]** 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 employees **[**2802]** 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 **[***732]** their commercial employers can adhere unreservedly **[****143]** to their religious tenets. See *supra, at 745-746, 764, 189 L. Ed. 2d, at 719-720, 731*. [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 728, 189 L. Ed. 2d, at 709*. The ACA, however, requires coverage of preventive services **[****144]** 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 **[*766]** 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 744, 189 L. Ed. 2d, at 718*.

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 **[****145]** women equal pay for substantially similar work, see *Dole v. Shenandoah Baptist Church, 899 F. 2d 1389, 1392 (CA4 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 692-693, 698-699, 730-732, 189 L. Ed. 2d, at 687, 690-691, 710-711*. "At a minimum," according to the Court, such an approach would not "impinge on [Hobby Lobby's and Conestoga's] religious belief." *Ante, [***733] at 731, 189 L. Ed. 2d, at 711*. I have already discussed the "special solicitude" **[**2803]** generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial **[*767]** enterprises comprising employees of diverse faiths. See *supra, at 752-755, 189 L. Ed. 2d, at 723-725*.

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 731, 189 L. Ed. 2d, at 716*. Counsel for Hobby Lobby was similarly noncommittal. Asked at oral argument whether the Court-proposed alternative was acceptable, [27] counsel

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[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, 161 L. Ed. 2d 1020*. "[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, 6 L. Ed. 2d. 563*, a "rich mosaic of religious faiths," *Town of Greece v. Galloway, 572 U.S. 565, 628, 134 S. Ct. 1811, 1849, 188 L. Ed. 2d 835, 878 (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*, **[****146]** effective alternatives" (emphasis added)).

[27] On brief, Hobby Lobby and Conestoga barely addressed the

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 **[*768]** pocket in the first instance, and it would do nothing for the woman too poor to be aided by **[****148]** 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, 71 L. Ed. 2d 127*. See also *id., at 258, 102 S. Ct. 1051, 71 L. Ed. 2d 127* (recognizing the important governmental **[***734]** 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 **[**2804]** urges that *Lee* should control the challenges brought by Hobby Lobby and Conestoga. See Brief for Respondents in No. 13-356, p. 18. **[****149]** In contrast, today's Court dismisses *Lee* as a tax case. See *ante, at 733-734, 189 L. Ed. 2d, at 712*. 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, 71 L. Ed. 2d 127*.

But the *Lee* Court made two key points one cannot confine to tax cases. "When followers of a particular sect enter into **[*769]** 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, 71 L. Ed. 2d 127*. 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 **[****150]** employer would "operat[e] to impose the employer's religious faith on the employees." *Ibid.* [29] No doubt the Greens and

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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, 6 F. Supp. 3d 1225, 2013 U.S. Dist. LEXIS 180867, 2013 WL 6839900 (Colo., Dec. 27, 2013)*, injunction pending appeal granted, *571 U.S. 1171, 134 S. Ct. 1022, 187 L. Ed. 2d 867 (2014)*. At another point in today's decision, the Court **[****147]** 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 721, 189 L. Ed. 2d, at 704*. 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 (CA10 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 general 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

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 **[*770]** 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 (SC 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 (CA4 1967)*, aff'd and modified on other grounds, *390 U.S. 400, 88 S. Ct. **[***735]** 964, 19 L. Ed. 2d 1263 (1968)*; *State by McClure v. Sports & Health Club, Inc., 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 **[****152]** person "antagonistic **[**2805]** 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, 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. 1046, 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 724, 189 L. Ed. 2d, at 706*.

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); **[*771]** and **[****153]** 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 **[****154]** the least restrictive means of providing them." *Ante, at 733, 189 L. Ed. 2d, at 712*. 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," **[***736]** *Lee, 455 U.S., at 263, n. 2, 102 S. Ct. 1051, 71 L. Ed. 2d 127* (Stevens, J., concurring in judgment), or the sincerity with which an asserted religious belief is held. Indeed,

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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)* **[****151]** (disallowing religion-based exemption that "would undoubtedly give [the commercial enterprise seeking the exemption] and similar organizations an advantage over their competitors").

[31] Religious objections to immunization programs are not hypothetical. See *Phillips v. City of New York, ___ F. Supp. 2d ___, 27 F. Supp. 3d 310, 2014 U.S. Dist. LEXIS 77500, 2014 WL 2547584 (EDNY, 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*.

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* ***[*772]*** *(CA9 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 . . . **[**2806]** substantially in the exchange **[****155]** of goods or services for money beyond nominal amounts." See *id., at 748* (Kleinfeld, J., concurring).

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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.

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Comment Note.--What provisions of the *Federal Constitution's Bill of Rights* are applicable to **[****156]** the states. *18 L. Ed. 2d 1388*, *23 L. Ed. 2d 985*.

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# If the Supreme Court undermines Roe v. Wade, contraception could be banned

Constitutional protections for birth control could be on shaky ground.

Analysis by Rachel VanSickle-Ward and Kevin Wallsten

Updated May 3, 2022 at 5:28 p.m. EDT | Published December 11, 2021 at 7:00 a.m. EST

*Editors' note: We are reposting this piece, originally published Dec. 11, 2021, in light of news that the Supreme Court is circulating a draft opinion that would overturn Roe v. Wade.*

After last week's U.S. Supreme Court oral arguments on *Dobbs v. Jackson Women's Health Organization*, many observers noted that the justices are likely to undermine or overturn *Roe v. Wade's* constitutional protections for abortion. Less broadly publicized is how the decision could also limit access to contraception.

Contraceptives came up frequently in the oral arguments. Mississippi's Solicitor General Scott G. Stewart contended that the court needn't worry about pregnancy's burden on women because "contraception is more accessible and affordable and available than it was at the time of *Roe* or *Casey*. It serves the same goal of allowing women to decide if, when, and how many children to have."

But as U.S. Solicitor General Elizabeth B. Prelogar pointed out, "about half the women who have unplanned pregnancies were on contraceptives" when they got pregnant. While contraception reduces the chance of pregnancy, it is not a foolproof alternative to abortion.

## The Dobbs argument ignored "contraceptive deserts" and burdensome costs

But that's not the only flaw in Stewart's argument. Birth control has never been as affordable, easy and widespread in the U.S. as he suggests, according to our research. Take affordability. One of the most widely used forms of contraception — "the pill" — costs approximately $370 a year, the equivalent of 51 hours of minimum wage work. Not until the mid-1990s did state governments begin requiring health insurance plans to cover prescription contraceptives. That's a major out-of-pocket cost for people who may have to put housing or food first.

Although the Affordable Care Act broadened insurance coverage for contraception, the Supreme Court's 2014 decision in *Burwell v. Hobby Lobby* and a 2017 Trump administration order limited that coverage by exempting employers and insurance providers who have objections based on "sincerely held religious beliefs."

Nor is contraception always easy to get. In most states, women must first get a doctor's prescription and then find a pharmacist who will fill it — which can be hard in rural areas or for those whose jobs and families give them little control over their time. Only 15 states allow pharmacists to prescribe birth control themselves. Six states allow pharmacists to refuse to dispense contraceptives altogether if they have religious or other conscience-based objections.

Overall, as a result of state-level differences in direct funding for family planning and Title X implementation, between 17 percent and 53 percent of Americans currently live in "contraceptive deserts" with inadequate and inequitable access to affordable reproductive health care. In other words, contraception cannot possibly be a meaningful substitute for access to abortion.

## If the court topples Roe, it puts constitutional protections for birth control on shaky ground

But here's the more important question: Will women still have access to birth control in a post-*Roe* world? The limits described above will likely expand, and some states will try to ban contraceptive access entirely.

There are two reasons for this. First, constitutional protections for abortion and birth control are linked. In *Griswold v. Connecticut*, the Supreme Court invalidated a law prohibiting birth control, arguing that the prohibition violated a fundamental "right to privacy." This right to privacy is the foundation for *Roe v. Wade*.

Justice Sonia Sotomayor clearly had this precedent in mind during oral arguments for *Dobbs*, saying, "in *Roe*, the Court said … certain personal decisions that belong to individuals and the states can't intrude on them. … We have recognized that sense of privacy in people's choices about whether to use contraception or not." If the court invalidates *Roe v. Wade*, contraception rights might be precarious as well.

The changing composition of the court, particularly the replacement of reproductive rights champion Ruth Bader Ginsburg with conservative Amy Coney Barrett, increases the chances that legal precedents related to contraception may be overturned. When asked during her confirmation hearing whether *Griswold v. Connecticut* was decided correctly, Barrett declined to answer on the grounds that a full ban on contraception at the state level was "unthinkable." Barrett's silence on Griswold, coupled with the court's new conservative majority, sends the signal to state governments that more restrictive contraception policies might be welcomed.

## Religious groups classify some forms of birth control as abortion

Further, in recent decisions, the court let religious groups argue that some forms of contraception are "abortifacients." For instance, in the Hobby Lobby case, the company objected that four FDA-approved contraceptives prevented implantation of a fertilized egg — and that that counted as an abortion. More specifically, the company claimed that the owners' "religious beliefs forbid them from participating in, providing access to, paying for, training others to engage in, or otherwise supporting abortion-causing drugs and devices."

The Little Sisters of the Poor, an organization of Roman Catholic nuns, challenged the paperwork requirements of religious exemptions under the Affordable Care Act, arguing that even signing the exemption forms constituted an endorsement of contraception and a violation of their religious tenets. In both of these cases, the court tacitly endorsed the plaintiffs' conflation between birth control and abortion by not clearly distinguishing between the two in its rulings. This conflation has been subsequently echoed by Justice Samuel A Alito Jr. and in briefs submitted in *Dobbs*.

That legal blurring of distinct scientific boundaries between abortion and birth control threatens contraceptive access in the United States. Some state governments will listen to the *Dobbs* arguments and extrapolate from the *Hobby Lobby* and *Little Sisters of the Poor* decisions — and will probably ban some forms of contraception outright, using the discredited idea that contraceptives act as abortifacients.

In other words, the court doesn't have to formally end legal protection for contraception use. If it allows plaintiffs to call contraception abortion, and *Dobbs* ends legal protection for abortion, then contraception is at risk.

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# *Griswold v. Connecticut*

Supreme Court of the United States

March 29, 1965, Argued ; June 7, 1965, Decided

No. 496

**Reporter**
381 U.S. 479 *; 85 S. Ct. 1678 **; 14 L. Ed. 2d 510 ***; 1965 U.S. LEXIS 2282 ****

GRISWOLD ET AL. v. CONNECTICUT

**Prior History:** **[****1]** APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

**Disposition:** *151 Conn. 544, 200 A. 2d 479*, reversed.

## Syllabus

Appellants, the Executive Director of the Planned Parenthood League of Connecticut, and its medical director, a licensed physician, were convicted as accessories for giving married persons information and medical advice on how to prevent conception and, following examination, prescribing a contraceptive device or material for the wife's use. A Connecticut statute makes it a crime for any person to use any drug or article to prevent conception. Appellants claimed that the accessory statute as applied violated the *Fourteenth Amendment*. An intermediate appellate court and the State's highest court affirmed the judgment. *Held*:

1. Appellants have standing to assert the constitutional rights of the married people. *Tileston v. Ullman, 318 U.S. 44*, distinguished. P. 481.

2. The Connecticut statute forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the *Bill of Rights*. Pp. 481-486.

**Counsel:** Thomas I. Emerson argued the cause for appellants. With him on the briefs was **[****2]** Catherine G. Roraback.

Joseph B. Clark argued the cause for appellee. With him on the brief was Julius Maretz.

Briefs of amici curiae, urging reversal, were filed by Whitney North Seymour and Eleanor M. Fox for Dr. John M. Adams et al.; by Morris L. Ernst, Harriet F. Pilpel and Nancy F. Wechsler for the Planned Parenthood Federation of America, Inc.; by Alfred L. Scanlon for the Catholic Council on Civil Liberties, and by Rhoda H. Karpatkin, Melvin L. Wulf and Jerome E. Caplan for the American Civil Liberties Union et al.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

**Opinion by:** DOUGLAS

## Opinion

**[*480]** **[***512]** **[**1679]** MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven -- a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to *married persons* as to the means of preventing conception. They examined the wife and prescribed **[****3]** the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are §§ 53-32 and *54-196* of the General Statutes of Connecticut (1958 rev.). The former provides:

"Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

*Section 54-196* provides:

"Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be

prosecuted and punished as if he were the principal offender."

The appellants were found guilty as accessories and fined $ 100 each, against the claim that the accessory statute as so applied violated the *Fourteenth Amendment*. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. *151 Conn. 544, 200 A. 2d 479*. We noted probable jurisdiction. *379 U.S. 926*.

**[*481]** [1][2]We think that appellants have standing to raise the constitutional **[****4]** rights of the married people with whom they had a professional relationship. *Tileston v. Ullman, 318 U.S. 44*, is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought that the requirements **[***513]** of standing should be strict, lest the standards of "case or controversy" in Article III of the Constitution become blurred. Here those doubts **[**1680]** are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime.

This case is more akin to *Truax v. Raich, 239 U.S. 33*, where an employee was permitted to assert the rights of his employer; to *Pierce v. Society of Sisters, 268 U.S. 510*, where the owners of private schools were entitled to assert the rights of potential pupils and their parents; and to *Barrows v. Jackson, 346 U.S. 249*, where a white defendant, party to a racially restrictive covenant, who was **[****5]** being sued for damages by the covenantors because she had conveyed her property to Negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection, although no Negro was a party to the suit. And see *Meyer v. Nebraska, 262 U.S. 390*; *Adler v. Board of Education, 342 U.S. 485*; *NAACP v. Alabama, 357 U.S. 449*; *NAACP v. Button, 371 U.S. 415*. The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.

[3]Coming to the merits, we are met with a wide range of questions that implicate the *Due Process Clause of the Fourteenth Amendment*. Overtones of some arguments **[*482]** suggest that *Lochner v. New York, 198 U.S. 45*, should be our guide. But we decline that invitation as we did in *West Coast Hotel Co*. v. *Parrish, 300 U.S. 379*; *Olsen v. Nebraska, 313 U.S. 236*; *Lincoln Union v. Northwestern Co., 335 U.S. 525*; **[****6]** *Williamson v. Lee Optical Co., 348 U.S. 483*; *Giboney v. Empire Storage Co., 336 U.S. 490*. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the *Bill of Rights*. The right to educate a child in a school of the parents' choice -- whether public or private or parochial -- is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the *First Amendment* has been construed to include certain of those rights.

[4][5][6]By *Pierce v. Society of Sisters, supra*, the right to educate one's children as one chooses is made applicable to the States by the force of the *First* and *Fourteenth Amendments*. By *Meyer v. Nebraska, supra*, the same dignity is given the right to study the German language **[***514]** in a private school. In other words, the State may **[****7]** not, consistently with the spirit of the *First Amendment*, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read ( *Martin v. Struthers, 319 U.S. 141, 143)* and freedom of inquiry, freedom of thought, and freedom to teach (see *Wieman v. Updegraff, 344 U.S. 183, 195)* -- indeed the freedom of the entire university community. *Sweezy v. New Hampshire, 354 U.S. 234, 249-250, 261-263*; *Barenblatt v. United States, 360 U.S. 109, 112*; **[**1681]** *Baggett v. Bullitt, 377 U.S. 360, 369*. Without **[*483]** those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

[7]

In *NAACP v. Alabama, 357 U.S. 449, 462*, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral *First Amendment* right. Disclosure of

membership lists of a constitutionally valid association, **[****8]** we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Ibid*. In other words, the *First Amendment* has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. *NAACP v. Button, 371 U.S. 415, 430-431*. In *Schware v. Board of Bar Examiners, 353 U.S. 232*, we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" ( *id., at 244*) and was not action of a kind proving bad moral character. *Id., at 245-246*.

[8][9]Those cases involved more than the "right of assembly" -- a right that extends to all irrespective of their race or ideology. *De Jonge v. Oregon, 299 U.S. 353*. The right of "association," like the right of **[****9]** belief ( *Board of Education v. Barnette, 319 U.S. 624*), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the *First Amendment* its existence is necessary in making the express guarantees fully meaningful.

**[*484]** [10]The foregoing cases suggest that specific guarantees in the *Bill of Rights* have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman, 367 U.S. 497, 516-522* (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra **[***515]** of the *First Amendment* is one, as we have seen. The *Third Amendment* in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The *Fourth Amendment* explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against **[****10]** unreasonable searches and seizures." The *Fifth Amendment* in its *Self-Incrimination Clause* enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The *Ninth Amendment* provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The *Fourth* and *Fifth Amendments* were described in *Boyd v. United States, 116 U.S. 616, 630*, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." * We **[**1682]** recently referred **[*485]** in *Mapp v. Ohio, 367 U.S. 643, 656*, to the *Fourth Amendment* as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup. Ct. Rev. 212; Griswold, The Right to be Let Alone, 55 Nw. U. L. Rev. 216 (1960).

**[****11]** We have had many controversies over these penumbral rights of "privacy and repose." See, *e. g., Breard v. Alexandria, 341 U.S. 622, 626, 644*; *Public Utilities Comm'n v. Pollak, 343 U.S. 451*; *Monroe v. Pape, 365 U.S. 167*; *Lanza v. New York, 370 U.S. 139*; *Frank v. Maryland, 359 U.S. 360*; *Skinner v. Oklahoma, 316 U.S. 535, 541*. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

[11][12]The present case, then, concerns a relationship

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* The Court said in full about this right of privacy:

"The principles laid down in this opinion [by Lord Camden in *Entick* v. *Carrington*, 19 How. St. Tr. 1029] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the *Fourth* and *Fifth Amendments* run almost into each other." *116 U.S., at 630*.

lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot **[***516]** stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily **[****12]** broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama, 377 U.S. 288, 307*. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The **[*486]** very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the *Bill of Rights* -- older than our political parties, older than our school system. 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.

*Reversed*.

**Concur by:** GOLDBERG; HARLAN; WHITE

## Concur

MR. JUSTICE GOLDBERG, whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN join, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process" **[****13]** as used in the *Fourteenth Amendment* incorporates all of the first eight Amendments (see my concurring opinion in *Pointer v. Texas, 380 U.S. 400, 410*, **[**1683]** and the dissenting opinion of MR. JUSTICE BRENNAN in *Cohen v. Hurley, 366 U.S. 117, 154)*, I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the *Bill of Rights*. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution [1] is supported both **[***517]** by numerous **[*487]** decisions of this Court, referred to in the Court's opinion, and by the language and history of the *Ninth Amendment*. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the *Bill of Rights*, the Court refers to the *Ninth Amendment*, *ante*, at 484. I add these words to emphasize the relevance of that Amendment to the Court's holding.

**[****14]** The Court stated many years ago that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts, 291 U.S. 97, 105*. In *Gitlow v. New York, 268 U.S. 652, 666*, the Court said:

"For present purposes we may and do assume that freedom of speech and of the press -- which are protected by the *First Amendment* from abridgment by Congress -- are among the *fundamental* personal rights and 'liberties' protected by the *due process clause of the Fourteenth Amendment* from impairment by the States." (Emphasis added.)

**[*488]** And, in *Meyer v. Nebraska, 262 U.S. 390, 399*, the Court, referring to the *Fourteenth Amendment*, stated:

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[1] My Brother STEWART dissents on the ground that he "can find no . . . general right of privacy in the *Bill of Rights*, in any other part of the Constitution, or in any case ever before decided by this Court." *Post*, at 530. He would require a more explicit guarantee than the one which the Court derives from several constitutional amendments. This Court, however, has never held that the *Bill of Rights* or the *Fourteenth Amendment* protects only those rights that the Constitution specifically mentions by name. See, *e. g.*, *Bolling v. Sharpe, 347 U.S. 497*; *Aptheker v. Secretary of State, 378 U.S. 500*; *Kent v. Dulles, 357 U.S. 116*; *Carrington v. Rash, 380 U.S. 89, 96*; *Schware v. Board of Bar Examiners, 353 U.S. 232*; *NAACP v. Alabama, 360 U.S. 240*; *Pierce v. Society of Sisters, 268 U.S. 510*; *Meyer v. Nebraska, 262 U.S. 390*. To the contrary, this Court, for example, in *Bolling v. Sharpe, supra*, while recognizing that the *Fifth Amendment* does not contain the "explicit safeguard" of an *equal protection clause*, *id., at 499*, nevertheless derived an equal protection principle from that Amendment's Due Process Clause. And in *Schware v. Board of Bar Examiners, supra*, the Court held that the *Fourteenth Amendment* protects from arbitrary state action the right to pursue an occupation, such as the practice of law.

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also [for example,] the right . . . to marry, establish a home and bring up children . . . ."

This Court, in a series of **[****15]** decisions, has held that the *Fourteenth Amendment* absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal **[**1684]** rights. [2] The language and history of the *Ninth Amendment* reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

The **[****16]** *Ninth Amendment* reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights [3] could not be sufficiently broad to cover all essential **[*489]** rights and that the specific mention of certain rights **[***518]** would be interpreted as a denial that others were protected. [4]

**[****17]** In presenting the proposed Amendment, Madison said:

"It has been objected also against a *bill of rights*, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a *bill of rights* into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the **[*490]** last clause of the fourth resolution [the *Ninth Amendment*]." I Annals of Congress 439 (Gales and Seaton ed. 1834).

**[**1685]** Mr. Justice Story wrote of this argument against a *bill of rights* and the meaning of the *Ninth Amendment*:

"In regard to . . . [a] suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis . . . **[****18]** . But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a *bill of rights* that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people." II Story, Commentaries on the Constitution of the United States 626-627 (5th ed. 1891).

He further stated, referring to the *Ninth Amendment*:

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[2] See, *e. g., Chicago, B. & Q. R. Co.* v. *Chicago, 166 U.S. 226*; *Gitlow v. New York, supra*; *Cantwell v. Connecticut, 310 U.S. 296*; *Wolf v. Colorado, 338 U.S. 25*; *Robinson v. California, 370 U.S. 660*; *Gideon v. Wainwright, 372 U.S. 335*; *Malloy v. Hogan, 378 U.S. 1*; *Pointer v. Texas, supra*; *Griffin v. California, 380 U.S. 609*.

[3] Madison himself had previously pointed out the dangers of inaccuracy resulting from the fact that "no language is so copious as to supply words and phrases for every complex idea." The Federalist, No. 37 (Cooke ed. 1961), at 236.

[4] Alexander Hamilton was opposed to a *bill of rights* on the ground that it was unnecessary because the Federal Government was a government of delegated powers and it was not granted the power to intrude upon fundamental personal rights. The Federalist, No. 84 (Cooke ed. 1961), at 578-579. He also argued,

"I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power." *Id., at 579*.

The *Ninth Amendment* and the *Tenth Amendment*, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," were apparently also designed in part to meet the above-quoted argument of Hamilton.

"This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others." *Id., at 651*.

These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people. [5]

**[****19]** While **[***519]** this Court has had little occasion to interpret the *Ninth Amendment*, [6] "it cannot be presumed that any **[*491]** clause in the constitution is intended to be without effect." *Marbury v. Madison, 1 Cranch 137, 174*. In interpreting the Constitution, "real effect should be given to all the words it uses." *Myers v. United States, 272 U.S. 52, 151*. The *Ninth Amendment to the Constitution* may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the *Ninth Amendment* and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because **[**1686]** it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the *Ninth Amendment*, which **[****20]** specifically states that **[*492]** "the enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people." (Emphasis added.)

**[****21]** A dissenting opinion suggests that my interpretation of the *Ninth Amendment* somehow "broaden[s] the powers of this Court." *Post*, at 520. With all due respect, I believe that it misses the import of what I am saying. I do not take the position of my Brother BLACK in his dissent in *Adamson v. California, 332 U.S. 46, 68*, that the entire *Bill of Rights* is incorporated in the *Fourteenth Amendment*, and I do not mean to imply that the *Ninth Amendment* is applied against the States by the Fourteenth. Nor do I mean to state that the *Ninth Amendment* constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the *Ninth Amendment* shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be **[***520]** deemed exhaustive. As any student of this Court's opinions knows, this Court has held, often unanimously, that the *Fifth* and *Fourteenth Amendments* protect certain fundamental personal liberties from abridgment by the Federal Government or the States. See, *e.* **[****22]** *g.*, *Bolling v. Sharpe, 347 U.S. 497*; *Aptheker v. Secretary of State, 378 U.S. 500*; *Kent v. Dulles, 357 U.S. 116*; *Cantwell v. Connecticut, 310 U.S. 296*; *NAACP v. Alabama, 357 U.S. 449*; *Gideon v. Wainwright, 372 U.S. 335*; *New York Times Co*. v. *Sullivan, 376 U.S. 254*. The *Ninth Amendment* simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority **[*493]** of the Court; rather it serves to support what this Court has been doing in protecting

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[5] The *Tenth Amendment* similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government.

[6] This Amendment has been referred to as "The Forgotten *Ninth Amendment*," in a book with that title by Bennett B. Patterson (1955). Other commentary on the *Ninth Amendment* includes Redlich, Are There "Certain Rights . . . Retained by the People"? 37 N. Y. U. L. Rev. 787 (1962), and Kelsey, The *Ninth Amendment of the Federal Constitution*, 11 Ind. L. J. 309 (1936). As far as I am aware, until today this Court has referred to the *Ninth Amendment* only in *United Public Workers v. Mitchell, 330 U.S. 75, 94-95*; *Tennessee Electric Power Co*. v. *TVA, 306 U.S. 118, 143-144*; and *Ashwander v. TVA, 297 U.S. 288, 330-331*. See also *Calder* v. *Bull*, 3 Dall. 386, 388; *Loan Assn*. v. *Topeka, 20 Wall. 655, 662-663*.

In *United Public Workers v. Mitchell, supra, at 94-95*, the Court stated: "We accept appellants' contention that the nature of political rights reserved to the people by the *Ninth* and *Tenth Amendments* [is] involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the *First*, *Ninth* and *Tenth Amendments*. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the *Fifth Amendment*."

fundamental rights.

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a *State's* infringement of a fundamental right. While the Ninth Amendment -- and indeed the entire Bill of Rights -- originally concerned restrictions upon *federal* power, the subsequently enacted Fourteenth **[****23]** Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. Cf. United Public Workers v. Mitchell, 330 U.S. 75, 94-95.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without **[****24]** violating those 'fundamental principles of liberty and justice **[**1687]** which lie at the base of all our civil and political institutions' . . . ." Powell v. Alabama, 287 U.S. 45, 67. "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." Poe **[*494]** v. Ullman, 367 U.S. 497, 517 (dissenting opinion of MR. JUSTICE DOUGLAS). [7]

**[****25]** I **[***521]** agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live." Id., at 521. Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 478, comprehensively summarized the principles underlying the Constitution's guarantees of privacy:

"The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men."

**[*495]** The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy -- **[****26]** that of the marital relation and the marital home. This Court recognized in Meyer v. Nebraska, supra, that the right "to marry, establish a home and bring up children" was an essential part of the liberty guaranteed by the Fourteenth Amendment. 262 U.S., at 399. In Pierce v. Society of Sisters, 268 U.S. 510, the Court held unconstitutional an Oregon Act which forbade parents from sending their children to private schools because such an act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S., at 534-535. As this Court said in Prince v. Massachusetts, 321 U.S. 158, at 166, the *Meyer* and *Pierce* decisions "have respected the private realm of family life which the state cannot enter."

I agree with MR. JUSTICE HARLAN'S statement in his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 551-552: "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. **[****27]** And the integrity of that life is something so fundamental that it has been found to draw to its

[7] In light of the tests enunciated in these cases it cannot be said that a judge's responsibility to determine whether a right is basic and fundamental in this sense vests him with unrestricted personal discretion. In fact, a hesitancy to allow too broad a discretion was a substantial reason leading me to conclude in Pointer v. Texas, supra, at 413-414, that those rights absorbed by the Fourteenth Amendment and applied to the States because they are fundamental apply with equal force and to the same extent against both federal and state governments. In *Pointer* I said that the contrary view would require "this Court to make the extremely subjective and excessively discretionary determination as to whether a practice, forbidden the Federal Government by a fundamental constitutional guarantee, is, as viewed in the factual circumstances surrounding each individual case, sufficiently repugnant to the notion of due process as to be forbidden the States." Id., at 413.

protection the principles of more than one explicitly granted **[**1688]** Constitutional right. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

**[***522]** The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution **[*496]** explicitly forbids the State from disrupting the traditional relation of the family -- a relation as old and as fundamental as our entire civilization -- surely does not show that the Government was meant to have the power to do so. Rather, as the *Ninth Amendment* expressly recognizes, there are fundamental personal rights such **[****28]** as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

My Brother STEWART, while characterizing the Connecticut birth control law as "an uncommonly silly law," *post*, at 527, would nevertheless let it stand on the ground that it is not for the courts to "'substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.'" *Post*, at 528. Elsewhere, I have stated that "while I quite agree with Mr. Justice Brandeis that . . . 'a . . . State may . . . serve as a laboratory; and try novel social and economic experiments,' *New State Ice Co*. v. *Liebmann, 285 U.S. 262, 280, 311* (dissenting opinion), I do not believe that this includes the power to experiment with the fundamental liberties of citizens . . . ." [8] The vice of the dissenters' views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

**[****29]** The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born **[*497]** to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory **[****30]** birth control also would seem to **[***523]** be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be **[**1689]** abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," *Bates v. Little Rock, 361 U.S. 516, 524*. The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida, 379 U.S. 184, 196*. See *Schneider v. Irvington, 308 U.S. 147, 161*.

Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any "subordinating [state] interest which is compelling" or that it is "necessary . . . **[*498]** to the **[****31]** accomplishment of a permissible state policy." The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern -- the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all

[8] *Pointer v. Texas, supra, at 413*. See also the discussion of my Brother DOUGLAS, *Poe v. Ullman, supra, at 517-518* (dissenting opinion).

persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception, see Tileston v. Ullman, 129 Conn. 84, 26 A. 2d 582. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. See Aptheker v. Secretary of State, 378 U.S. 500, 514; NAACP v. Alabama, 377 U.S. 288, 307-308; **[****32]** McLaughlin v. Florida, supra, at 196. Here, as elsewhere, "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415, 438. The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. See Conn. Gen. Stat. §§ 53-218, 53-219 *et seq*. These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to "invade the area of protected freedoms." NAACP v. Alabama, supra, at 307. See McLaughlin v. Florida, supra, at 196.

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation **[*499]** of sexual promiscuity or misconduct. As my Brother HARLAN so well stated in his dissenting opinion in Poe v. Ullman, supra, at 553.

"Adultery, homosexuality and the like are sexual intimacies which the **[***524]** State forbids . . . but the intimacy of husband and wife is necessarily **[****33]** an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."

**[**1690]** In sum, I believe that the right of privacy in the marital relation is fundamental and basic -- a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

MR. JUSTICE HARLAN, concurring in the judgment.

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers BLACK and STEWART in dissent, namely: **[****34]** the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.

**[*500]** In other words, what I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to *restrict* the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to *impose* upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them. See, *e. g*., my concurring opinions in Pointer v. Texas, 380 U.S. 400, 408, and Griffin v. California, 380 U.S. 609, 615, and my dissenting opinion in Poe v. Ullman, 367 U.S. 497, 522, at pp. 539-545.

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325. **[****35]** For reasons stated at length in my dissenting opinion in Poe v. Ullman, supra, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

A further observation seems in order respecting the justification of my Brothers BLACK and STEWART for their "incorporation" approach to this case. Their approach does not rest on historical reasons, which are of course wholly lacking (see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949)), but on the thesis that by limiting the content of the **[***525]** Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution, in this instance in the Bill of Rights, judges will thus be confined to "interpretation" of specific constitutional **[*501]** provisions, and will thereby be restrained from

introducing their own notions of constitutional right and wrong into **[****36]** the "vague contours of the Due Process Clause." *Rochin v. California, 342 U.S. 165, 170*.

While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times" (*post*, p. 522). Need one go further than to recall last Term's reapportionment cases, *Wesberry v. Sanders, **[**1691]** 376 U.S. 1*, and *Reynolds v. Sims, 377 U.S. 533*, where a majority of the Court "interpreted" "by the People" (Art. I, § 2) and "equal protection" (*Amdt. 14*) to command "one person, one vote," an interpretation that was made in the face of irrefutable and still unanswered history to the contrary? See my dissenting opinions in those cases, *376 U.S., at 20*; *377 U.S., at 589*.

Judicial self-restraint will not, I suggest, be brought **[****37]** about in the "due process" area by the historically unfounded incorporation formula long advanced by my Brother BLACK, and now in part espoused by my Brother STEWART. It will be achieved in this area, as in other constitutional areas, only by 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 that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. See *Adamson v. California, 332 U.S. 46, 59* (Mr. Justice Frankfurter, concurring). Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition **[*502]** will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause. [*]

[*] Indeed, my Brother BLACK, in arguing his thesis, is forced to lay aside a host of cases in which the Court has recognized fundamental rights in the *Fourteenth Amendment* without specific reliance upon the *Bill of Rights*. *Post*, p. 512, n. 4.

**[****38]** MR. JUSTICE WHITE, concurring in the judgment.

In my view this Connecticut law as applied to married couples deprives them of "liberty" without due process of law, as that concept is used in the *Fourteenth Amendment*. I therefore concur in the judgment of the Court reversing these convictions under Connecticut's aiding and abetting statute.

It would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the *Fourteenth **[***526]** Amendment* against arbitrary or capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the *Fourteenth Amendment* includes the right "to marry, establish a home and bring up children," *Meyer v. Nebraska, 262 U.S. 390, 399*, and "the liberty . . . to direct the upbringing and education of children," *Pierce v. Society of Sisters, 268 U.S. 510, 534-535*, and that these are among "the basic civil rights of man." *Skinner v. Oklahoma, 316 U.S. 535, 541*. These decisions affirm that there is a "realm **[****39]** of family life which the state cannot enter" without substantial justification. *Prince v. Massachusetts, 321 U.S. 158, 166*. Surely the right invoked in this case, to be free of regulation of the intimacies of **[*503]** the marriage relationship, "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs v. Cooper, 336 U.S. 77, 95* (opinion of Frankfurter, J.).

The Connecticut anti-contraceptive statute deals rather substantially with **[**1692]** this relationship. For it forbids all married persons the right to use birth-control devices, regardless of whether their use is dictated by considerations of family planning, *Trubek v. Ullman, 147 Conn. 633, 165 A. 2d 158*, health, or indeed even of life itself. *Buxton v. Ullman, 147 Conn. 48, 156 A. 2d 508*. The anti-use statute, together with the general aiding and abetting statute, prohibits doctors from affording advice to married persons on proper and effective methods of birth control. *Tileston v. Ullman, 129 Conn. 84, 26 A. 2d 582*. **[****40]** And the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. *State v. Nelson, 126 Conn. 412, 11 A. 2d 856*; *State v. Griswold, 151 Conn. 544, 200 A. 2d 479*. In my view, a statute

with these effects bears a substantial burden of justification when attacked under the *Fourteenth Amendment*. *Yick Wo v. Hopkins, 118 U.S. 356*; *Skinner v. Oklahoma, 316 U.S. 535*; *Schware v. Board of Bar Examiners, 353 U.S. 232*; *McLaughlin v. Florida, 379 U.S. 184, 192*.

An examination of the justification offered, however, cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demeans the marriage relationship. The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under **[*504]** the **[****41]** cases of this Court, require "strict scrutiny," *Skinner v. Oklahoma, 316 U.S. 535, 541*, and "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker, 364 U.S. 479, 488*. **[***527]** "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. Little Rock, 361 U.S. 516, 524*. See also *McLaughlin v. Florida, 379 U.S. 184*. But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause. *Zemel v. Rusk, 381 U.S. 1*. [*]

[*] Dissenting opinions assert that the liberty guaranteed by the Due Process Clause is limited to a guarantee against unduly vague statutes and against procedural unfairness at trial. Under this view the Court is without authority to ascertain whether a challenged statute, or its application, has a permissible purpose and whether the manner of regulation bears a rational or justifying relationship to this purpose. A long line of cases makes very clear that this has not been the view of this Court. *Dent v. West Virginia, 129 U.S. 114*; *Jacobson v. Massachusetts, 197 U.S. 11*; *Douglas v. Noble, 261 U.S. 165*; *Meyer v. Nebraska, 262 U.S. 390*; *Pierce v. Society of Sisters, 268 U.S. 510*; *Schware v. Board of Bar Examiners, 353 U.S. 232*; *Aptheker v. Secretary of State, 378 U.S. 500*; *Zemel v. Rusk, 381 U.S. 1*.

The traditional due process test was well articulated, and applied, in *Schware v. Board of Bar Examiners, supra*, a case which placed no reliance on the specific guarantees of the *Bill of Rights*.

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or *Equal Protection Clause of the Fourteenth Amendment*. *Dent v. West Virginia, 129 U.S. 114*. Cf. *Slochower v. Board of Education, 350 U.S. 551*; *Wieman v. Updegraff, 344 U.S. 183*. And see *Ex parte Secombe, 19 How. 9, 13*. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Douglas v. Noble, 261 U.S. 165*; *Cummings v. Missouri, 4 Wall. 277, 319-320*. Cf. *Nebbia v. New York, 291 U.S. 502*. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." *353 U.S., at 238-239*. Cf. *Martin v. Walton, 368 U.S. 25, 26* (DOUGLAS, J., dissenting).

**[****42]** **[*505]** **[**1693]** As I read the opinions of the Connecticut courts and the argument of Connecticut in this Court, the State claims but one justification for its anti-use statute. Cf. *Allied Stores of Ohio v. Bowers, 358 U.S. 522, 530*; *Martin v. Walton, 368 U.S. 25, 28* (DOUGLAS, J., dissenting). There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion. Rather, the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal.

Without taking issue with the premise that the fear of conception operates as a deterrent to such relationships in addition to the criminal proscriptions Connecticut has **[***528]** against such conduct, I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships. See *Schware v. Board of Bar Examiners, 353 U.S. 232, 239*. **[****43]** Connecticut does not bar the importation or possession of contraceptive devices; they are not considered contraband material under state law, *State v. Certain Contraceptive Materials, 126 Conn. 428, 11 A. 2d 863*, and their availability in that State is not seriously disputed. The only way Connecticut seeks to limit or control the availability of such devices is through its general aiding and abetting statute whose operation in this context has **[*506]** been quite obviously ineffective and whose most serious use has been against birth-control clinics rendering advice to married, rather than unmarried, persons. Cf. *Yick Wo v. Hopkins, 118 U.S. 356*. Indeed, after over 80 years of the State's proscription of use, the legality of the sale of such devices to prevent disease has never been expressly passed upon, although it appears that sales have long occurred and have only infrequently been

challenged. This "undeviating policy . . . throughout all the long years . . . bespeaks more than prosecutorial paralysis." *Poe v. Ullman, 367 U.S. 497, 502*. Moreover, it would appear that the sale of contraceptives **[****44]** to prevent disease is plainly legal under Connecticut law.

In these circumstances one is rather hard pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the State's policy against such relationships. Neither the state courts nor the State before the bar of this Court has tendered such an explanation. It is purely fanciful to believe that the broad proscription on use facilitates discovery of use by persons engaging in a prohibited relationship or for some other reason makes such use more unlikely and thus can be supported by any sort of administrative consideration. Perhaps the theory is that the flat ban on use prevents married people from possessing contraceptives and without the ready availability of such devices for use in the marital relationship, there **[**1694]** will be no or less temptation to use them in extramarital ones. This reasoning rests on the premise that married people will comply with the ban in regard to their marital relationship, notwithstanding total nonenforcement in this context and apparent nonenforcibility, but will not comply with **[****45]** criminal statutes prohibiting extramarital affairs and the anti-use statute in respect to illicit sexual relationships, a premise whose validity has not been **[*507]** demonstrated and whose intrinsic validity is not very evident. At most the broad ban is of marginal utility to the declared objective. A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness, or ineffectiveness, as the broad anti-use statute under attack in this case. I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.

**Dissent by:** BLACK; STEWART

## Dissent

**[***529]** MR. JUSTICE BLACK, with whom MR. JUSTICE STEWART joins, dissenting.

I agree with my Brother STEWART'S dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained **[****46]** to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers HARLAN, WHITE and GOLDBERG who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe -- except their conclusion that the evil qualities they see in the law make it unconstitutional.

Had the doctor defendant here, or even the nondoctor defendant, been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be desirable, or for telling people how devices could be used, I can think of no reasons at this time why their expressions of views would not be **[*508]** protected by the *First* and *Fourteenth Amendments*, which guarantee freedom of speech. Cf. *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1*; *NAACP v. Button, 371 U.S. 415*. But speech is **[****47]** one thing; conduct and physical activities are quite another. See, *e. g.*, *Cox v. Louisiana, 379 U.S. 536, 554-555*; *Cox v. Louisiana, 379 U.S. 559, 563-564*; *id., 575-584* (concurring opinion); *Giboney v. Empire Storage & Ice Co., 336 U.S. 490*; cf. *Reynolds v. United States, 98 U.S. 145, 163-164*. The two defendants here were active participants in an organization which gave physical examinations to women, advised them what kind of contraceptive devices or medicines would most likely be satisfactory for them, and then supplied the devices themselves, all for a graduated scale of fees, based on the family income. Thus these defendants admittedly engaged with others in a planned course of conduct to help people violate the Connecticut law. Merely because some speech was used in carrying on that conduct -- just as in ordinary life some speech accompanies most kinds of conduct -- we are not in my view justified in holding that the *First Amendment* forbids the State to punish their conduct. Strongly as I desire to protect all *First Amendment* freedoms, I am unable to stretch **[****48]** the Amendment **[**1695]** so as to afford protection to the conduct of these defendants in violating the Connecticut law. What would be the constitutional fate of the law if hereafter applied to punish nothing but speech is, as I have said, quite another matter.

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are **[***530]** designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the *Fourth **[*509]** Amendment's* guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any *Bill of Rights* provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately **[****49]** and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the *Fourth Amendment's* guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that *First Amendment* freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the *First Amendment* in construing it, instead of invoking multitudes of words substituted for those the Framers used. **[****50]** See, *e. g., New York Times Co.* v. *Sullivan, 376 U.S. 254, 293* (concurring opinion); cases collected in *City of El Paso v. Simmons, 379 U.S. 497, 517, n. 1* (dissenting opinion); Black, The *Bill of Rights*, 35 N. Y. U. L. Rev. 865. For these reasons I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from **[*510]** one or more constitutional provisions. [1] I like **[**1696]** my privacy as well **[***531]** as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

**[****51]** This brings me to the arguments made by my Brothers HARLAN, WHITE and GOLDBERG for invalidating the Connecticut law. Brothers HARLAN [2] and WHITE would invalidate it by reliance on the *Due Process Clause of the Fourteenth Amendment*, but Brother GOLDBERG, while agreeing with Brother HARLAN, relies also on the *Ninth Amendment*. I have no doubt that the Connecticut law could be applied in such a way as to abridge freedom of **[*511]** speech and press and therefore violate the *First* and *Fourteenth Amendments*. My disagreement with the Court's opinion holding that there is such a violation here is a narrow one, relating to the application of the *First Amendment* to the facts and circumstances of this particular case. But my disagreement with Brothers HARLAN, WHITE and GOLDBERG is more basic. I think that if properly construed neither the Due Process Clause nor the *Ninth Amendment*, nor both together, could under any circumstances be a proper basis for

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[1] The phrase "right to privacy" appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890 which urged that States should give some form of tort relief to persons whose private affairs were exploited by others. The Right to Privacy, 4 Harv. L. Rev. 193. Largely as a result of this article, some States have passed statutes creating such a cause of action, and in others state courts have done the same thing by exercising their powers as courts of common law. See generally 41 Am. Jur. 926-927. Thus the Supreme Court of Georgia, in granting a cause of action for damages to a man whose picture had been used in a newspaper advertisement without his consent, said that "A right of privacy in matters purely private is . . . derived from natural law" and that "The conclusion reached by us seems to be . . . thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law . . . ." *Pavesich v. New England Life Ins. Co., 122 Ga. 190, 194, 218, 50 S. E. 68, 70, 80*. Observing that "the right of privacy . . . presses for recognition here," today this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with "privacy."

[2] Brother HARLAN'S views are spelled out at greater length in his dissenting opinion in *Poe v. Ullman, 367 U.S. 497, 539-555*.

invalidating the Connecticut law. I discuss the due process and *Ninth Amendment* arguments together because on analysis they turn out to be the same thing -- merely using different words to claim for this Court and the federal judiciary **[****52]** power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.

The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." [3] **[****55]** If these formulas based on "natural justice," or others which mean the same thing, [4] **[****56]** are to prevail, they require **[**1697]** judges to determine **[*512]** what is or is not constitutional on **[***532]** the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative **[****53]** body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. I readily admit that no legislative body, state or national, should pass laws that can justly be given any **[*513]** of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose. While I completely subscribe to the holding of *Marbury v. Madison, 1 Cranch 137*, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is **[****54]** offensive to our own notions of "civilized standards of conduct." [5] **[***533]** Such an appraisal of the wisdom

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[3] Indeed, Brother WHITE appears to have gone beyond past pronouncements of the natural law due process theory, which at least said that the Court should exercise this unlimited power to declare state acts unconstitutional with "restraint." He now says that, instead of being presumed constitutional (see *Munn v. Illinois, 94 U.S. 113, 123*; compare *Adkins v. Children's Hospital, 261 U.S. 525, 544)*, the statute here "bears a substantial burden of justification when attacked under the *Fourteenth Amendment*."

[4] A collection of the catchwords and catch phrases invoked by judges who would strike down under the *Fourteenth Amendment* laws which offend their notions of natural justice would fill many pages. Thus it has been said that this Court can forbid state action which "shocks the conscience," *Rochin v. California, 342 U.S. 165, 172*, sufficiently to "shock itself into the protective arms of the Constitution," *Irvine v. California, 347 U.S. 128, 138* (concurring opinion). It has been urged that States may not run counter to the "decencies of civilized conduct," *Rochin, supra, at 173*, or "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts, 291 U.S. 97, 105*, or to "those canons of decency and fairness which express the notions of justice of English-speaking peoples," *Malinski v. New York, 324 U.S. 401, 417* (concurring opinion), or to "the community's sense of fair play and decency," *Rochin, supra, at 173*. It has been said that we must decide whether a state law is "fair, reasonable and appropriate," or is rather "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into . . . contracts," *Lochner v. New York, 198 U.S. 45, 56*. States, under this philosophy, cannot act in conflict with "deeply rooted feelings of the community," *Haley v. Ohio, 332 U.S. 596, 604* (separate opinion), or with "fundamental notions of fairness and justice," *id., 607*. See also, *e. g., Wolf v. Colorado, 338 U.S. 25, 27* ("rights . . . basic to our free society"); *Hebert v. Louisiana, 272 U.S. 312, 316* ("fundamental principles of liberty and justice"); *Adkins v. Children's Hospital, 261 U.S. 525, 561* ("arbitrary restraint of . . . liberties"); *Betts v. Brady, 316 U.S. 455, 462* ("denial of fundamental fairness, shocking to the universal sense of justice"); *Poe v. Ullman, 367 U.S. 497, 539* (dissenting opinion) ("intolerable and unjustifiable"). Perhaps the clearest, frankest and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can "not tolerate." *Linkletter* v. *Walker, post*, p. 618, at 631.

[5] See Hand, The *Bill of Rights* (1958) 70:

"Judges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' 'fundamental,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision." See also *Rochin v. California, 342 U.S. 165, 174* (concurring

of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination -- a power which was specifically **[**1698]** denied to federal courts by the convention that framed the Constitution. [6]

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opinion). But see *Linkletter* v. *Walker, supra*, n. 4, at 631.

[6] This Court held in *Marbury v. Madison, 1 Cranch 137*, that this Court has power to invalidate laws on the ground that they exceed the constitutional power of Congress or violate some specific prohibition of the Constitution. See also *Fletcher v. Peck, 6 Cranch 87*. But the Constitutional Convention did on at least two occasions reject proposals which would have given the federal judiciary a part in recommending laws or in vetoing as bad or unwise the legislation passed by the Congress. Edmund Randolph of Virginia proposed that the President

". . . and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [original word illegible] of the members of each branch." 1 The Records of the Federal Convention of 1787 (Farrand ed. 1911) 21.

In support of a plan of this kind James Wilson of Pennsylvania argued that:

". . . It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature." 2 *id., at 73*.

Nathaniel Gorham of Massachusetts "did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures." *Ibid*.

Elbridge Gerry of Massachusetts likewise opposed the proposal for a council of revision:

". . . He relied for his part on the Representatives of the people as the guardians of their Rights & interests. It [the proposal] was making the Expositors of the Laws, the Legislators which ought never to be done." *Id., at 75*.

And at another point:

"Mr. Gerry doubts whether the Judiciary ought to form a part of it [the proposed council of revision], as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. . . . It was quite foreign from the nature of ye. office to make them judges of the policy of public measures." 1 *Id*., at 97-98.

Madison supported the proposal on the ground that "a Check [on the legislature] is necessary." *Id., at 108*. John Dickinson of Delaware opposed it on the ground that "the Judges must interpret the Laws they ought not to be legislators." *Ibid*. The proposal for a council of revision was defeated.

The following proposal was also advanced:

"To assist the President in conducting the Public affairs there shall be a Council of State composed of the following officers -- 1. The Chief Justice of the Supreme Court, who shall from time to time recommend such alterations of and additions to the laws of the U.S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union . . . ." 2 *id., at 342*. This proposal too was rejected.

**[****57]** **[*514]** Of the cases on which my Brothers WHITE and GOLDBERG rely so heavily, undoubtedly the reasoning of two of them supports their result here -- as would that of a number of others which they do not bother to name, *e. g.,* ***[*515]*** *Lochner v. New York, 198 U.S. 45*, **[***534]** *Coppage v. Kansas, 236 U.S. 1*, *Jay Burns Baking Co*. v. *Bryan, 264 U.S. 504*, and *Adkins v. Children's Hospital, 261 U.S. 525*. The two they do cite and quote from, *Meyer v. Nebraska, 262 U.S. 390*, and *Pierce v. Society of Sisters, 268 U.S. 510*, were both decided in opinions **[**1699]** by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in *Lochner v. New York, supra*, one of the cases on which he relied in *Meyer*, along with such other long-discredited decisions as, *e. g., Adams v. Tanner, 244 U.S. 590*, and *Adkins v. Children's Hospital, supra.* *Meyer* held unconstitutional, as an "arbitrary" and unreasonable interference with the right of a teacher to **[****58]** carry on his occupation and of parents to hire him, a **[*516]** state law forbidding the teaching of modern foreign languages to young children in the schools. [7] **[****60]** And in *Pierce*, relying

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[7] In *Meyer*, in the very same sentence quoted in part by my Brethren in which he asserted that the Due Process Clause gave an abstract and inviolable right "to marry, establish a

principally on *Meyer*, Mr. Justice McReynolds said that a state law requiring that all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an "arbitrary, unreasonable and unlawful interference" which threatened "destruction of their business and property." *268 U.S., at 536*. Without expressing an opinion as to whether either of those cases reached a correct result in light of our later decisions applying the *First Amendment* to the States through the Fourteenth, [8] I merely point out that the reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept. Brothers WHITE and GOLDBERG also cite other cases, such as *NAACP v. Button, 371 U.S. 415*, *Shelton v. Tucker, 364 U.S. 479*, and *Schneider v. State, 308 U.S. 147*, which held that States **[****59]** in regulating conduct could not, consistently with the *First Amendment* as applied to them by the Fourteenth, pass unnecessarily broad laws which might indirectly infringe on *First Amendment* freedoms. [9] See *Brotherhood of Railroad Trainmen v. Virginia ex rel. [*517] Virginia State Bar, 377 U.S. 1, 7-8*. [10] **[****61]** Brothers WHITE and GOLDBERG **[***535]** **[**1700]** now apparently would start from this requirement that laws be narrowly drafted so as not to curtail free speech and assembly, and extend it limitlessly to require States to justify any law restricting "liberty" as my Brethren define "liberty." This would mean at the **[*518]** very least, I suppose, that every state criminal statute -- since it must inevitably curtail "liberty" to some extent -- would be suspect, and would have to be justified to this Court. [11]

My Brother GOLDBERG has adopted the recent discovery [12] **[****65]** that the *Ninth Amendment* as well

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home and bring up children," Mr. Justice McReynolds also asserted the heretofore discredited doctrine that the Due Process Clause prevented States from interfering with "the right of the individual to contract." *262 U.S., at 399*.

[8] Compare *Poe v. Ullman, 367 U.S., at 543-544* (HARLAN, J., dissenting).

[9] The Court has also said that in view of the *Fourteenth Amendment's* major purpose of eliminating state-enforced racial discrimination, this Court will scrutinize carefully any law embodying a racial classification to make sure that it does not deny equal protection of the laws. See *McLaughlin v. Florida, 379 U.S. 184*.

[10] None of the other cases decided in the past 25 years which Brothers WHITE and GOLDBERG cite can justly be read as holding that judges have power to use a natural law due process formula to strike down all state laws which they think are unwise, dangerous, or irrational. *Prince v. Massachusetts, 321 U.S. 158*, *upheld* a state law forbidding minors from selling publications on the streets. *Kent v. Dulles, 357 U.S. 116*, recognized the power of Congress to restrict travel outside the country so long as it accorded persons the procedural safeguards of due process and did not violate any other specific constitutional provision. *Schware v. Board of Bar Examiners, 353 U.S. 232*, held simply that a State could not, consistently with due process, refuse a lawyer a license to practice law on the basis of a finding that he was morally unfit when there was no evidence in the record, *353 U.S., at 246-247*, to support such a finding. Compare *Thompson v. City of Louisville, 362 U.S. 199*, in which the Court relied in part on *Schware*. See also *Konigsberg v. State Bar, 353 U.S. 252*. And *Bolling v. Sharpe, 347 U.S. 497*, merely recognized what had been the understanding from the beginning of the country, an understanding shared by many of the draftsmen of the *Fourteenth Amendment*, that the whole *Bill of Rights*, including the *Due Process Clause of the Fifth Amendment*, was a guarantee that all persons would receive equal treatment under the law. Compare *Chambers v. Florida, 309 U.S. 227, 240-241*. With one exception, the other modern cases relied on by my Brethren were decided either solely under the *Equal Protection Clause of the Fourteenth Amendment* or under the *First Amendment*, made applicable to the States by the Fourteenth, some of the latter group involving the right of association which this Court has held to be a part of the rights of speech, press and assembly guaranteed by the *First Amendment*. As for *Aptheker v. Secretary of State, 378 U.S. 500*, I am compelled to say that if that decision was written or intended to bring about the abrupt and drastic reversal in the course of constitutional adjudication which is now attributed to it, the change was certainly made in a very quiet and unprovocative manner, without any attempt to justify it.

[11] Compare *Adkins v. Children's Hospital, 261 U.S. 525, 568* (Holmes, J., dissenting):

"The earlier decisions upon the same words [the Due Process Clause] in the *Fourteenth Amendment* began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts."

[12] See Patterson, The Forgotten *Ninth Amendment* (1955). Mr. Patterson urges that the *Ninth Amendment* be used to protect unspecified "natural and inalienable rights." P. 4. The Introduction by Roscoe Pound states that "there is a marked revival of natural law ideas throughout the world. Interest in

as the Due Process **[***536]** Clause can be used by this Court as authority to strike down all state legislation which this Court thinks **[*519]** violates "fundamental principles of liberty and justice," or is contrary to the "traditions and [collective] conscience of our people." He also states, **[****62]** without proof satisfactory to me, that in making decisions on this basis judges will not consider "their personal and private notions." One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll. [13] And **[**1701]** the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "[collective] conscience of our people." Moreover, one would certainly have to look far beyond the language of the *Ninth Amendment* [14] to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. The whole history of the adoption of the Constitution and *Bill of Rights* points the other way, and the very material quoted by my Brother GOLDBERG shows that the *Ninth Amendment* was intended to protect against the idea that "by enumerating particular exceptions to the grant of power" to the Federal Government, "those rights which were not singled out, were intended to be assigned into the hands of the General Government **[****63]** [the United States], and were consequently **[*520]** insecure." [15] That Amendment was passed, not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the "[collective] conscience of our people" is vested in this Court by the *Ninth Amendment*, the *Fourteenth Amendment*, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court. This fact is perhaps responsible for the peculiar phenomenon that for a period of a century and a half no serious suggestion **[***537]** was ever made that the *Ninth Amendment*, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would **[****64]** make of this Court's members a day-to-day constitutional convention.

**[****66]** I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision **[*521]** of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of

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the *Ninth Amendment* is a symptom of that revival." P. iii.

In Redlich, Are There "Certain Rights . . . Retained by the People"?, 37 N. Y. U. L. Rev. 787, Professor Redlich, in advocating reliance on the *Ninth* and *Tenth Amendments* to invalidate the Connecticut law before us, frankly states:

"But for one who feels that the marriage relationship should be beyond the reach of a state law forbidding the use of contraceptives, the birth control case poses a troublesome and challenging problem of constitutional interpretation. He may find himself saying, 'The law is unconstitutional -- but why?' There are two possible paths to travel in finding the answer. One is to revert to a frankly flexible due process concept even on matters that do not involve specific constitutional prohibitions. The other is to attempt to evolve a new constitutional framework within which to meet this and similar problems which are likely to arise." *Id.*, at 798.

[13] Of course one cannot be oblivious to the fact that Mr. Gallup has already published the results of a poll which he says show that 46% of the people in this country believe schools should teach about birth control. Washington Post, May 21, 1965, p. 2, col. 1. I can hardly believe, however, that Brother GOLDBERG would view 46% of the persons polled as so overwhelming a proportion that this Court may now rely on it to declare that the Connecticut law infringes "fundamental" rights, and overrule the long-standing view of the people of Connecticut expressed through their elected representatives.

[14] *U.S. Const., Amend. IX*, provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[15] 1 Annals of Congress 439. See also II Story, Commentaries on the Constitution of the United States (5th ed. 1891): "This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies." *Id., at 651* (footnote omitted).

the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to **[**1702]** a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution **[****67]** plainly intended them to have. [16]

**[****68]** **[*522]** I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or **[***538]** the *Ninth Amendment* or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, *e. g.,* **[****69]** *Lochner v. New York, 198 U.S. 45*. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like *West Coast Hotel Co*. v. *Parrish, 300 U.S. 379*; *Olsen v. Nebraska ex rel. Western Reference & Bond Assn., 313 U.S. 236*, and many other **[*523]** opinions. [17] See also *Lochner v. New York, 198 U.S. 45, 74* **[**1703]** (Holmes, J., dissenting).

**[****70]** In *Ferguson v. Skrupa, 372 U.S. 726, 730*, this Court two years ago said in an opinion joined by all the Justices but one [18] that

"The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded. We have returned to the original constitutional proposition that courts do not

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[16] Justice Holmes in one of his last dissents, written in reply to Mr. Justice McReynolds' opinion for the Court in *Baldwin v. Missouri, 281 U.S. 586*, solemnly warned against a due process formula apparently approved by my concurring Brethren today. He said:

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the *Fourteenth Amendment* in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law,' if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the *Fourteenth Amendment* as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass." *281 U.S., at 595*. See 2 Holmes-Pollock Letters (Howe ed. 1941) 267-268.

[17] *E. g.*, in *Day-Brite Lighting, Inc*. v. *Missouri, 342 U.S. 421, 423*, this Court held that "Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."

Compare ***Gardner v. Massachusetts, 305 U.S. 559***, which the Court today apparently overrules, which held that a challenge under the Federal Constitution to a state law forbidding the sale or furnishing of contraceptives did not raise a substantial federal question.

[18] Brother HARLAN, who has consistently stated his belief in the power of courts to strike down laws which they consider arbitrary or unreasonable, see, *e. g., Poe v. Ullman, 367 U.S. 497, 539-555* (dissenting opinion), did not join the Court's opinion in *Ferguson* v. *Skrupa*.

substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

And only six weeks ago, without even bothering to hear argument, this Court overruled *Tyson & Brother v. Banton, 273 U.S. 418*, which had held state laws regulating ticket brokers to be a denial of due process of law. [19] *Gold* ***[*524]*** *v. DiCarlo, 380 U.S. 520.* I find April's holding hard to square with what my concurring Brethren urge today. They would reinstate the *Lochner, Coppage, Adkins, Burns* line of cases, cases from which this Court recoiled after the 1930's, and which had been I thought totally discredited until **[***539]** now. Apparently **[****71]** my Brethren have less quarrel with state economic regulations than former Justices of their persuasion had. But any limitation upon their using the natural law due process philosophy to strike down any state law, dealing with any activity whatever, will obviously be only self-imposed. [20]

**[****72]** In 1798, when this Court was asked to hold another Connecticut law unconstitutional, Justice Iredell said:

"It has been the policy of all the *American* states, which have, individually, framed their state constitutions since the revolution, and of the people of the *United States*, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will **[**1704]** never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the **[*525]** general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed **[****73]** upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." *Calder* v. *Bull*, 3 Dall. 386, 399 (emphasis in original).

I would adhere to that constitutional philosophy in passing on this Connecticut law today. I am not persuaded to deviate from the view which I stated in 1947 in *Adamson v. California, 332 U.S. 46, 90-92* (dissenting opinion):

"Since *Marbury v. Madison, 1 Cranch 137*, was decided, the practice has been firmly established, for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the *Bill of Rights* and other **[****74]** parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another. 'In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into **[***540]** the Constitution: in the other, they roam at will in the limitless **[*526]** area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.' *Federal Power Commission v. Pipeline Co., 315 U.S. 575, 599, 601, n. 4*." [21] **[****76]** (Footnotes omitted.)

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[19] Justice Holmes, dissenting in *Tyson*, said:

"I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." *273 U.S., at 446*.

[20] Compare *Nicchia v. New York, 254 U.S. 228, 231*, upholding a New York dog-licensing statute on the ground that it did not "deprive dog owners of liberty without due process of law." And as I said concurring in *Rochin v. California, 342 U.S. 165, 175*, "I believe that faithful adherence to the specific guarantees in the *Bill of Rights* insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards" urged by my concurring Brethren today.

[21] *Gideon v. Wainwright, 372 U.S. 335*, and similar cases

The late Judge Learned Hand, after emphasizing his view that judges should not **[**1705]** use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their "personal preferences," [22] made the statement, with which I fully agree, that:

"For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I **[*527]** knew how to choose them, which I assuredly do not." [23]

So far as I am concerned, Connecticut's **[****75]** law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK joins, dissenting.

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applying specific *Bill of Rights* provisions to the States do not in my view stand for the proposition that this Court can rely on its own concept of "ordered liberty" or "shocking the conscience" or natural law to decide what laws it will permit state legislatures to enact. *Gideon* in applying to state prosecutions the *Sixth Amendment's* guarantee of right to counsel followed *Palko v. Connecticut, 302 U.S. 319*, which had held that specific provisions of the *Bill of Rights*, rather than the *Bill of Rights* as a whole, would be selectively applied to the States. While expressing my own belief (not shared by MR. JUSTICE STEWART) that all the provisions of the *Bill of Rights* were made applicable to the States by the *Fourteenth Amendment*, in my dissent in *Adamson v. California, 332 U.S. 46, 89*, I also said:

"If the choice must be between the selective process of the *Palko* decision applying some of the *Bill of Rights* to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process."

*Gideon* and similar cases merely followed the *Palko* rule, which in *Adamson* I agreed to follow if necessary to make *Bill of Rights* safeguards applicable to the States. See also *Pointer v. Texas, 380 U.S. 400*; *Malloy v. Hogan, 378 U.S. 1*.

[22] Hand, The *Bill of Rights* (1958) 70. See note 5, *supra*. See generally *id., at 35-45*.

[23] *Id., at 73*. While Judge Hand condemned as unjustified the invalidation of state laws under the natural law due process formula, see *id., at 35-45*, he also expressed the view that this Court in a number of cases had gone too far in holding legislation to be in violation of specific guarantees of the *Bill of Rights*. Although I agree with his criticism of use of the due process formula, I do not agree with all the views he expressed about construing the specific guarantees of the *Bill of Rights*.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private **[****77]** choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to **[***541]** hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. **[*528]** But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We *are* told that the *Due Process Clause of the Fourteenth Amendment* is not, as such, the "guide" in this case. With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day **[****78]** has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws. Compare *Lochner v. New York, 198 U.S. 45*, with *Ferguson v. Skrupa, 372 U.S. 726*. My Brothers HARLAN and WHITE to the contrary, "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, supra, at 730*.

As to the *First*, *Third*, *Fourth*, and *Fifth Amendments*, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States. [1] It

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[1] The Amendments in question were, as everyone knows, originally adopted as limitations upon the power of the newly created Federal Government, not as limitations upon the

has **[*529]** not even been argued **[**1706]** that this is a law "respecting an establishment of religion, or prohibiting the free exercise thereof." [2] **[****80]** And surely, unless the solemn process of constitutional adjudication is to descend to the level of a play on words, there is not involved here any abridgment of "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and **[****79]** to petition the Government for a redress of grievances." [3] No soldier has been quartered in any house. [4] There has been no search, and no seizure. [5] Nobody has been compelled **[***542]** to be a witness against himself. [6]

The Court also quotes the *Ninth Amendment*, and my Brother GOLDBERG's concurring opinion relies heavily upon it. But to say that the *Ninth Amendment* has anything to do with this case is to turn somersaults with history. The *Ninth Amendment*, like its companion the Tenth, which this Court held "states but a truism that all is retained which has not been surrendered," *United States v. Darby, 312 U.S. 100, 124*, was framed by James Madison and adopted by the States simply to make clear that the adoption of the *Bill of Rights* did not alter the plan **[****81]** that **[*530]** the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the *Ninth Amendment* meant anything else, and the idea that a federal court could ever use the *Ninth Amendment* to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the *Bill of Rights*, in any other part of the Constitution, or in any case ever before decided by this Court. [7]

**[****82]** At **[**1707]** the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial **[*531]** duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true *Ninth* and *Tenth Amendment* rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books. [8]

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powers of the individual States. But the Court has held that many of the provisions of the first eight amendments are fully embraced by the *Fourteenth Amendment* as limitations upon state action, and some members of the Court have held the view that the adoption of the *Fourteenth Amendment* made every provision of the first eight amendments fully applicable against the States. See *Adamson v. California, 332 U.S. 46, 68* (dissenting opinion of MR. JUSTICE BLACK).

[2] *U.S. Constitution, Amendment I*. To be sure, the injunction contained in the Connecticut statute coincides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the *First Amendment* relating to religion, then most criminal laws would be invalidated. See, *e. g.*, the Ten Commandments. The Bible, Exodus 20:2-17 (King James).

[3] *U.S. Constitution, Amendment I*. If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial *First Amendment* claim. But their activities went far beyond mere advocacy. They prescribed specific contraceptive devices and furnished patients with the prescribed contraceptive materials.

[4] *U.S. Constitution, Amendment III*.

[5] *U.S. Constitution, Amendment IV*.

[6] *U.S. Constitution, Amendment V*.

[7] Cases like *Shelton v. Tucker, 364 U.S. 479* and *Bates v. Little Rock, 361 U.S. 516*, relied upon in the concurring opinions today, dealt with true *First Amendment* rights of association and are wholly inapposite here. See also, *e. g., NAACP v. Alabama, 357 U.S. 449*; *Edwards v. South Carolina, 372 U.S. 229*. Our decision in *McLaughlin v. Florida, 379 U.S. 184*, is equally far afield. That case held invalid under the *Equal Protection Clause*, a state criminal law which discriminated against Negroes.

The Court does not say how far the new constitutional right of privacy announced today extends. See, *e. g.*, Mueller, Legal Regulation of Sexual Conduct, at 127; Ploscowe, Sex and the Law, at 189. I suppose, however, that even after today a State can constitutionally still punish at least some offenses which are not committed in public.

[8] See *Reynolds v. Sims, 377 U.S. 533, 562*. The Connecticut House of Representatives recently passed a bill (House Bill

**[****83]**

## References

Annotation References:

Validity of regulations as to contraceptives or the dissemination of birth control information. *96 ALR2d 955*.

Right of privacy. *138 ALR 22, 168 ALR 446, 14 ALR2d 750*.

The Supreme Court and the right of free speech and press. 93 L ed 1151, 2 L ed 2d 1706, 11 L ed 2d 1116.

Validity of statutes or other regulations as to the use, or teaching, of foreign languages in schools. 7 ALR 1695, 29 ALR 1452.

Schools: extent of legislative power with respect to attendance and curriculum. 39 ALR 477, 53 ALR 832.

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No. 2462) repealing the birth control law. The State Senate has apparently not yet acted on the measure, and today is relieved of that responsibility by the Court. New Haven Journal-Courier, Wed., May 19, 1965, p. 1, col. 4, and p. 13, col. 7.

POLITICO

LEGAL

# Justice Thomas: SCOTUS 'should reconsider' contraception, same-sex marriage rulings

Democrats warned that the court would seek to undo other constitutional rights if it overturned Roe v. Wade, as it did on Friday.

Abortion rights advocate Sadie Kuhns holds a sign outside the U.S. Supreme Court after the court announced its decision in Dobbs v. Jackson to overturn Roe v. Wade on June 24, 2022. | Francis Chung/E&E News/POLITICO

By **QUINT FORGEY** and **JOSH GERSTEIN**
06/24/2022 11:24 AM EDT
Updated: 06/24/2022 01:45 PM EDT

Justice Clarence Thomas argued in a concurring opinion released on Friday that the Supreme Court "should reconsider" its past rulings codifying rights to contraception access, same-sex relationships and same-sex marriage.

The sweeping suggestion from the current court's longest-serving justice came in the concurring opinion he authored in response to the court's ruling revoking the constitutional right to abortion, also released on Friday.



In his concurring opinion, Thomas — an appointee of President George H.W. Bush — wrote that the justices "should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*" — referring to three cases having to do with Americans' fundamental privacy, due process and equal protection rights.

Since May, when POLITICO published an initial draft majority opinion of the court's decision on Friday to strike down *Roe v. Wade*, Democratic politicians have repeatedly warned that such a ruling would lead to the reversal of other landmark privacy-related cases.

**SUPREME COURT OVERTURNS *ROE V. WADE***

The Supreme Court has voted to strike down *Roe v. Wade*, the landmark case that upheld abortion rights for the past 50 years.

- Read the court's official opinion ...
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- Abortion statistics by state, visualized
- How an investigation into the release could make the court extremely uncomfortable

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"If the rationale of the decision as released were to be sustained, a whole range of rights are in question. A whole range of rights," President Joe Biden said of the draft opinion at the time. "And the idea [that] we're letting the states make those decisions, localities make those decisions, would be a fundamental shift in what we've done."



The court's liberal wing — Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan — echoed those concerns in a dissenting opinion released on Friday, writing that "no one should be confident that this majority is done with its work."

The constitutional right to abortion "does not stand alone," the three justices wrote. "To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation."

The court's past rulings in *Roe*, *Griswold v. Connecticut*, *Lawrence v. Texas*, *Obergefell v. Hodges* and other cases "are all part of the same constitutional fabric," the three justices continued, "protecting autonomous decisionmaking over the most personal of life decisions."

The court's majority opinion, written by Justice Samuel Alito, repeatedly insists that the justices' decision to abandon *Roe* poses no threat to other precedents.

"Our decision concerns the constitutional right to abortion and no other right," Alito wrote. "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."

However, the court's liberal wing argued that assurance was unsatisfactory, given Thomas' simultaneous invitation on Friday to open up numerous other precedents for review.

"The first problem with the majority's account comes from [Thomas'] concurrence — which makes clear he is not with the program," Breyer, Sotomayor and Kagan wrote, adding: "At least one Justice is planning to use the ticket of today's decision again and again and again."



Still, no other justice joined Thomas' concurring opinion, which largely reiterated his long-stated views on the legal theories behind many of those decisions.

Furthermore, it appears doubtful that many of Thomas' conservative colleagues would be eager to revisit issues like contraception and same-sex marriage anytime soon, considering the claims in Alito's majority opinion that the court's ruling on Friday casts no doubt on those decisions.

> We'll be on Twitter Spaces to discuss the Supreme Court's landmark decision to overturn *Roe v. Wade* with Josh Gerstein, the reporter who broke the news of the leaked draft opinion in May. Join us at 3 p.m. ET:
> https://twitter.com/i/spaces/1LyxBoayjPoKN

Still, by declining to explicitly repudiate Thomas' stance, his conservative colleagues provided fodder to the court's liberal members and left-leaning critics to warn that more overrulings of precedent are on the way.

Of those in the majority on Friday, Justice Brett Kavanaugh came closest to rejecting Thomas' position, although without mentioning him by name. In a solo concurring opinion, Kavanaugh wrote: "Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents."

Speaking from the White House shortly after the decision was released, Biden directly invoked Thomas' concurring opinion and reasserted that the ruling "risks the broader right to privacy for everyone."

"*Roe* recognized the fundamental right to privacy that has served as a basis for so many more rights that we've come to take for granted, that are ingrained in the fabric of this country," Biden said. "The right to make the best decisions for your health. The right to use birth control. A married couple in the privacy of their bedroom, for God's sake. The right to marry the person you love."

With his concurring opinion, Thomas "explicitly called to reconsider the right of marriage equality [and] the right of couples to make their choices on contraception," Biden continued. "This [is an] extreme and dangerous path the court is now taking us on."

**FILED UNDER:** LEGAL

# Lawrence v. Texas

Supreme Court of the United States

March 26, 2003, Argued ; June 26, 2003, Decided

No. 02-102

**Reporter**
539 U.S. 558 *; 123 S. Ct. 2472 **; 156 L. Ed. 2d 508 ***; 2003 U.S. LEXIS 5013 ****; 71 U.S.L.W. 4574; 2003 Cal. Daily Op. Service 5559; 2003 Daily Journal DAR 7036; 16 Fla. L. Weekly Fed. S 427

JOHN GEDDES LAWRENCE and TYRON GARNER, Petitioners v. TEXAS

**Prior History: [****1]** ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT.

*Lawrence v. State, 41 S.W.3d 349, 2001 Tex. App. LEXIS 1776 (Tex. App. Houston 14th Dist., 2001)*

**Disposition:** *41 S. W. 3d 349*, reversed and remanded.

## 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 **[***513]** 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, 92 L. Ed. 2d 140, 106 S. Ct. 2841,* **[****2]** 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*.

(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 US, at 190, 92 L Ed 2d 140, 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 not more than prohibit a particular sexual act, their penalties and purposes have more far-reaching consequences, touching **[****3]** 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.

(b) Having misapprehended the liberty claim presented to it, the *Bowers* Court stated that proscriptions against sodomy have ancient roots. *478 US, at 192, 92 L Ed 2d 140, 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 have been enforced against consenting adults acting in private. Instead, sodomy prosecutions often involved predatory acts against **[****4]** 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 **[***514]** "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, 120 L. Ed. 2d 674, 112 S. Ct. 2791.* **[****5]** 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, 140 L. Ed. 2d 1043, 118 S. Ct. 1708*.

(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, 120 L Ed 2d 674, 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, 134 L. Ed. 2d 855, 116 S. Ct. 1620* --which struck down class-based legislation directed at homosexuals--cast *Bowers'* holding into even more doubt. The stigma **[****6]** 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, 115 L. Ed. 2d 720, 111 S. Ct. 2597.* **[****7]** *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, 120 L Ed 2d 674, 112 S Ct **[***515]** 2791*. *Bowers* causes uncertainty, for the precedents before and after it contradict its central holding.

(d) *Bowers'* rationale does not withstand careful analysis. In his dissenting opinion in *Bowers* Justice Stevens concluded that (1) the fact 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 **[****8]** 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, 120 L Ed 2d 674, 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.

*41 SW3d 349*, reversed and remanded.

**Counsel: Paul M. Smith** argued the cause for petitioners.

**Charles A. Rosenthal, Jr.** argued the cause for respondent.

**Judges:** 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. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined. Thomas, J., filed a dissenting opinion.

**Opinion by:** KENNEDY

## Opinion

**[**2475] [*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, **[****9]** belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

I

[1A] 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 another **[**2476]** man, Tyron Garner, engaging in a sexual act. **[***516]** The two petitioners were arrested, held in custody over night, 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 **[****10]** statute defines "deviate 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 (Tex. App. 2001)*. The majority opinion indicates that the Court of Appeals considered our decision in *Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986).* **[****11]** 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, 154 L. Ed. 2d 514, 123 S. Ct. 661 (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 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, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986)*, should be overruled?" Pet. for Cert. i.

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

II

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 **[****12] [***517] 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, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), and Meyer v. Nebraska, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923); but the most pertinent beginning point is our decision in Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965).

In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or **[**2477] 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, 14 L Ed 2d 510, 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, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (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, 31 L Ed 2d 349, 92 S Ct 1029; but with respect **[****13] 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, 31 L Ed 2d 349, 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, 35 L. Ed. 2d 147, 93 S. Ct. 705 (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 **[****14] 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, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (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 **[***518] 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.*

[2A] 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 **[****15] 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 US, at 199, 92 L Ed 2d 140, 106 S Ct

2841 (opinion of Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ.); id., at 214, 92 L Ed 2d 140, 106 S Ct 2841 **[**2478]** (opinion of Stevens, J., joined by Brennan and Marshall, JJ.).

[1B] 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 **[****16]** 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, 92 L Ed 2d 140, 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 **[****17]** 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 **[***519]** homosexual persons the right to make this choice.

[2B] 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, 92 L Ed 2d 140, 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* ***[****18]*** *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 **[****19]** 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 **[**2479]** 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 **[****20]** 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 **[***520]** 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 **[****21]** 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," **[****22]** *Bowers, 478 U.S., at 192, 92 L Ed 2d 140, 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. **[**2480]** 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, 1986 OK CR 30, 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. **[***521]** Picado, 349 Ark. 600, 80 S. W. 3d 332 (2002)*; **[****23]** *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.

[3A] 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 **[****24]** 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, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)*.

[2C] [4] 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 US, at 196, 92 L Ed 2d 140, 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 **[****25]** to conduct their private lives in matters pertaining to sex. "History 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, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998)* (Kennedy, J., concurring).

[2D] 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 **[***522]** 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. **[**2481]** Other States soon followed. Brief for Cato Institute as *Amicus Curiae* 15-16.

In *Bowers* the Court referred to the fact that before **[****26]** 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, 92 L Ed 2d 140, 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, 92 L Ed 2d 140, 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 **[****27]** 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) P 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 **[****28]** 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, 37 Tex. Sup. Ct. J. 390*.

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, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (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 **[***523]** protection to personal decisions relating to

marriage, procreation, contraception, family relationships, child rearing, and education. *Id., at 851, 120 L Ed 2d 674, 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. **[****29]** Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Ibid.*

**[**2482]** 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, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (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, 134 L Ed 2d 855, 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, 134 L Ed 2d 855, 116 S Ct 1620.*.

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides **[****30]** 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. **[****31]** Its continuance as precedent demeans the lives of homosexual persons.

[1C] The stigma this criminal statute **[***524]** 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. __, 538 U.S. 84, 155 L. Ed. 2d 164, 123 S. Ct. 1140 (2003)*; *Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 155 L. Ed. 2d 98, 123 S. Ct. 1160 (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 **[****32]** 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.

[2E] 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 significance. **[**2483]** 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)*; **[****33]** *Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996)*; *Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992)*.

[1D] [2F] 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, P 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.

**[***525]** [2G] [5] The doctrine of *stare decisis* is essential to the **[****34]** 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, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (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, 84 L. Ed. 604, 60 S. Ct. 444, 1940-1 C.B. 223 (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, 120 L Ed 2d 674, 112 S Ct 2791*; see also *id., at 844, 120 L Ed 2d 674, 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 **[****35]** its issuance contradict its central holding.

[2H] [3B] [6] 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 US, at 216, 92 L Ed 2d 140, 106 S Ct 2841* (footnotes and citations omitted).

**[**2484]** Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.

[2I] *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 **[****36]** be and now is overruled.

[1E] [7] 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* ***[***526]*** *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, 120 L Ed 2d 674, 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 **[****37]** 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.

**Concur by:** O'CONNOR

## Concur

Justice **O'Connor,** concurring in the judgment.

The Court today overrules Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (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 **[****38]** 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, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985); see also Plyler v. Doe, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (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, 87 L Ed 2d 313, 105 S Ct 3249; see also Department of Agriculture v. Moreno, 413 U.S. 528, 534, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973); Romer v. Evans, 517 U.S. 620, 632-633, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996); Nordlinger v. Hahn, 505 U.S. 1, 11-12, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992).

Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since "the Constitution presumes that **[**2485]** even improvident decisions will eventually be rectified by the **[*580]** democratic processes." Cleburne v. Cleburne Living Center, supra, at 440, 87 L Ed 2d 313, 105 S Ct 3249; see also Fitzgerald v Racing Ass'n, ***[****39]*** ante, 539 U.S. 103, 156 L. Ed. 2d 97, 123 S. Ct. 2156; Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955). We have consistently held, however, that some objectives, **[***527]** such as "a bare . . . desire to harm a politically unpopular group," are not legitimate state interests. Department of Agriculture v. Moreno, supra, at 534, 37 L Ed 2d 782, 93 S Ct 2821. See also Cleburne v. Cleburne Living Center, supra, at 446-447, 87 L Ed 2d 313, 105 S Ct 3249; Romer v. Evans, supra, at 632, 134 L Ed 2d 855, 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 US, at 534, 37 L Ed 2d 782, 93 S Ct 2821. **[****40]** The asserted governmental interest in preventing food stamp fraud was not deemed sufficient to satisfy rational basis review. Id., at 535-538, 37 L Ed 2d 782, 93 S Ct 2821. In Eisenstadt v. Baird, 405 U.S. 438, 447-455, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (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 "imposed a broad and undifferentiated disability on a single named group"--specifically, homosexuals. *517 US, at 632, 134 L Ed 2d 855, 116 S Ct 1620*.

**[*581]** The statute at issue here makes **[****41]** 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, 37 Tex. Sup. Ct. J. 390 (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 **[***528]** are not. As the Court notes, see *ante*, at 156 L Ed 2d, at 523-524, petitioners' convictions, if upheld, would disqualify them from or restrict **[****42]** 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)* **[**2486]** (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 156 L Ed 2d, at 524.

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, **[****43]** 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 US, at 196, 92 L Ed 2d 140, 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, 92 L Ed 2d 140, 106 S Ct 2841*. *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 **[****44]** 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, supra, at 534, 37 L Ed 2d 782, 93 S Ct 2821*; *Romer v. Evans, 517 U.S., at 634-635, 134 L Ed 2d 855, 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 **[***529]** by the law." *Id., at 633, 134 L Ed 2d 855, 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, 134 L Ed 2d*

855, 116 S Ct 1620. And because Texas so rarely enforces its sodomy law as applied to **[****45]** 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 "raises the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Id., at 634, 134 L Ed 2d 855, 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' **[**2487]** 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, 134 L Ed 2d 855, 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 **[****46]** homosexual persons to discrimination both in the public and in the private spheres." *Ante*, at 156 L Ed 2d, at 523.

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]** "imputes the commission of a crime." Plumley v. Landmark Chevrolet, Inc., 122 F.3d 308, 310 (CA5 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 ("The 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 US, at 633, 134 L Ed 2d 855, 116 S Ct 1620. The same is true here. The **[****47]** Equal Protection Clause "'neither knows nor tolerates classes among citizens.'" Id., at 623, 134 L Ed 2d 855, 116 S Ct 1620 (quoting Plessy v. Ferguson, 163 U.S. 537, 559, 41 L. Ed. 256, 16 S. Ct. 1138 (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 **[***530]** 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, 72 L Ed 2d 786, 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, 30 L. Ed. 220, 6 S. Ct. 1064 (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 **[****48]** 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, 93 L. Ed. 533, 69 S. Ct. 463 (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 legitimate **[**2488]** state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations-- **[****49]** 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 solely based 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.

**Dissent by:** SCALIA; THOMAS

## Dissent

**[*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, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (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, 35 L. Ed. 2d 147, 93 S. Ct. 705 (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, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986),* **[****50]** is very **[***531]** 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 156 L Ed 2d, at 526 (overruling *Bowers* to the extent it sustained Georgia's anti-sodomy statute under the rational-basis test). Though there is discussion of "fundamental propositions," *ante*, at 156 L Ed 2d, at 517, 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: "Respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." *478 US, at 191, 92 L Ed 2d 140, 106 S Ct 2841*. Instead the Court simply describes petitioners' conduct as "an exercise of their liberty"--which it undoubtedly **[****51]** is--and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case. *Ante*, at 156 L Ed 2d, at 516.

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. . . . To overrule under fire in the absence of the most compelling reason . **[****52]** . . would subvert the Court's legitimacy beyond any serious **[**2489]** question." *505 U.S., at 866-867, 120 L Ed 2d 674, 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 156 L Ed 2d, at 524. 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, 120 L Ed 2d 674, 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 "eroded" by subsequent decisions, *ante*, at 156 L Ed 2d, at 524; (2) it has been subject to "substantial and continuing" **[***532]** criticism, *ibid.*; and (3) it has not induced "individual or societal reliance" that counsels against overturning, *ante*, at 156 L Ed 2d, at 524. 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,* **[****53]** "casts some doubt" upon the holding in *Bowers* (or any other case, for that matter) does not withstand analysis. *Ante*, at 156 L Ed 2d, at 521. 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 156 L Ed 2d, at 523 ("'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, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996)*, "eroded" the "foundations" of *Bowers*' rational-basis holding. See *Romer, supra, at 640-643, 134 L Ed 2d 855, 116 S Ct 1620* **[****54]** (Scalia, J., dissenting). But *Roe* and *Casey* have been equally "eroded" by *Washington v. Glucksberg, 521 U.S. 702, 721, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (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 156 L Ed 2d, at 524. 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 **[****55]** 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* . . . fails to measure up to professional expectations regarding **[**2490]** **[***533]** judicial opinions"); Posner, Judicial Opinion Writing, *62 U. Chi. L. Rev. 1421, 1434 (1995)* (describing the opinion in *Roe* as an "embarrassing performance").

(3) That leaves, to distinguish the rock-solid, unamendable disposition of *Roe* from the readily overrulable *Bowers*, only the third factor. "There has been," the Court says, "no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding . . . ." *Ante*, at 156 L Ed 2d, at 525. It seems to me that the "societal **[****56]** 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 (CA11 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 (CA7 1998)* (citing *Bowers* for the proposition that "legislatures 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 (CA9 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)* **[****57]** (relying on *Bowers* in holding that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage"); *City of 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,*

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[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.

Inc., 501 U.S. 560, 569, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (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, 115 L Ed 2d 504, 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 156 L Ed 2d, at 521 (noting "an emerging awareness that liberty gives substantial protection to adult persons in deciding **[****58]** 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 **[***534]** indeed." 478 US, at 196, 92 L Ed 2d 140, 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) [10 USCS § 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 (CA6 2002) (relying on *Bowers* in rejecting a claimed fundamental right to commit adultery); Mullins v. Oregon, 57 F.3d 789, 793-794 (CA9 1995) (relying on *Bowers* in rejecting a grandparent's claimed "fundamental liberty interest" in the adoption of her grandchildren); Doe v. Wigginton, 21 F.3d 733, 739-740 (CA6 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 (CA9 1991) (relying on *Bowers* in upholding a bisexual's discharge from the armed services); Charles v. Baesler, 910 F.2d 1349, 1353 (CA6 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 (CA8 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 (CA4 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 (CA9 1988) (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 clearance).

**[****59] [**2491] [*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. "People," 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 US, at 856, 120 L Ed 2d 674, 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 **[****60]** 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 **[***535]** 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 156 L Ed 2d, at 518-519

("The liberty protected by the Constitution allows homosexual persons the right to make this choice"); *ante*, at 156 L Ed 2d, at 523 ("'These matters . . . are central to the liberty protected by the Fourteenth Amendment'"); *ante*, at 156 L Ed 2d, at 525-526 ("Their right to liberty under the Due Process Clause gives them the full **[****61]** 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, 138 L Ed 2d 772, 117 S Ct 2258. We have held repeatedly, in cases the Court today does **[**2492]** 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, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (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, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987) **[****62]** (same). See also Michael H. v. Gerald D., 491 U.S. 110, 122, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989) ("We 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, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (plurality opinion); Meyer v. Nebraska, 262 U.S. 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625 (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]** **[****63]** *Bowers* held, first, that criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny because they do not implicate a **[***536]** "fundamental right" under the Due Process Clause, 478 U.S., at 191-194, 92 L Ed 2d 140, 106 S Ct 2841. Noting that "[p]roscriptions against that conduct have ancient roots," id., at 192, 92 L Ed 2d 140, 106 S Ct 2841, that "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," *ibid.*, and that many States had retained their bans on sodomy, id., at 193, 92 L Ed 2d 140, 106 S Ct 2841, *Bowers* concluded that a right to engage in homosexual sodomy was not "'deeply rooted in this Nation's history and tradition,'" id., at 192, 92 L Ed 2d 140, 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 **[****64]** *Bowers*' holding to the contrary, see id., at 196, 92 L Ed 2d 140, 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 156 L Ed 2d, at 526.

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.

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[3] The Court is quite right that "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry," *ante*, at 156 L Ed 2d, at 521. 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, 138 L. Ed. 2d 772, 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, 138 L Ed 2d 772, 117 S Ct 2258. As I proceed to discuss, it is this latter principle that the Court applies in the present case.

III

The Court's description of "the state of the law" at the time of *Bowers* only confirms that *Bowers* was right. *Ante*, at 156 L Ed 2d, at 518. The Court points to *Griswold v. Connecticut, 381 U.S. 479, 481-482, 14 L. Ed. 2d 510, **[**2493]** 85 S. Ct. 1678 (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, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972)*, likewise had nothing to do with "substantive due process"; it invalidated a Massachusetts law prohibiting the distribution of contraceptives to unmarried **[****65]** 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 US, at 155, 35 L Ed 2d 147, 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 anti-abortion laws were undesirable. See *id., at 153, 35 L Ed 2d 147, 93 S Ct 705*. We have since rejected *Roe*'s **[***537]** 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, 120 L Ed 2d 674, 112 S Ct 2791* (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *id., at 951-953, 120 L Ed 2d 674, 112 S Ct 2791* (Rehnquist, **[****66]** 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, 120 L Ed 2d 674, 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 156 L Ed 2d, at 519-521, 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 156 L Ed 2d, at 519. This observation in no way casts into doubt the "definitive [historical] conclusion," *id.*, 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 **[****67]** 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, 92 L Ed 2d 140, 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 156 L Ed 2d, at 519. 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* criminalized-- **[**2494]** which suffices to establish that homosexual sodomy is not a right "deeply rooted in our Nation's **[****68]** 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 "laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private." *Ante*, at 156 L Ed 2d, at 519. 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 "infrequent," *ante*, at **[***538]** 156 L Ed 2d, at 520). 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 **[****69]** 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: "We 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 156 L Ed 2d, at 521 (emphasis **[*598]** added). Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States **[****70]** 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 156 L Ed 2d, at 521, 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 traditions," 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 **[****71]** we share with a wider civilization," *ante*, at 156 L Ed 2d, at 524, 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 [***539] U.S., at 193-194, 92 L Ed 2d 140, 106 S Ct 2841* (emphasis added). *Bowers*' rational-basis holding is likewise devoid of any reliance on the views of a " **[**2495]** wider civilization," see *id., at 196, 92 L Ed 2d 140, 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, 537 U.S. 990, 154 L. Ed. 2d 359, 123 S. Ct. 470*470 (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 **[****72]** forms of sexual behavior are "immoral and unacceptable," *Bowers, supra, at 196, 92 L Ed 2d 140, 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 156 L Ed 2d, at 526 (emphasis addded). 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 156 L Ed 2d, at 525. 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 156 L Ed 2d, at 526 (opinion concurring **[****73]** 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, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967), similarly were applicable to whites and blacks alike, and only distinguished between the races **[***540]** 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, 18 L Ed 2d 1010, 87 S Ct 1817. A racially discriminatory **[****74]** 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, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (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 US, at 196, 92 L Ed 2d 140, 106 S Ct 2841. This is the same justification that supports many **[**2496]** 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. **[****75]** 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 156 L Ed 2d, at 529.

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 156 L Ed 2d, at 527. 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, 134 L Ed 2d 855, 116 S Ct 1620; Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448-450, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985); **[****76]** Department of Agriculture v. Moreno, 413 U.S. 528, 534-538, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (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 156 L Ed 2d, at 527, are invalid *even though* there may be a conceivable rational basis to support them.

This reasoning leaves on pretty **[***541]** 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 156 L Ed 2d, at 530. 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 **[*602]** has 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" **[****77]** (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, 134 L Ed 2d 855, 116 S Ct 1620*.

One of the most revealing statements in today's opinion is the Court's grim warning **[**2497]** 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 156 L Ed 2d, at 523. 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. **[****78]** 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)* [10 USCS § 654(b)(1)] (mandating discharge from the armed forces of any service member who engages in or intends to **[****79]** engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see *BSA v. Dale, 530 U.S. 640, 147 L Ed 2d 554, 120 S Ct 2446 (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 **[****80]** 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 156 L Ed 2d, at 526; 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 **[****81]** --after having laid waste the foundations of our rational-basis jurisprudence--the Court says that the present **[**2498]** case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Ante*, at 156 L Ed 2d, at 525. 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 "persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Ante*, at 156 L Ed 2d, at 523 (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 **[***543]** "no legitimate state interest" for purposes of proscribing that conduct, *ante*, at 156 L Ed 2d, at 526; and if, as the Court coos (casting aside all pretense of neutrality), "when **[****82]** **[*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 156 L Ed 2d, at 518; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "the 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, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965)* **[****83]** (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, 14 L Ed 2d 510, 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 156 L Ed 2d, at 515.

## References

70C Am Jur 2d, Sodomy §§ **[****84]** 5, 7, 9

*USCS, Constitution, Amendment 14*

L Ed Digest, Constitutional Law § 528.1; Sodomy § 1

L Ed Index, Due Process; Homosexuality; Liberty; Privacy; Sodomy

**Annotation References**

Rights of, and validity of provisions concerning or affecting, homosexuals, under Federal Constitution--Supreme Court cases. *134 L Ed 2d 1047*.

Supreme Court's views as to concept of "liberty" under due process clauses of *Fifth* and *Fourteenth Amendments.* *47 L Ed 2d 975*.

Supreme Court's views as to the federal legal aspects of the right to privacy. *43 L Ed 2d 871*.

Validity of statute making sodomy a criminal offense. 20 ALR4th 1009.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Nietupski v. Del Castillo, Conn.App., February 25, 2020

138 S.Ct. 1719
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., et al., Petitioners
v.
COLORADO CIVIL RIGHTS COMMISSION, et al.

No. 16–111.
|
Argued Dec. 5, 2017.
|
Decided June 4, 2018.

**Synopsis**
**Background:** Cake shop and its owner sought review of the Colorado Civil Rights Commission's decision and issuance of cease and desist order, in a proceeding arising from shop's refusal to sell a wedding cake to a same-sex couple, requiring shop and owner not to violate Colorado Anti–Discrimination Act (CADA) by discriminating against potential customers because of their sexual orientation. The Colorado Court of Appeals, Taubman, J., 370 P.3d 272, affirmed. Certiorari was granted.

**[Holding:]** The Supreme Court, Justice Kennedy, held that Commission did not comply with the Free Exercise Clause's requirement of religious neutrality.

Reversed.

Justice Kagan filed a concurring opinion, in which Justice Breyer joined.

Justice Gorsuch filed a concurring opinion, in which Justice Alito joined.

Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Gorsuch joined.

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

**Procedural Posture(s):** Petition for Writ of Certiorari; Review of Administrative Decision.

West Headnotes (9)

[1] **Constitutional Law** Sex or gender; sexual orientation

The exercise of the freedom of gay persons and gay couples, on terms equal to others, must be given great weight and respect by the courts. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[2] **Civil Rights** Religion
**Constitutional Law** Family law

Religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression under the First Amendment. U.S.C.A. Const.Amend. 1.

21 Cases that cite this headnote

[3] **Constitutional Law** Freedom of Religion and Conscience
**Constitutional Law** Religious Organizations in General

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. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[4] **Constitutional Law** Particular Issues and Applications

While religious and philosophical objections to gay marriage are protected under the First Amendment, it is a general rule that such objections do not allow business owners

  

and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. U.S.C.A. Const.Amend. 1.

19 Cases that cite this headnote

[5] **Civil Rights** Place of business or public resort

**Constitutional Law** Particular Issues and Applications

Colorado Civil Rights Commission did not comply with the Free Exercise Clause's requirement of religious neutrality, when it considered whether cake shop owner had violated Colorado's statutory protection against sexual orientation discrimination in places of public accommodation, by refusing to create a cake for a same-sex couple who wanted to celebrate their out-of-state marriage; Commission's hostility towards religion was reflected in Commissioners' comments at public hearings in the case, as well as Commission's disparate treatment of shop owner compared to its treatment of bakers in three other cases who had objected to creating cakes with messages that they had deemed to be discriminatory or derogatory towards same-sex marriage. U.S.C.A. Const.Amend. 1; West's C.R.S.A. § 24–34–601(2)(a).

31 Cases that cite this headnote

[6] **Constitutional Law** Free Exercise of Religion

The government, if it is to respect the Constitution's guarantee of free exercise of religion, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. U.S.C.A. Const.Amend. 1.

41 Cases that cite this headnote

[7] **Constitutional Law** Neutrality; general applicability

The Free Exercise Clause bars even subtle departures from neutrality on matters of religion. U.S.C.A. Const.Amend. 1.

20 Cases that cite this headnote

[8] **Constitutional Law** Freedom of Religion and Conscience

The Constitution commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[9] **Constitutional Law** Neutrality

Factors relevant to the assessment of governmental neutrality towards religion, as required by the First Amendment, include the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. U.S.C.A. Const.Amend. 1.

25 Cases that cite this headnote

***1720** *Syllabus* [*]

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012 he told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages —marriages that Colorado did not then recognize—but that

  

he would sell them other baked goods, *e.g.,* birthday cakes. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti–Discrimination Act (CADA), which prohibits, as relevant here, discrimination based on sexual orientation in a "place of business engaged in any sales to the public and any place offering services ... to the public." Under CADA's administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple's favor. In so doing, the ALJ rejected Phillips' First Amendment claims: that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. Both the Commission and the Colorado Court of Appeals affirmed.

*Held* : The Commission's actions in this case violated the Free Exercise Clause. Pp. 1727 – 1732.

(a) The laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical ***1721** objections to gay marriage are protected views and in some instances protected forms of expression. See *Obergefell v. Hodges,* 576 U.S. ——, ——, 135 S.Ct. 2584, 2594, 192 L.Ed.2d 609. While it is unexceptional that Colorado law can protect gay persons in acquiring products and services on the same terms and conditions as are offered to other members of the public, the law must be applied in a manner that is neutral toward religion. To Phillips, his claim that using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. His dilemma was understandable in 2012, which was before Colorado recognized the validity of gay marriages performed in the State and before this Court issued *United States v. Windsor,* 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808, or *Obergefell*. Given the State's position at the time, there is some force to Phillips' argument that he was not unreasonable in deeming his decision lawful. State law at the time also afforded storekeepers some latitude to decline to create specific messages they considered offensive. Indeed, while the instant enforcement proceedings were pending, the State Civil Rights Division concluded in at least three cases that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. Phillips too was entitled to a neutral and respectful consideration of his claims in all the circumstances of the case. Pp. 1727 – 1729.

(b) That consideration was compromised, however, by the Commission's treatment of Phillips' case, which showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. As the record shows, some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.

Another indication of hostility is the different treatment of Phillips' case and the cases of other bakers with objections to anti-gay messages who prevailed before the Commission. The Commission ruled against Phillips in part on the theory that any message on the requested wedding cake would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the cases involving requests for cakes depicting anti-gay marriage symbolism. The Division also considered that each bakery was willing to sell other products to the prospective customers, but the Commission found Phillips' willingness to do the same irrelevant. The State Court of Appeals' brief discussion of this disparity of treatment does not answer Phillips' concern that the State's practice was to disfavor the religious basis of his objection. Pp. 1728 – 1731.

(c) For these reasons, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. The government, consistent with the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected ***1722** citizens and cannot act in a

manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472. Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*, at 540, 113 S.Ct. 2217. In view of these factors, the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of his religious beliefs. The Commission gave "every appearance," *id.*, at 545, 113 S.Ct. 2217, of adjudicating his religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it, *id.*, at 537, 113 S.Ct. 2217, but government has no role in expressing or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. The inference here is thus that Phillips' religious objection was not considered with the neutrality required by the Free Exercise Clause. The State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. But the official expressions of hostility to religion in some of the commissioners' comments were inconsistent with that requirement, and the Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. Pp. 1730 – 1732.

370 P.3d 272, reversed.

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

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**Opinion**

Justice KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual

orientation in violation of the Colorado Anti–Discrimination Act.

The Commission determined that the shop's actions violated the Act and ruled in the couple's favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a ***1724** business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside.

## I

### A

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his "main goal in life is to be obedient to" Jesus Christ and Christ's "teachings in all aspects of his life." App. 148. And he seeks to "honor God through his work at Masterpiece Cakeshop." *Ibid.* One of Phillips' religious beliefs is that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman." *Id.,* at 149. To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for "our wedding." *Id.,* at 152 (emphasis deleted). They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not "create" wedding cakes for same-sex weddings. *Ibid.* He explained, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." *Ibid*. The couple left the shop without further discussion.

The following day, Craig's mother, who had accompanied the couple to the cakeshop and been present for their interaction with Phillips, telephoned to ask Phillips why he had declined to serve her son. Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado (at that time) did not recognize same-sex marriages. *Id.,* at 153. He later explained his belief that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into." *Ibid*. (emphasis deleted).

B

For most of its history, Colorado has prohibited discrimination in places of public ***1725** accommodation. In 1885, less than a decade after Colorado achieved statehood, the General Assembly passed "An Act to Protect All Citizens in Their Civil Rights," which guaranteed "full and equal enjoyment" of certain public facilities to "all citizens," "regardless of race, color or previous condition of servitude." 1885 Colo. Sess. Laws pp. 132–133. A decade later, the General Assembly expanded the requirement to apply to "all other places of public accommodation." 1895 Colo. Sess. Laws ch. 61, p. 139.

Today, the Colorado Anti–Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows:

> "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. § 24–34–601(2)(a) (2017).

The Act defines "public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services ... to the public," but excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes." § 24–34–601(1).

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division. The Division investigates each claim; and if it finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission, in turn, decides whether to initiate a formal hearing before a state Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. See §§ 24–34–306, 24–4–105(14). The decision of the ALJ may be appealed to the full Commission, a seven-member appointed body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. See § 24–34–306(9). Available remedies include, among other things, orders to cease-and-desist a discriminatory policy, to file regular compliance reports with the Commission, and "to take affirmative action, including the posting of notices setting forth the substantive rights of the public." § 24–34–605. Colorado law does not permit the Commission to assess money damages or fines. §§ 24–34–306(9), 24–34–605.

  

C

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in September 2012, shortly after the couple's visit to the shop. App. 31. The complaint alleged that Craig and Mullins had been denied "full and equal service" at the bakery because of their sexual orientation, *id.,* at 35, 48, and that it was Phillips' "standard business practice" not to provide cakes for same-sex weddings, *id.,* at 43.

The Civil Rights Division opened an investigation. The investigator found that "on multiple occasions," Phillips "turned away potential customers on the basis of their sexual orientation, stating that he ***1726** could not create a cake for a same-sex wedding ceremony or reception" because his religious beliefs prohibited it and because the potential customers "were doing something illegal" at that time. *Id.,* at 76. The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis. *Id.,* at 72. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips' shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop "had a policy of not selling baked goods to same-sex couples for this type of event." *Id.,* at 73. Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission. *Id.,* at 69.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. The ALJ first rejected Phillips' argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended. App. to Pet. for Cert. 68a–72a.

Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech and did not agree that creating Craig and Mullins' cake would force Phillips to adhere to "an ideological point of view." *Id.,* at 75a. Applying CADA to the facts at hand, in the ALJ's view, did not interfere with Phillips' freedom of speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. Citing this Court's precedent 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), the ALJ determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. *Id.*, at 879, 110 S.Ct. 1595; App. to Pet. for Cert. 82a–83a. The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.

The Commission affirmed the ALJ's decision in full. *Id.,* at 57a. The Commission ordered Phillips to "cease and desist from discriminating against ... same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." *Ibid.* It also ordered additional remedial measures, including "comprehensive staff training on the Public Accommodations section" of CADA "and changes to any and all company policies to comply with ... this Order." *Id.,* at 58a. The Commission additionally required Phillips to prepare "quarterly compliance reports" for a period of two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken." *Ibid.*

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial ***1727** order. The court rejected the argument that the "Commission's order unconstitutionally compels" Phillips and the shop "to convey a celebratory message about same sex marriage." *Craig v. Masterpiece Cakeshop, Inc.,* 370 P.3d 272, 283 (2015). The court also rejected the argument that the Commission's order violated the Free Exercise Clause.

Relying on this Court's precedent in *Smith, supra,* at 879, 110 S.Ct. 1595, the court stated that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability" on the ground that following the law would interfere with religious practice or belief. 370 P.3d, at 289. The court concluded that requiring Phillips to comply with the statute did not violate his free exercise rights. The Colorado Supreme Court declined to hear the case.

Phillips sought review here, and this Court granted certiorari. 582 U.S. ——, 137 S.Ct. 2290, 198 L.Ed.2d 723 (2017). He now renews his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

II

A

**[1]** **[2]** **[3]** **[4]** Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges,* 576 U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), "[t]he 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." *Id.,* at ——, 135 S.Ct., at 2607. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, n. 5, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam* ); see also *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 572, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

***1728** It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law. See Tr. of Oral Arg. 4–7, 10.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services

became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. See Colo. Const., Art. II, § 31 (2012); 370 P.3d, at 277. At the time of the events in question, this Court had not issued its decisions either in *United States v. Windsor,* 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), or *Obergefell*. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. See *Jack v. Gateaux, Ltd.,* Charge No. P20140071X (Mar. 24, 2015); *Jack v. Le Bakery Sensual, Inc.,* Charge No. P20140070X (Mar. 24, 2015); *Jack v. Azucar Bakery,* Charge No. P20140069X (Mar. 24, 2015).

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in ***1729** effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

B

**[5]** The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." Tr. 23. A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise." *Id*., at 30. Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

> "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." Tr. 11–12.

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention ***1730** those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 540–542, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *id.,* at 558, 113 S.Ct. 2217 (Scalia, J., concurring in part and concurring in judgment). In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included "wording and images [the baker] deemed derogatory," *Jack v. Gateaux, Ltd.,* Charge No. P20140071X, at 4; featured "language and images [the baker] deemed hateful," *Jack v. Le Bakery Sensual, Inc.,* Charge No. P20140070X, at 4; or displayed a message the baker "deemed as discriminatory, *Jack v. Azucar Bakery,* Charge No. P20140069X, at 4.

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell "birthday cakes, shower cakes, [and] cookies and brownies," App. 152, to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers' conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote.

There, the court stated that "[t]his case is distinguishable from the Colorado Civil Rights Division's recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed" when they refused to create the ***1731** requested cakes. 370 P.3d, at 282, n. 8. In those cases, the court continued, there was no impermissible discrimination because "the Division found that the bakeries ... refuse[d] the patron's request ... because of the offensive nature of the requested message." *Ibid.*

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See *Matal v. Tam,* 582 U.S. ——, —— – ——, 137 S.Ct. 1744, 1762–1764, 198 L.Ed.2d 366 (2017) (opinion of ALITO, J.). The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

C

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

**[6]** **[7]** **[8]** In *Church of Lukumi Babalu Aye, supra,* the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Id.,* at 534, 113 S.Ct. 2217. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.*, at 547, 113 S.Ct. 2217.

**[9]** Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*, at 540, 113 S.Ct. 2217. In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave "every appearance," *id.*, at 545, 113 S.Ct. 2217, of adjudicating Phillips' religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it. *Id.*, at 537, 113 S.Ct. 2217. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.

***1732** While the issues here are difficult to resolve, it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

  

III

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

The judgment of the Colorado Court of Appeals is reversed.

*It is so ordered.*

Justice KAGAN, with whom Justice BREYER joins, concurring.

"[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Ante,* at 1727. But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views "neutral and respectful consideration." *Ante,* at 1729. I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write separately to elaborate on one of the bases for the Court's holding.

The Court partly relies on the "disparate consideration of Phillips' case compared to the cases of [three] other bakers" who "objected to a requested cake on the basis of conscience." *Ante,* at 1730, 1732. In the latter cases, a customer named William Jack sought "cakes with images that conveyed disapproval of same-sex marriage, along with religious text"; the bakers whom he approached refused to make them. *Ante,* at 1730; see *post,* at 1749 (GINSBURG, J., dissenting) (further describing the requested cakes). Those bakers prevailed before the Colorado Civil Rights Division and Commission, while Phillips—who objected for religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case. See *ante,* at 1730. And the Court takes especial ***1733** note of the suggestion made by the Colorado Court of Appeals, in comparing those cases, that the state agencies found the message Jack requested "offensive [in] nature." *Ante,* at 1731 (internal quotation marks omitted). As the Court states, a "principled rationale for the difference in treatment" cannot be "based on the government's own assessment of offensiveness." *Ibid.*

What makes the state agencies' consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti–Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny "the full and equal enjoyment" of goods and services to individuals based on certain characteristics, including sexual orientation and creed. Colo. Rev. Stat. § 24–34–601(2)(a) (2017). The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive "the full and equal enjoyment" of public accommodations irrespective of their sexual orientation. *Ibid.* The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief. [*]

I read the Court's opinion as fully consistent with that view. The Court limits its analysis to the *reasoning* of the state agencies (and Court of Appeals)—"quite ***1734** apart from

whether the [Phillips and Jack] cases should ultimately be distinguished." *Ante,* at 1727. And the Court itself recognizes the principle that would properly account for a difference in *result* between those cases. Colorado law, the Court says, "can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante,* at 1728. For that reason, Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State's decisions are not infected by religious hostility or bias. I accordingly concur.

Justice GORSUCH, with whom Justice ALITO joins, concurring.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith,* this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge. 494 U.S. 872, 878–879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). *Smith* remains controversial in many quarters. Compare McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990), with Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992). But we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored. *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

Today's decision respects these principles. As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer's request that would have required them to violate their secular commitments. Yet it denied the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious beliefs. *Ante,* at 1729 – 1731. As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips's religious beliefs "offensive." *Ibid.* That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full.

The only wrinkle is this. In the face of so much evidence suggesting hostility toward Mr. Phillips's sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment. See *post,* at 1749 – 1750, and n. 4 (GINSBURG, J., dissenting); *ante,* at 1732 – 1734, and n. (KAGAN, J., concurring). But, respectfully, I do not see how we might rescue the Commission from its error.

A full view of the facts helps point the way to the problem. Start with William Jack's case. He approached three bakers ***1735** and asked them to prepare cakes with messages disapproving same-sex marriage on religious grounds. App. 233, 243, 252. All three bakers refused Mr. Jack's request, stating that they found his request offensive to their secular convictions. *Id.,* at 231, 241, 250. Mr. Jack responded by filing complaints with the Colorado Civil Rights Division. *Id.,* at 230, 240, 249. He pointed to Colorado's Anti–Discrimination Act, which prohibits discrimination against customers in public accommodations because of religious creed, sexual orientation, or certain other traits. See *ibid.*; Colo. Rev. Stat. § 24–34–601(2)(a) (2017). Mr. Jack argued that the cakes he sought reflected his religious beliefs and that the bakers could not refuse to make them just because they happened to disagree with his beliefs. App. 231, 241, 250. But the Division declined to find a violation, reasoning that the bakers didn't deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions. *Id.,* at 237, 247, 255–256. As proof, the Division pointed to the fact that the bakers said they treated Mr. Jack as they would have anyone who requested a cake with similar messages, regardless of their religion. *Id.,* at 230–231, 240, 249. The Division pointed, as well, to the fact that the bakers said they were happy to provide religious persons with other cakes expressing other ideas. *Id.,* at 237, 247, 257. Mr. Jack appealed to the Colorado Civil Rights Commission, but the

  

Commission summarily denied relief. App. to Pet. for Cert. 326a–331a.

Next, take the undisputed facts of Mr. Phillips's case. Charlie Craig and Dave Mullins approached Mr. Phillips about creating a cake to celebrate their wedding. App. 168. Mr. Phillips explained that he could not prepare a cake celebrating a same-sex wedding consistent with his religious faith. *Id.,* at 168–169. But Mr. Phillips offered to make other baked goods for the couple, including cakes celebrating other occasions. *Ibid.* Later, Mr. Phillips testified without contradiction that he would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation. *Id.,* at 166–167 ("I will not design and create wedding cakes for a same-sex wedding regardless of the sexual orientation of the customer"). And the record reveals that Mr. Phillips apparently refused just such a request from Mr. Craig's mother. *Id.,* at 38–40, 169. (Any suggestion that Mr. Phillips was willing to make a cake celebrating a same-sex marriage for a heterosexual customer or was not willing to sell other products to a homosexual customer, then, would simply mistake the undisputed factual record. See *post,* at 1749, n. 2 (GINSBURG, J., dissenting); *ante,* at 1732 – 1734, and n. (KAGAN, J., concurring)). Nonetheless, the Commission held that Mr. Phillips's conduct violated the Colorado public accommodations law. App. to Pet. for Cert. 56a–58a.

The facts show that the two cases share all legally salient features. In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers *knew* their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). ***1736** So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.

The distinction between intended and knowingly accepted effects is familiar in life and law. Often the purposeful pursuit of worthy commitments requires us to accept unwanted but entirely foreseeable side effects: so, for example, choosing to spend time with family means the foreseeable loss of time for charitable work, just as opting for more time in the office means knowingly forgoing time at home with loved ones. The law, too, sometimes distinguishes between intended and foreseeable effects. See, *e.g.,* ALI, Model Penal Code §§ 1.13, 2.02(2)(a)(i) (1985); 1 W. LaFave, Substantive Criminal Law § 5.2(b), pp. 460–463 (3d ed. 2018). Other times, of course, the law proceeds differently, either conflating intent and knowledge or presuming intent as a matter of law from a showing of knowledge. See, *e.g.,* Restatement (Second) of Torts § 8A (1965); *Radio Officers v. NLRB,* 347 U.S. 17, 45, 74 S.Ct. 323, 98 L.Ed. 455 (1954).

The problem here is that the Commission failed to act neutrally by applying a consistent legal rule. In Mr. Jack's case, the Commission chose to distinguish carefully between intended and knowingly accepted effects. Even though the bakers knowingly denied service to someone in a protected class, the Commission found no violation because the bakers only intended to distance themselves from "the offensive nature of the requested message." *Craig v. Masterpiece Cakeshop, Inc.,* 370 P.3d 272, 282, n. 8 (Colo.App.2015); App. 237, 247, 256; App. to Pet. for Cert. 326a–331a; see also Brief for Respondent Colorado Civil Rights Commission 52 ("Businesses are entitled to reject orders for any number of reasons, including because they deem a particular product requested by a customer to be 'offensive' "). Yet, in Mr. Phillips's case, the Commission dismissed this very same argument as resting on a "distinction without a difference." App. to Pet. for Cert. 69a. It concluded instead that an "intent to disfavor" a protected class of persons should be "readily ... presumed" from the knowing failure to serve someone who belongs to that class. *Id.,* at 70a. In its judgment, Mr. Phillips's intentions were "inextricably tied to the sexual orientation of the parties involved" and essentially "irrational." *Ibid.*

Nothing in the Commission's opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips's

objection is "inextricably tied" to a protected class, then the bakers' objection in Mr. Jack's case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic. In the end, the Commission's decisions simply reduce to this: it *presumed* that Mr. Phillip harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack's case even though the effects of the bakers' conduct were just as foreseeable. Underscoring the double standard, a state appellate court said that "no ***1737** such showing" of actual "animus"—or intent to discriminate against persons in a protected class—was even required in Mr. Phillips's case. 370 P.3d, at 282.

The Commission cannot have it both ways. The Commission cannot slide up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies. Either actual proof of intent to discriminate on the basis of membership in a protected class is required (as the Commission held in Mr. Jack's case), or it is sufficient to "presume" such intent from the knowing failure to serve someone in a protected class (as the Commission held in Mr. Phillips's case). Perhaps the Commission could have chosen either course as an initial matter. But the one thing it can't do is apply a more generous legal test to secular objections than religious ones. See *Church of Lukumi Babalu Aye,* 508 U.S., at 543–544, 113 S.Ct. 2217. That is anything but the neutral treatment of religion.

The real explanation for the Commission's discrimination soon comes clear, too—and it does anything but help its cause. This isn't a case where the Commission self-consciously announced a change in its legal rule in all public accommodation cases. Nor is this a case where the Commission offered some persuasive reason for its discrimination that might survive strict scrutiny. Instead, as the Court explains, it appears the Commission wished to condemn Mr. Phillips for expressing just the kind of "irrational" or "offensive ... message" that the bakers in the first case refused to endorse. *Ante,* at 1730 – 1731. Many may agree with the Commission and consider Mr. Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. And, to be sure, this Court has held same-sex marriage a matter of constitutional right and various States have enacted laws that preclude discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise. Just as it is the "proudest boast of our free speech jurisprudence" that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. See *Matal v. Tam,* 582 U.S. ——, ——, 137 S.Ct. 1744, 1764, 198 L.Ed.2d 366 (2017) (plurality opinion) (citing *United States v. Schwimmer,* 279 U.S. 644, 655, 49 S.Ct. 448, 73 L.Ed. 889 (1929) (Holmes, J., dissenting)). Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom. See *Church of Lukumi Babalu Aye, supra,* at 547, 113 S.Ct. 2217; *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 715–716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Wisconsin v. Yoder,* 406 U.S. 205, 223–224, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Cantwell v. Connecticut,* 310 U.S. 296, 308–310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

Nor can any amount of after-the-fact maneuvering by our colleagues save the Commission. It is no answer, for example, to observe that Mr. Jack requested a cake with text on it while Mr. Craig and Mr. Mullins sought a cake celebrating their wedding without discussing its decoration, and then suggest this distinction makes all the difference. See *post,* at 1749 – 1750, and n. 4 (GINSBURG, J., dissenting). It is no answer either simply to slide up a level of generality to redescribe Mr. Phillips's case as involving only a wedding cake ***1738** like any other, so the fact that Mr. Phillips would make one for some means he must make them for all. See *ante,* at 1732 – 1734, and n. (KAGAN, J., concurring). These arguments, too, fail to afford Mr. Phillips's faith neutral respect.

Take the first suggestion first. To suggest that cakes with words convey a message but cakes without words do not —all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational. Not even the Commission or court of appeals purported to rely on that distinction. Imagine Mr. Jack asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers' intentional wish to avoid participating in that message too. Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. See 370 P.3d, at 276 (stating that Mr. Craig and Mr. Mullins "requested that Phillips design and create a *cake to celebrate their same-sex wedding* ") (emphasis added). Like "an emblem or flag," a cake for a same-sex wedding is a symbol that serves as "a short cut from mind to mind," signifying approval of a specific "system, idea, [or] institution." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith. The Commission denied Mr. Phillips that choice, even as it afforded the bakers in Mr. Jack's case the choice to refuse to advance a message they deemed offensive to their secular commitments. That is not neutral.

Nor would it be proper for this or any court to suggest that a person must be forced to write words rather than create a symbol before his religious faith is implicated. Civil authorities, whether "high or petty," bear no license to declare what is or should be "orthodox" when it comes to religious beliefs, *id.,* at 642, 63 S.Ct. 1178, or whether an adherent has "correctly perceived" the commands of his religion, *Thomas, supra,* at 716, 101 S.Ct. 1425. Instead, it is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith. See generally *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression," which are "not a condition of constitutional protection").

The second suggestion fares no better. Suggesting that this case is only about "wedding cakes"—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. At its most general level, the cake at issue in Mr. Phillips's case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: describing the cake by its ingredients is *too general* ; understanding it as celebrating a same-sex wedding is *too specific* ; but regarding it as a generic wedding cake is *just right*. The problem is, the Commission didn't play with the level of generality in Mr. Jack's case in this way. It didn't declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to produce them. Instead, the Commission accepted the bakers' view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed ***1739** them to refuse service. Having done that there, it must do the same here.

Any other conclusion would invite civil authorities to gerrymander their inquiries based on the parties they prefer. Why calibrate the level of generality in Mr. Phillips's case at "wedding cakes" exactly—and not at, say, "cakes" more generally or "cakes that convey a message regarding same-sex marriage" more specifically? If "cakes" were the relevant level of generality, the Commission would have to order the bakers to make Mr. Jack's requested cakes just as it ordered Mr. Phillips to make the requested cake in his case. Conversely, if "cakes that convey a message regarding same-sex marriage" were the relevant level of generality, the Commission would have to respect Mr. Phillips's refusal to make the requested cake just as it respected the bakers' refusal to make the cakes Mr. Jack requested. In short, when the same level of generality is applied to both cases, it is no surprise that the bakers have to be treated the same. Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can you engineer the Commission's outcome, handing a win to Mr. Jack's bakers but delivering a loss to Mr. Phillips. Such results-driven reasoning is improper. Neither the Commission nor this Court may apply a more specific level of generality in Mr. Jack's case (a cake that conveys a message regarding same-sex marriage) while applying a higher level of generality in Mr. Phillips's case (a cake that conveys no message regarding

same-sex marriage). Of course, under *Smith* a vendor cannot escape a public accommodations law just because his religion frowns on it. But for any law to comply with the First Amendment and *Smith,* it must be applied in a manner that treats religion with neutral respect. That means the government must apply the *same* level of generality across cases—and that did not happen here.

There is another problem with sliding up the generality scale: it risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government's preferred level of description. To some, all wedding cakes may appear indistinguishable. But *to Mr. Phillips* that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers' secular beliefs in Mr. Jack's case. This Court has explained these same points "[r]epeatedly and in many different contexts" over many years. *Smith,* 494 U.S. at 887, 110 S.Ct. 1595. For example, in *Thomas* a faithful Jehovah's Witness and steel mill worker agreed to help manufacture sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets. 450 U.S., at 711, 101 S.Ct. 1425. Of course, the line Mr. Thomas drew wasn't the same many others would draw and it wasn't even the same line many other members of the same faith would draw. Even so, the Court didn't try to suggest that making steel is just making steel. Or that to offend his religion the steel needed to be of a particular kind or shape. Instead, it recognized that Mr. Thomas alone was entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment. *Id.,* at 714–716, 101 S.Ct. 1425; see also *United States v. Lee,* 455 U.S. 252, 254–255, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982); *Smith, supra,* at 887, 110 S.Ct. 1595 (collecting authorities). It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding ***1740** cake is just like any other —without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.

Only one way forward now remains. Having failed to afford Mr. Phillips's religious objections neutral consideration and without any compelling reason for its failure, the Commission must afford him the same result it afforded the bakers in Mr. Jack's case. The Court recognizes this by reversing the judgment below and holding that the Commission's order "must be set aside." *Ante,* at 1732. Maybe in some future rulemaking or case the Commission could adopt a new "knowing" standard for all refusals of service and offer neutral reasons for doing so. But, as the Court observes, "[h]owever later cases raising these or similar concerns are resolved in the future, ... the rulings of the Commission and of the state court that enforced the Commission's order" in *this* case "must be invalidated." *Ibid*. Mr. Phillips has conclusively proven a First Amendment violation and, after almost six years facing unlawful civil charges, he is entitled to judgment.

Justice THOMAS, with whom Justice GORSUCH joins, concurring in part and concurring in the judgment.

I agree that the Colorado Civil Rights Commission (Commission) violated Jack Phillips' right to freely exercise his religion. As Justice GORSUCH explains, the Commission treated Phillips' case differently from a similar case involving three other bakers, for reasons that can only be explained by hostility toward Phillips' religion. See *ante,* at 1734 – 1737 (concurring opinion). The Court agrees that the Commission treated Phillips differently, and it points out that some of the Commissioners made comments disparaging Phillips' religion. See *ante,* at 1728 – 1731. Although the Commissioners' comments are certainly disturbing, the discriminatory application of Colorado's public-accommodations law is enough on its own to violate Phillips' rights. To the extent the Court agrees, I join its opinion.

While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. The Court does not address this claim because it has some uncertainties about the record. See *ante,* at 1723 – 1724. Specifically, the parties dispute whether Phillips refused to create a *custom* wedding cake for the individual respondents, or whether he refused to sell them *any* wedding cake (including a premade one). But the Colorado Court of Appeals resolved this factual dispute in Phillips' favor. The court described his conduct as a refusal to "design and create a cake to celebrate [a] same-sex wedding." *Craig v. Masterpiece Cakeshop, Inc.,* 370 P.3d 272, 276 (2015); see also *id.,* at 286 ("designing and

selling a wedding cake"); *id.*, at 283 ("refusing to create a wedding cake"). And it noted that the Commission's order required Phillips to sell " '*any* product [he] would sell to heterosexual couples,' " including custom wedding cakes. *Id.*, at 286 (emphasis added).

Even after describing his conduct this way, the Court of Appeals concluded that Phillips' conduct was not expressive and was not protected speech. It reasoned that an outside observer would think that Phillips was merely complying with Colorado's public-accommodations law, not expressing a message, and that Phillips could post a disclaimer to that effect. This reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak. It should not pass without comment.

***1741** I

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits state laws that abridge the "freedom of speech." When interpreting this command, this Court has distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose "incidental burdens" on expression. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011). As the Court explains today, public-accommodations laws usually regulate conduct. *Ante,* at 1727 – 1728 (citing *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995)). "[A]s a general matter," public-accommodations laws do not "target speech" but instead prohibit "the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Id.*, at 572, 115 S.Ct. 2338 (emphasis added).

Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech. When a public-accommodations law "ha[s] the effect of declaring ... speech itself to be the public accommodation," the First Amendment applies with full force. *Id.*, at 573, 115 S.Ct. 2338; accord, *Boy Scouts of America v. Dale,* 530 U.S. 640, 657–659, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). In *Hurley,* for example, a Massachusetts public-accommodations law prohibited " 'any distinction, discrimination or restriction on account of ... sexual orientation ... relative to the admission of any person to, or treatment in any place of public accommodation.' " 515 U.S., at 561, 115 S.Ct. 2338 (quoting Mass. Gen. Laws § 272:98 (1992); ellipsis in original). When this law required the sponsor of a St. Patrick's Day parade to include a parade unit of gay, lesbian, and bisexual Irish–Americans, the Court unanimously held that the law violated the sponsor's right to free speech. Parades are "a form of expression," this Court explained, and the application of the public-accommodations law "alter [ed] the expressive content" of the parade by forcing the sponsor to add a new unit. 515 U.S., at 568, 572–573, 115 S.Ct. 2338. The addition of that unit compelled the organizer to "bear witness to the fact that some Irish are gay, lesbian, or bisexual"; "suggest ... that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals"; and imply that their participation "merits celebration." *Id.*, at 574, 115 S.Ct. 2338. While this Court acknowledged that the unit's exclusion might have been "misguided, or even hurtful," *ibid.,* it rejected the notion that governments can mandate "thoughts and statements acceptable to some groups or, indeed, all people" as the "antithesis" of free speech, *id.*, at 579, 115 S.Ct. 2338; accord, *Dale, supra,* at 660–661, 120 S.Ct. 2446.

The parade in *Hurley* was an example of what this Court has termed "expressive conduct." See 515 U.S., at 568–569, 115 S.Ct. 2338. This Court has long held that "the Constitution looks beyond written or spoken words as mediums of expression," *id.*, at 569, 115 S.Ct. 2338, and that "[s]ymbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Thus, a person's "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.' " *Texas v. Johnson,* 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Applying this principle, the Court has recognized a wide array of conduct that can qualify as expressive,

  

including nude dancing, burning the American flag, flying an upside-down American ***1742** flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag. [1]

Of course, conduct does not qualify as protected speech simply because "the person engaging in [it] intends thereby to express an idea." *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). To determine whether conduct is sufficiently expressive, the Court asks whether it was "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative." *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). But a " 'particularized message' " is not required, or else the freedom of speech "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley,* 515 U.S., at 569, 115 S.Ct. 2338.

Once a court concludes that conduct is expressive, the Constitution limits the government's authority to restrict or compel it. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say' " and "tailor" the content of his message as he sees fit. *Id.,* at 573, 115 S.Ct. 2338 (quoting *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U.S. 1, 16, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion)). This rule "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley, supra,* at 573, 115 S.Ct. 2338. And it "makes no difference" whether the government is regulating the "creati[on], distributi [on], or consum[ption]" of the speech. *Brown v. Entertainment Merchants Assn.,* 564 U.S. 786, 792, n. 1, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011).

II

A

The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist's paint palette with a paintbrush and baker's whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Examples of his creations can be seen on Masterpiece's website. See http://masterpiececakes.com/wedding-cakes (as last visited June 1, 2018).

Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ***1743** ensure that each cake reflects the couple who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in wedding cakes. To him, a wedding cake inherently communicates that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." App. 162.

Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, "[w]edding cakes are so packed with symbolism that it is hard to know where to begin." M. Krondl, Sweet Invention: A History of Dessert 321 (2011) (Krondl); see also *ibid.* (explaining the symbolism behind the color, texture, flavor, and cutting of the cake). If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding. The cake is "so standardised and inevitable a part of getting married that few ever think to question it." Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 95 (1987)Man 93, 95 (1987). Almost no wedding, no matter how spartan, is missing the cake. See *id.,* at 98. "A whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards." *Ibid.* Although the cake is eventually eaten, that is not its primary purpose. See *id.,* at 95

  

("It is not unusual to hear people declaring that they do not like wedding cake, meaning that they do not like to eat it. This includes people who are, without question, having such cakes for their weddings"); *id.,* at 97 ("Nothing is made of the eating itself"); Krondl 320–321 (explaining that wedding cakes have long been described as "inedible"). The cake's purpose is to mark the beginning of a new marriage and to celebrate the couple. [2]

Accordingly, Phillips' creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing, *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 565–566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), or flying a plain red flag, *Stromberg v. California,* 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). [3] By ***1744** forcing Phillips to create custom wedding cakes for same-sex weddings, Colorado's public-accommodations law "alter[s] the expressive content" of his message. *Hurley,* 515 U.S., at 572, 115 S.Ct. 2338. The meaning of expressive conduct, this Court has explained, depends on "the context in which it occur[s]." *Johnson,* 491 U.S., at 405, 109 S.Ct. 2533. Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are "weddings" and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to "bear witness to [these] fact[s]," *Hurley,* 515 U.S., at 574, 115 S.Ct. 2338, or to "affir [m] ... a belief with which [he] disagrees," *id.,* at 573, 115 S.Ct. 2338.

B

The Colorado Court of Appeals nevertheless concluded that Phillips' conduct was "not sufficiently expressive" to be protected from state compulsion. 370 P.3d, at 283. It noted that a reasonable observer would not view Phillips' conduct as "an endorsement of same-sex marriage," but rather as mere "compliance" with Colorado's public-accommodations law. *Id.,* at 286–287 (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 64–65, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (*FAIR* ); *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 841–842, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 76–78, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980)). It also emphasized that Masterpiece could "disassociat[e]" itself from same-sex marriage by posting a "disclaimer" stating that Colorado law "requires it not to discriminate" or that "the provision of its services does not constitute an endorsement." 370 P.3d, at 288. This reasoning is badly misguided.

1

The Colorado Court of Appeals was wrong to conclude that Phillips' conduct was not expressive because a reasonable observer would think he is merely complying with Colorado's public-accommodations law. This argument would justify any law that compelled protected speech. And, this Court has never accepted it. From the beginning, this Court's compelled-speech precedents have rejected arguments that "would resolve every issue of power in favor of those in authority." *Barnette,* 319 U.S., at 636, 63 S.Ct. 1178. *Hurley,* for example, held that the application of Massachusetts' public-accommodations law "requir[ed] [the organizers] to alter the expressive content of their parade." 515 U.S., at 572–573, 115 S.Ct. 2338. It did not hold that reasonable observers would view the organizers as merely complying with Massachusetts' public-accommodations law.

The decisions that the Colorado Court of Appeals cited for this proposition are far afield. It cited three decisions where groups objected to being forced to provide a forum for a third party's speech. See *FAIR, supra,* at 51, 126 S.Ct. 1297 (law school refused to allow military recruiters ***1745** on campus); *Rosenberger, supra,* at 822–823, 115 S.Ct. 2510 (public university refused to provide funds to a religious student paper); *PruneYard, supra,* at 77, 100 S.Ct. 2035 (shopping center refused to allow individuals to collect signatures on its property). In those decisions, this Court rejected the argument that requiring the groups to provide a forum for third-party speech also required them

to endorse that speech. See *FAIR,* *supra,* at 63–65, 126 S.Ct. 1297; *Rosenberger, supra,* at 841–842, 115 S.Ct. 2510; *PruneYard, supra,* at 85–88, 100 S.Ct. 2035. But these decisions do not suggest that the government can force speakers to alter their *own* message. See *Pacific Gas & Elec.,* 475 U.S., at 12, 106 S.Ct. 903 ("Notably absent from *PruneYard* was any concern that access ... might affect the shopping center owner's exercise of his own right to speak"); *Hurley, supra,* at 580, 115 S.Ct. 2338 (similar).

The Colorado Court of Appeals also noted that Masterpiece is a "for-profit bakery" that "charges its customers." 370 P.3d, at 287. But this Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech. See *Pacific Gas & Elec., supra,* at 8, 16, 106 S.Ct. 903 (collecting cases); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 761, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (deeming it "beyond serious dispute" that "[s]peech ... is protected even though it is carried in a form that is 'sold' for profit"). Further, even assuming that most for-profit companies prioritize maximizing profits over communicating a message, that is not true for Masterpiece Cakeshop. Phillips routinely sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries. These efforts to exercise control over the messages that Masterpiece sends are still more evidence that Phillips' conduct is expressive. See *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 256–258, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.,* 576 U.S. ——, ——, 135 S.Ct. 2239, 2251, 192 L.Ed.2d 274 (2015).

The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech. And again, this Court has rejected it. We have described similar arguments as "beg[ging] the core question." *Tornillo, supra,* at 256, 94 S.Ct. 2831. Because the government cannot compel speech, it also cannot "require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Elec.,* 475 U.S., at 16, 106 S.Ct. 903; see also *id.,* at 15, n. 11, 106 S.Ct. 903 (citing *PruneYard,* 447 U.S., at 99, 100 S.Ct. 2035 (Powell, J., concurring in part and concurring in judgment)). States cannot put individuals to the choice of "be[ing] compelled to affirm someone else's belief" or "be[ing] forced to speak when [they] would prefer to remain silent." *Id.,* at 99, 100 S.Ct. 2035.

## III

Because Phillips' conduct (as described by the Colorado Court of Appeals) was expressive, Colorado's public-accommodations law cannot penalize it unless the law ***1746** withstands strict scrutiny. Although this Court sometimes reviews regulations of expressive conduct under the more lenient test articulated in *O'Brien,*[4] that test does not apply unless the government would have punished the conduct regardless of its expressive component. See, *e.g., Barnes,* 501 U.S., at 566–572, 111 S.Ct. 2456 (applying *O'Brien* to evaluate the application of a general nudity ban to nude dancing); *Clark,* 468 U.S., at 293, 104 S.Ct. 3065 (applying *O'Brien* to evaluate the application of a general camping ban to a demonstration in the park). Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage. In cases like this one, our precedents demand " 'the most exacting scrutiny.' " *Johnson,* 491 U.S., at 412, 109 S.Ct. 2533; accord, *Holder v. Humanitarian Law Project,* 561 U.S. 1, 28, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010).



  

The Court of Appeals did not address whether Colorado's law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with one of the asserted justifications for Colorado's law. According to the individual respondents, Colorado can compel Phillips' speech to prevent him from " 'denigrat[ing] the dignity' " of same-sex couples, " 'assert[ing] [their] inferiority,' " and subjecting them to " 'humiliation, frustration, and embarrassment.' " Brief for Respondents Craig et al. 39 (quoting *J.E.B. v. Alabama ex rel. T. B.,* 511 U.S. 127, 142, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 292, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (Goldberg, J., concurring)). These justifications are completely foreign to our free-speech jurisprudence.

States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson, supra,* at 414, 109 S.Ct. 2533. A contrary rule would allow the government to stamp out virtually any speech at will. See *Morse v. Frederick,* 551 U.S. 393, 409, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) ("After all, much political and religious speech might be perceived as offensive to some"). As the Court reiterates today, "it is not ... the role of the State or its officials to prescribe what shall be offensive." *Ante,* at 1731. " 'Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.' " *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 55, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); accord, *Johnson, supra,* at 408–409, 109 S.Ct. 2533. If the only reason a public-accommodations law regulates speech is "to produce a society free of ... biases" against the protected groups, that purpose is "decidedly fatal" to the law's constitutionality, "for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley,* 515 U.S., at 578–579, 115 S.Ct. 2338; see also ***1747** *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails"). "[A] speech burden based on audience reactions is simply government hostility ... in a different guise." *Matal v. Tam,* 582 U.S. ——, ——, 137 S.Ct. 1744, 1767, 198 L.Ed.2d 366 (2017) (KENNEDY, J., concurring in part and concurring in judgment).

Consider what Phillips actually said to the individual respondents in this case. After sitting down with them for a consultation, Phillips told the couple, " 'I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.' " App. 168. It is hard to see how this statement stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say "God Hates Fags"—all of which this Court has deemed protected by the First Amendment. See *Hurley, supra,* at 574–575, 115 S.Ct. 2338; *Dale,* 530 U.S., at 644, 120 S.Ct. 2446; *Snyder v. Phelps,* 562 U.S. 443, 448, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). Moreover, it is also hard to see how Phillips' statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about "dignity" and "stigma" did not carry the day when this Court affirmed the right of white supremacists to burn a 25–foot cross, *Virginia v. Black,* 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); conduct a rally on Martin Luther King Jr.'s birthday, *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to " 'Bury the niggers,' " *Brandenburg v. Ohio,* 395 U.S. 444, 446, n. 1, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam* ).

Nor does the fact that this Court has now decided *Obergefell v. Hodges,* 576 U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), somehow diminish Phillips' right to free speech. "It is one thing ... to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share [that view] as bigoted" and unentitled to express a different view. *Id.,* at ——, 135 S.Ct., at 2626 (ROBERTS, C.J., dissenting). This Court is not an authority on matters of

conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* itself emphasized that the traditional understanding of marriage "long has been held —and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Id.*, at ——, 135 S.Ct., at 2594 (majority opinion). If Phillips' continued adherence to that understanding makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected. See *Dale, supra,* at 660, 120 S.Ct. 2446 ("[T]he fact that [the social acceptance of homosexuality] may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view").

* * *

In *Obergefell*, I warned that the Court's decision would "inevitabl [y] ... come into conflict" with religious liberty, "as individuals ... are confronted with demands to participate in and endorse civil marriages between same-sex couples." 576 U.S., at ——, 135 S.Ct., at 2638 (dissenting opinion). This case proves that the conflict has ***1748** already emerged. Because the Court's decision vindicates Phillips' right to free exercise, it seems that religious liberty has lived to fight another day. But, in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to "stamp out every vestige of dissent" and "vilify Americans who are unwilling to assent to the new orthodoxy." *Id.*, at ——, 135 S.Ct., at 2642 (ALITO, J., dissenting). If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals' must be rejected.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, dissenting.

There is much in the Court's opinion with which I agree. "[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Ante,* at 1727. "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante,* at 1727 – 1728. "[P]urveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying 'no goods or services will be sold if they will be used for gay marriages.' " *Ante,* at 1728 – 1729. Gay persons may be spared from "indignities when they seek goods and services in an open market." *Ante,* at 1732.[1] I strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

The Court concludes that "Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." *Ante,* at 1731. This conclusion rests on evidence said to show the Colorado Civil Rights Commission's ***1749** (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted "disparate consideration of Phillips' case compared to the cases of" three other bakers who refused to make cakes requested by William Jack, an *amicus* here. *Ante,* at 1732. The Court also finds hostility in statements made at two public hearings on Phillips' appeal to the Commission. *Ante,* at 1728 – 1730. The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips' appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes

> "made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red 'X' over the image. On one cake,

> he requested [on] one side[,] ... 'God hates sin. Psalm 45:7' and on the opposite side of the cake 'Homosexuality is a detestable sin. Leviticus 18:2.' On the second cake, [the one] with the image of the two groomsmen covered by a red 'X' [Jack] requested [these words]: 'God loves sinners' and on the other side 'While we were yet sinners Christ died for us. Romans 5:8.' " App. to Pet. for Cert. 319a; see *id.,* at 300a, 310a.

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery "does not discriminate" and "accept[s] all humans." *Id.,* at 301a (internal quotation marks omitted). The second bakery owner told Jack he "had done open Bibles and books many times and that they look amazing," but declined to make the specific cakes Jack described because the baker regarded the messages as "hateful." *Id.,* at 310a (internal quotation marks omitted). The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message. *Id.,* at 319a. [2]

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack's claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. *Id.,* at 297a, 307a, 316a. In this regard, the Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose dignity the Colorado Antidiscrimination Act (CADA) protects. See *id.,* at 305a, 314a, 324a. The Commission summarily affirmed the Division's no-probable-cause finding. See *id.,* at 326a–331a.

***1750** The Court concludes that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of [the other bakers'] objections." *Ante,* at 1730. See also *ante,* at 1736 – 1737 (GORSUCH, J., concurring). But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries' refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips' refusal to serve Craig and Mullins: Phillips would *not* sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding —not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied. Cf. *ante,* at 1735 – 1736, 1738 – 1739 (GORSUCH, J., concurring). Colorado, the Court does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. See *supra,* at 1748. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse. [3]

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers [4] was irrelevant to the issue Craig and Mullins' case presented. What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple. In contrast, the other bakeries' sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer. Cf. *ante,* at 1730.

Nor was the Colorado Court of Appeals' "difference in treatment of these two instances ... based on the government's own assessment of offensiveness." *Ante,* at 1731. Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the ***1751** requested product would literally display. As the Court recognizes, a refusal "to design a special cake with words or images ... might be different from a refusal to sell any cake at all." *Ante,* at 1723. [5] The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division's finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant

vigorous protection from discrimination. See App. to Pet. for Cert. 20a, n. 8 ("The Division found that the bakeries did not refuse [Jack's] request because of his creed, but rather because of the offensive nature of the requested message.... [T]here was no evidence that the bakeries based their decisions on [Jack's] religion ... [whereas Phillips] discriminat [ed] on the basis of sexual orientation."). I do not read the Court to suggest that the Colorado Legislature's decision to include certain protected characteristics in CADA is an impermissible government prescription of what is and is not offensive. Cf. *ante,* at 1727 – 1728. To repeat, the Court affirms that "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante,* at 1728.

II

Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. See App. to Pet. for Cert. 5a–6a. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips' appeal. Fourth, after the Commission's ruling, the Colorado Court of Appeals considered the case *de novo*. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), where the government action that ***1752** violated a principle of religious neutrality implicated a sole decisionmaking body, the city council, see *id.,* at 526–528, 113 S.Ct. 2217.

* * *

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals' judgment. I would so rule.

**All Citations**

138 S.Ct. 1719, 201 L.Ed.2d 35, 102 Empl. Prac. Dec. P 46,050, 86 USLW 4335, 18 Cal. Daily Op. Serv. 5293, 2018 Daily Journal D.A.R. 5291, 27 Fla. L. Weekly Fed. S 289

## Footnotes

* 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.

* Justice GORSUCH disagrees. In his view, the Jack cases and the Phillips case must be treated the same because the bakers in all those cases "would not sell the requested cakes to anyone." *Post,* at 1735. That description perfectly fits the Jack cases—and explains why the bakers there did not engage in unlawful discrimination. But it is a surprising characterization of the Phillips case, given that Phillips routinely sells wedding cakes to opposite-sex couples. Justice GORSUCH can make the claim only because he does not think a "wedding cake" is the relevant product. As Justice GORSUCH sees it, the product that Phillips refused to sell here—and would refuse to sell to anyone—was a "cake celebrating same-sex marriage." *Ibid.*; see *post,* at 1735, 1736 – 1737, 1737 – 1738. But that is wrong. The cake requested was not a special "cake celebrating same-sex marriage." It was simply a wedding cake—one that (like other standard wedding cakes)

is suitable for use at same-sex and opposite-sex weddings alike. See *ante,* at 1724 – 1725 (majority opinion) (recounting that Phillips did not so much as discuss the cake's design before he refused to make it). And contrary to Justice GORSUCH's view, a wedding cake does not become something different whenever a vendor like Phillips invests its sale to particular customers with "religious significance." *Post,* at 1728. As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait. See *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, n. 5, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam* ) (holding that a barbeque vendor must serve black customers even if he perceives such service as vindicating racial equality, in violation of his religious beliefs); *ante,* at 1727. A vendor can choose the products he sells, but not the customers he serves—no matter the reason. Phillips sells wedding cakes. As to that product, he unlawfully discriminates: He sells it to opposite-sex but not to same-sex couples. And on that basis—which has nothing to do with Phillips' religious beliefs—Colorado could have distinguished Phillips from the bakers in the Jack cases, who did not engage in any prohibited discrimination.

1 *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 565–566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *Texas v. Johnson,* 491 U.S. 397, 405–406, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Spence v. Washington,* 418 U.S. 405, 406, 409–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (*per curiam* ); *Schacht v. United States,* 398 U.S. 58, 62–63, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 505–506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Brown v. Louisiana,* 383 U.S. 131, 141–142, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (opinion of Fortas, J.); *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 633–634, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Stromberg v. California,* 283 U.S. 359, 361, 369, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

2 The Colorado Court of Appeals acknowledged that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage," depending on its "design" and whether it has "written inscriptions." *Craig v. Masterpiece Cakeshop, Inc.,* 370 P.3d 272, 288 (2015). But a wedding cake needs no particular design or written words to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated. Wedding cakes have long varied in color, decorations, and style, but those differences do not prevent people from recognizing wedding cakes as wedding cakes. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 96 (1987)Man 93, 96 (1987). And regardless, the Commission's order does not distinguish between plain wedding cakes and wedding cakes with particular designs or inscriptions; it requires Phillips to make any wedding cake for a same-sex wedding that he would make for an opposite-sex wedding.

3 The dissent faults Phillips for not "submitting ... evidence" that wedding cakes communicate a message. *Post,* at 1748, n. 1 (opinion of GINSBURG, J.). But this requirement finds no support in our precedents. This Court did not insist that the parties submit evidence detailing the expressive nature of parades, flags, or nude dancing. See *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 568–570, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); *Spence,* 418 U.S., at 410–411, 94 S.Ct. 2727; *Barnes,* 501 U.S., at 565–566, 111 S.Ct. 2456. And we do not need extensive evidence here to conclude that Phillips' artistry is expressive, see *Hurley,* 515 U.S., at 569, 115 S.Ct. 2338, or that wedding cakes at

least communicate the basic fact that "this is a wedding," see *id.,* at 573–575, 115 S.Ct. 2338. Nor does it matter that the couple also communicates a message through the cake. More than one person can be engaged in protected speech at the same time. See *id.,* at 569–570, 115 S.Ct. 2338. And by forcing him to provide the cake, Colorado is requiring Phillips to be "intimately connected" with the couple's speech, which is enough to implicate his First Amendment rights. See *id.,* at 576, 115 S.Ct. 2338.

4 "[A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

1 As Justice THOMAS observes, the Court does not hold that wedding cakes are speech or expression entitled to First Amendment protection. See *ante,* at 1740 (opinion concurring in part and concurring in judgment). Nor could it, consistent with our First Amendment precedents. Justice THOMAS acknowledges that for conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative. *Ante,* at 1724 – 1725 (citing *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). The record in this case is replete with Jack Phillips' own views on the messages he believes his cakes convey. See *ante,* at 1742 – 1743 (THOMAS, J., concurring in part and concurring in judgment) (describing how Phillips "considers" and "sees" his work). But Phillips submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's. Indeed, some in the wedding industry could not explain what message, or whose, a wedding cake conveys. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 100–101 (1987)Man 93, 100–101 (1987) (no explanation of wedding cakes' symbolism was forthcoming "even amongst those who might be expected to be the experts"); *id.,* at 104–105 (the cake cutting tradition might signify "the bride and groom ... as appropriating the cake" from the bride's parents). And Phillips points to no case in which this Court has suggested the provision of a baked good might be expressive conduct. Cf. *ante,* at 1743, n. 2 (THOMAS, J., concurring in part and concurring in judgment); *Hurley v. Irish–American Gay, Lesbian, and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 568–579, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (citing previous cases recognizing parades to be expressive); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (noting precedents suggesting nude dancing is expressive conduct); *Spence v. Washington,* 418 U.S. 405, 410, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (observing the Court's decades-long recognition of the symbolism of flags).

2 The record provides no ideological explanation for the bakeries' refusals. Cf. *ante,* at 1734 – 1735, 1738, 1739 – 1740 (GORSUCH, J., concurring) (describing Jack's requests as offensive to the bakers' "secular" convictions).

3 Justice GORSUCH argues that the situations "share all legally salient features." *Ante,* at 1735 (concurring opinion). But what critically differentiates them is the role the customer's "statutorily protected trait," *ibid.,* played in the denial of service. Change Craig and Mullins' sexual orientation (or sex), and Phillips would have provided the cake. Change Jack's religion, and the bakers would have been no more willing to comply with his request. The bakers' objections to Jack's cakes had nothing to do with "religious opposition to

same-sex weddings." *Ante,* at 1736 (GORSUCH, J., concurring). Instead, the bakers simply refused to make cakes bearing statements demeaning to people protected by CADA. With respect to Jack's second cake, in particular, where he requested an image of two groomsmen covered by a red "X" and the lines "God loves sinners" and "While we were yet sinners Christ died for us," the bakers gave not the slightest indication that religious words, rather than the demeaning image, prompted the objection. See *supra,* at 1749. Phillips did, therefore, discriminate *because of* sexual orientation; the other bakers did not discriminate *because of* religious belief; and the Commission properly found discrimination in one case but not the other. Cf. *ante,* at 1735 – 1737 (GORSUCH, J., concurring).

4 But see *ante,* at 1726 (majority opinion) (acknowledging that Phillips refused to sell to a lesbian couple cupcakes for a celebration of their union).

5 The Court undermines this observation when later asserting that the treatment of Phillips, as compared with the treatment of the other three bakeries, "could reasonably be interpreted as being inconsistent as to the question of whether speech is involved." *Ante,* at 1730. But recall that, while Jack requested cakes with particular text inscribed, Craig and Mullins were refused the sale of any wedding cake at all. They were turned away before any specific cake design could be discussed. (It appears that Phillips rarely, if ever, produces wedding cakes with words on them—or at least does not advertise such cakes. See Masterpiece Cakeshop, Wedding, http://www.masterpiececakes.com/wedding-cakes (as last visited June 1, 2018) (gallery with 31 wedding cake images, none of which exhibits words).) The Division and the Court of Appeals could rationally and lawfully distinguish between a case involving disparaging text and images and a case involving a wedding cake of unspecified design. The distinction is not between a cake with text and one without, see *ante,* at 1737 – 1738 (GORSUCH, J., concurring); it is between a cake with a particular design and one whose form was never even discussed.

# ***Obergefell v. Hodges***

Supreme Court of the United States

April 28, 2015, Argued [*]; June 26, 2015, Decided

Nos. 14-556, 14-562, 14-571, 14-574

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[*] Together with No. 14-562, *Tanco et al*. v. *Haslam, Governor of Tennessee, et al*., No. 14-571, *DeBoer et al.* v. *Snyder, Governor of Michigan, et al.,* and No. 14-574, *Bourke et al.* v. *Beshear, Governor of Kentucky*, also on certiorari to the same court.

**Reporter**
576 U.S. 644 *; 135 S. Ct. 2584 **; 192 L. Ed. 2d 609 ***; 2015 U.S. LEXIS 4250 ****; 83 U.S.L.W. 4592; 99 Empl. Prac. Dec. (CCH) P45,341; 115 A.F.T.R.2d (RIA) 2015-2309; 25 Fla. L. Weekly Fed. S 472

JAMES OBERGEFELL, et al., Petitioners (No. 14-556) v. RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, et al.VALERIA TANCO, et al., Petitioners (No. 14-562) v. BILL HASLAM, GOVERNOR OF TENNESSEE, et al.APRIL DeBOER, et al., Petitioners (No. 14-571) v. RICK SNYDER, GOVERNOR OF MICHIGAN, et al.GREGORY BOURKE, et al., Petitioners (No. 14-574) v. STEVE BESHEAR, GOVERNOR OF KENTUCKY

**Notice:** The LEXIS pagination of this document is subject to change pending release of the final published version.

**Subsequent History:** Costs and fees proceeding at, Motion granted by, in part, Motion denied by, in part, Sub nomine at *Tanco v. Haslam, 2016 U.S. Dist. LEXIS 39403 (M.D. Tenn., Mar. 25, 2016)*

**Prior History:** **[****1]** ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

*Deboer v. Snyder, 772 F.3d 388, 2014 U.S. App. LEXIS 21191 (6th Cir.), 2014 FED App. 275P (6th Cir.) (6th Cir. Mich., 2014)*

**Disposition:** *772 F. 3d 388*, reversed.

## Syllabus

**[*644]** **[***614]** **[**2588]** 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 **[****2]** 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. ___ - ___, 192 L. Ed. 2d, at 619-635*.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. *Pp. ___ - ___, 192 L. Ed. 2d, at 619-623*.

(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 **[***615]** 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. ___ - ___, 192 L. Ed. 2d, at 619-621*.

(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 **[****3]** 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 **[*645]** 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 2013, 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." **[**2589]** *Lawrence v. Texas, 539 U.S. 558, 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. In 2012, the federal

Defense of Marriage Act was also struck down. *United States v. Windsor, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808*. Numerous same-sex marriage cases reaching the federal **[****4]** courts and state supreme courts have added to the dialogue. *Pp. ___ - ___, 192 L. Ed. 2d, at 621-623*.

(b) The *Fourteenth Amendment* requires a State to license a marriage between two people of the same sex. *Pp. ___ - ___, 192 L. Ed. 2d, at 623-634*.

(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 **[***616]** 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. **[****5]** But other, more instructive precedents have expressed broader principles. See, *e.g., Lawrence, supra, at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. 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 **[*646]** protected. See, *e.g.,Eisenstadt, supra, at 453-454, 92 S. Ct. 1029, 31 L. Ed. 2d 349*. This analysis compels the conclusion that same-sex couples may exercise the right to marry. *Pp. ___ - ___, 192 L. Ed. 2d, at 623-625*.

(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, 18 L. Ed. 2d 1010*. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence, supra, at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. 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 **[****6]** 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, 14 L. Ed. 2d 510*, and was acknowledged in *Turner, supra, at 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64*. 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, 156 L. Ed. 2d 508*.

**[**2590]** 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 772, 133 S. Ct. 2675, 186 L. Ed. 2d 808*. 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 **[****7]** 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 **[***617]** 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 **[*647]** 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. ___ - ___, 192 L. Ed. 2d, at 625-629*.

(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 **[****8]** 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, supra at 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. 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 **[****9]** denial **[**2591]** works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. *Pp. ___ - ___, 192 L. Ed. 2d, at 629-631*.

(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. ___ - ___, 192 L. Ed. 2d, at 631*.

**[*648]** (5) There may be an initial inclination to await further legislation, litigation, **[***618]** 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 **[****10]** 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. The 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. ___ - ___, 192 L. Ed. 2d, at 631-634*.

(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. ___ - ___, 192 L. Ed. 2d, at 634-635*.

*772 F. 3d 388*, reversed.

**Counsel: Mary L. Bonauto** argued the cause for petitioner on Question 1.

**Donald B. Verrilli, [****11] Jr.**, argued the cause for the United States, as amicus curiae, by special leave of court on Question 1.

**John J. Bursch** argued the cause for respondents on Question 1.

**Douglas Hallward-Driemeier** for the petitioners on Question 2.

**Joseph F. Whalen** for the respondents on Question 2.

**Judges:** 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, ___.

**Opinion by:** Kennedy

## Opinion

**[*651]** **[**2593]** Justice **Kennedy** delivered the opinion of the Court.

[1] The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, **[*652]** 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.

**[*653]** I

These cases come from Michigan, Kentucky, Ohio, **[****12]** and Tennessee, States that define marriage as a union between one **[*654]** man and one woman. See, *e.g.*, *Mich. Const., Art. I, §25*; *Ky. Const. §233A*; *Ohio Rev. Code Ann. §3101.01* (Lexis 2008); **[***619]** *Tenn. Const., Art. XI, §18*. The petitioners are 14 same-sex couples and two men whose same-sex partners are **[*655]** 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.

**[*656]** The 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. 1118, 135 S. Ct. 1039; 190 L. Ed. 2d 908 (2015)*. The first, presented by the cases from Michigan and Kentucky, is whether the *Fourteenth Amendment* requires a State to license a marriage **[****13]** 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 **[**2594]** 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 **[*657]** 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, **[****14]** 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.

**[***620]** 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 **[****15]** 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. **[*658]** 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 **[****16]** 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 **[**2595]** 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 **[****17]** needs joined their family. Michigan, however, permits **[*659]** 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 **[***621]** 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 **[****18]** 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 **[*660]** 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, **[****19]** 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. **[**2596]** 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 **[****20]** 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 **[***622]** 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 **[*661]** 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 **[****21]** 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 ***[*662]*** 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, **[****22]** 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 **[**2597]** 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 **[***623]** 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. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013), this Court invalidated DOMA to the extent it barred the **[****23]** 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 764, 133 S. Ct. 2675, 186 L. Ed. 2d at 823*.

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 **[*663]** 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 (CA8 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 **[****24]** 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

[2] 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.,* **[**2598]** 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).

[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 **[*664]** 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 **[***624]** reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See **[****25]** *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, 156 L. Ed. 2d

508. 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.

Applying these established tenets, the Court has long held [5] 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 **[****26]** 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, ***[*665]*** 414 U.S. 632, 639-640, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974); Griswold, supra, at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510; 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.*, **[**2599]** Lawrence, 539 U.S., at 574, 123 S. Ct. 2472, 156 L. Ed. 2d 508; Turner, supra, at 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64; Zablocki, supra ***[****27]***, at 384, 98 S. Ct. 673, 54 L. Ed. 2d 618; Loving, ***[***625]*** supra, at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010; Griswold, supra, at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510. 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, 31 L. Ed. 2d 349; Poe, supra, at 542-553, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (Harlan, J., dissenting).

This analysis compels the conclusion that [6] 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.

A first premise of the Court's relevant precedents is that [7] 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, 18 L. Ed. 2d 1010; see also Zablocki, supra, at 384, 98 S. Ct. 673, 54 L. Ed. 2d 618 (observing *Loving* held "the right to marry is of fundamental importance **[*666]** 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, 156 L. Ed. 2d 508. Indeed, the Court has **[****28]** 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, 54 L. Ed. 2d 618.

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.

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 770 -772, 133 S. Ct. 2675, 186 L. Ed. 2d at 828*. 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, 18 L. Ed. 2d 1010* ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it **[****29]** 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, 14 L. Ed. 2d 510*. Suggesting that marriage is a right "older than the *Bill of Rights*," *Griswold* described marriage this way:

> **[*667]** **[***626]** "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 **[**2600]** as any involved in our prior decisions. " *Id., at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510*.

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, 96 L. Ed. 2d 64*. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor, supra, at 763, 133 S. Ct. 2675, 186 L. Ed. 2d at 823*. 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 **[****30]** and understanding and assurance that while both still live there will be someone to care for the other.

[8] 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, 156 L. Ed. 2d 508*. 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.

[9] 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)*; **[*668]** *Meyer, 262 U.S., at 399, 43 S. Ct. 625, 67 L. Ed. 1042*. 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, 54 L. Ed. 2d 618* (quoting *Meyer, supra, at 399, 43 S. Ct. 625, 67 L. Ed. 1042*). Under the laws of the several **[****31]** 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 772, 133 S. Ct. 2675, 186 L. Ed. 2d at 828*. 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 **[***627]** 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 **[****32]** 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 **[**2601]** here thus harm and humiliate the children of same-sex couples. See *Windsor, supra, at 772, 133 S. Ct. 2675, 186 L. Ed. 2d at 828*.

**[*669]** That is not to say the right to marry is less meaningful for those who do not or cannot have children. [10] 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 **[****33]** 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, 31 L. Ed. 654*. 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 **[*670]** free to vary the benefits they confer **[****34]** 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; **[***628]** 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 765, 133 S. Ct. 2675, 186 L. Ed. 2d at 824*. 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 **[****35]** 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 **[**2602]** 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 **[*671]** 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 **[****36]** 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. [11] *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, 138 L. Ed. 2d 772* (Souter, J., concurring in judgment); *id., at 789-792, 117 S. Ct. 2258, 138 L. Ed. 2d 772* (Breyer, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued **[***629]** justification **[****37]** 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, 18 L. Ed. 2d 1010*; *Lawrence, 539 U.S., at 566-567, 123 S. Ct. 2472, 156 L. Ed. 2d 508*.

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 **[*672]** 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.

[12] 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 **[****38]** the equal protection of the laws. The *Due Process Clause* and the *Equal Protection Clause* **[**2603]** 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, 136 L. Ed. 2d 473*; *id., at 128-129, 117 S. Ct. 555, 136 L. Ed. 2d 473* (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 **[*673]** 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, 18 L. Ed. 2d 1010*. With this link to equal protection the Court proceeded to hold **[****39]** 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 **[***630]** 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, 54 L. Ed.*

2d 618. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see id., at 383-387, 98 S. Ct. 673, 54 L. Ed. 2d 618, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding **[****40]** of the other.

Indeed, [13] 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 6, invidious sex-based classifications in marriage remained **[*674]** 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 **[**2604]** 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 **[****41]** 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 [14] 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, 136 L. Ed. 2d 473. 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, 31 L. Ed. 2d **[***631]** 349. 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, 86 L. Ed. 1655.

In *Lawrence*, the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the **[*675]** legal treatment of gays and lesbians. See 539 U.S., at 575, 123 S. Ct. 2472, 156 L. Ed. 2d 508. 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. **[****42]** 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, 156 L. Ed. 2d 508.

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, 54 L. Ed. 2d 618; Skinner, 316 U.S., at 541, 62 S. Ct. 1110, 86 L. Ed. 1655.

These considerations lead to the conclusion that [15] the right to marry is a fundamental right inherent in the liberty of the person, and under the **[****43]** 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 **[**2605]** 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 the petitioners in these cases are now held invalid to the extent they exclude **[*676]** 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 **[***632]** campaigns, as well as countless studies, papers, **[****44]** 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.

Of course,[16] 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 **[*677]** principle in *Schuette v. BAMN, 572 U.S. 291, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014)*, noting the "right of citizens to debate so they can learn and decide **[****45]** and then, through the political process, act in concert to try to shape the course of their own times." *Id., at 312, 134 S. Ct. 1623, 188 L. Ed. 2d at 628*. 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 311, 134 S. Ct. 1623, 188 L. Ed. 2d at 628*. 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 313, 134 S. Ct. 1623, 188 L. Ed. 2d at 628*. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

[17] 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 **[**2606]** the Constitution "was to withdraw certain subjects from **[****46]** 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 **[***633]** **[*678]** same-sex intimacy. See *478 U.S., at 186, 190-195, 106 S. Ct. 2841, 92 L. Ed. 2d 140*. 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, 92 L. Ed. 2d 140* (Blackmun, J., joined by Brennan **[****47]**, Marshall,

and Stevens, JJ., dissenting); *id., at 214, 106 S. Ct. 2841, 92 L. Ed. 2d 140* (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, 156 L. Ed. 2d 508*. 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 **[****48]** 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 **[*679]** 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 connection **[**2607]** 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, **[****49]** 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 (CA10 2014)* ("[I]t is wholly illogical to believe that state recognition **[***634]** 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.

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 **[*680]** that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations **[****50]** 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 **[****51]** 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.

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 **[*681]** recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds[18] same-sex couples may exercise the fundamental right to marry in all States. It **[**2608]** 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.

**[***635]** * * *

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 **[****52]** 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.

APPENDICES

A

State and Federal Judicial Decisions

Addressing Same-Sex Marriage

**United States Courts of Appeals Decisions**

*Adams v. Howerton, 673 F. 2d 1036 (CA9 1982)*

*Smelt v. County of Orange, 447 F. 3d 673 (CA9 2006)*

**[*682]** *Citizens for Equal Protection v. Bruning, 455 F. 3d 859 (CA8 2006)*

*Windsor v. United States, 699 F. 3d 169 (CA2 2012)*

*Massachusetts v. Department of Health and Human Services, 682 F. 3d 1 (CA1 2012)*

*Perry v. Brown, 671 F. 3d 1052 (CA9 2012)*

*Latta v. Otter, 771 F. 3d 456 (CA9 2014)*

*Baskin v. Bogan, 766 F. 3d 648 (CA7 2014)*

*Bishop v. Smith, 760 F. 3d 1070 (CA10 2014)*

*Bostic v. Schaefer, 760 F. 3d 352 (CA4 2014)*

*Kitchen v. Herbert, 755 F. 3d 1193 (CA10 2014)*

*DeBoer v. Snyder, 772 F. 3d 388 (CA6 2014)*

*Latta v. Otter, 779 F. 3d 902 (CA9 2015)* (O'Scannlain, J., dissenting from the denial of rehearing en banc)

**United States District Court Decisions**

*Adams v. Howerton, 486 F. Supp. 1119 (CD 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 (MD Fla. 2005)*

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

*Bishop v. Oklahoma ex rel. Edmondson, 447 F. Supp. 2d 1239 (ND 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)*

**[**2609]** ***[***636]*** *Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (ND Cal. 2010)*

**[*683]** Dragovich v. Department of Treasury, 764 F. Supp. 2d 1178 (ND Cal. 2011)

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

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

Windsor v. United States, 833 F. Supp. 2d 394 (SDNY 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 U.S. Dist. LEXIS 162583, 2013 WL 6044329 (MD La., Nov. 14, 2013)

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

Lee v. Orr, 2013 U.S. Dist. LEXIS 173801, 2013 WL 6490577 (ND Ill., Dec. 10, 2013)

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

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

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

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

Lee v. Orr, 2014 U.S. Dist. LEXIS 21620, 2014 WL 683680 (ND Ill., Feb. 21, 2014)

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

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

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

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

Henry v. Himes, 14 F. Supp. 3d 1036 (SD 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 (MD Pa. 2014)

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

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

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

Burns v. Hickenlooper, 2014 U.S. Dist. LEXIS 100894, 2014 WL 3634834 (Colo., July 23, 2014)

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

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

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

**[*684]** General Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790 (WDNC 2014)

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

**[***637]** Fisher-Borne v. Smith, 14 F. Supp. 3d 695 (MDNC 2014)

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

Connolly v. Jeanes, 73 F. Supp. 3d 1094, 2014 U.S. Dist. LEXIS 147950, 2014 WL 5320642 (Ariz., Oct. 17, 2014)

Guzzo v. Mead, 2014 U.S. Dist. LEXIS 148481, 2014 WL 5317797 (Wyo., Oct. 17, 2014)

Conde-Vidal v. Garcia-Padilla, 54 F. Supp. 3d 157 (PR 2014)

Marie v. Moser, 65 F. Supp. 3d 1175, 2014 U.S. Dist. LEXIS 157093, 2014 WL 5598128 (Kan., Nov. 4, 2014)

**[**2610]** Lawson v. Kelly, 58 F. Supp. 3d 923 (WD Mo. 2014)

McGee v . Cole, 66 F. Supp. 3d 747, 2014 U.S. Dist. LEXIS 158680, 2014 WL 5802665 (SD 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 U.S. Dist. LEXIS 165898, 2014 WL 6685391 (ED Ark., Nov. 25, 2014)

Campaign for Southern Equality v. Bryant, 64 F. Supp. 3d 906, 2014 U.S. Dist. LEXIS 165913, 2014 WL 6680570 (SD Miss., Nov. 25, 2014)

Inniss v. Aderhold, 80 F. Supp. 3d 1335, 2015 U.S. Dist. LEXIS 9697, 2015 WL 300593 (ND Ga., Jan. 8, 2015)

Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862, 61 F. Supp. 3d 862, 2015 U.S. Dist. LEXIS 4018 (S. D., 2015)

Caspar v. Snyder, 77 F. Supp. 3d 616, 2015 U.S. Dist. LEXIS 4644, 2015 WL 224741 (ED Mich., Jan. 15, 2015)

Searcey v. Strange, 81 F. Supp. 3d 1285, 2015 U.S. Dist. LEXIS 7776 (SD Ala., Jan. 23, 2015)

Strawser v. Strange, 44 F. Supp. 3d 1206 (SD 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)

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)

**[*685]** 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)

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

Hernandez v. Robles, 7 N. Y. 3d 338, 855 N. E. 2d 1, 821 N.Y.S.2d 770 (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, 200 So. 3d 495, 2015 Ala. LEXIS 33, 2015 WL 892752 (Ala., Mar. 3, 2015)*

**[**2611]** 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

**[*686] 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, 2013 N. M. LEXIS 414, 316 P. 3d 865 (2013)*

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

**Dissent by:** Roberts; Scalia; Thomas; Alito

## Dissent

Chief Justice **Roberts**, with whom Justice **Scalia** and Justice **Thomas** join, dissenting.

Petitioners make strong arguments rooted in social **[****53]** 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 **[***639]** 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).

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. **[****54]** In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage **[*687]** 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 **[**2612]** 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 **[****55]** to remake society according to its own "new insight" into the "nature of injustice." *Ante, at ___, ___, 192 L. Ed. 2d, at 624, 631*. 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, 49 L. Ed. 937* (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial

role. It seizes for itself a question the **[*688]** 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 ___, 192 L. Ed. 2d, at 629*. I have no choice but to dissent.

Understand well what this dissent is **[****56]** 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 **[***640]** 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 ___, 192 L. Ed. 2d, at 620*, 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. 565, 577, 134 S. Ct. 1811, 188 L. Ed. 2d 835, 846 (2014)*.

A

As the majority acknowledges, marriage "has existed for millennia and **[****57]** across civilizations." *Ante, at ___, 192 L. Ed. 2d, at 619*. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See *ibid*. Tr. of Oral Arg. on Question 1, p. 12 **[*689]** (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). **[**2613]** 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. 744, 763, 133 S. Ct. 2675, 186 L. Ed. 2d 823 (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. **[****58]** 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 **[***641]** 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 **[*690]** 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 **[****59]** care for children that the mere desire for children, and the sex that makes children possible, does not solve." J. 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 ___, 192 L. Ed. 2d, at 621*. 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 **[****60]** nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." **[**2614]** *Windsor, 570 U.S., at 767, 133 S. Ct. 2675, 186 L. Ed. 2d 824* (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 (CA6 2014)*. Even when state laws did not specify this definition expressly, no one **[*691]** 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 **[****61]** 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 **[***642]** 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 **[*692]** 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, **[****62]** 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, 18 L. Ed. 2d 1010*.

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." *Ante, at ___ - ___, 192 L. Ed. 2d, at 621*. 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 **[**2615]** that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured. *Ante, at ___, 192 L. Ed. 2d, at 621*.

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 **[****63]** 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 **[*693]** State Constitution to require recognition of same-sex marriage, many States—including the **[***643]** 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 **[****64]** 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 **[*694]** 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 **[****65]** 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 ___, 192 L. Ed. 2d, at 625*. In reality, however, **[**2616]** 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" **[***644]** Clause in the Constitution. See *ante, at ___, ___, 192 L. Ed. 2d, at 619, 626*. They **[****66]** 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 **[*695]** 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 University) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It **[****67]** 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, 60 U.S. 393, 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, 19 How. 393, 15 L. Ed. 691. In a dissent that has outlasted the majority opinion, Justice **[**2617]** Curtis explained that **[*696]** 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 **[****68]** 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, 19 How. 393, 15 L. Ed. 691.

*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 **[***645]** 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, 49 L. Ed. 937. 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, 49 L. Ed. 937.

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, 49 L. Ed. 937 (opinion of Harlan, J.). The majority's contrary conclusion **[****69]** 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, 49 L. Ed. 937 (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 **[*697]** whether statutes embodying them conflict with the Constitution." Id., at 75-76, 25 S. Ct. 539, 49 L. Ed. 937.

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 **[****70]** 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 super-legislature 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 harmony **[**2618]** 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 **[***646]** 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, **[*698]** deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered **[****71]** liberty, such that neither liberty nor justice would exist if they were sacrificed." Glucksberg, 521 U.S., at 720-721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (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 303113 S. Ct. 1439, 123 L. Ed. 2d 1; 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, 52 L. Ed. 2d 531 (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, 138 L. Ed. 2d 772)).

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 ___, 192 L. Ed. 2d, at 628. But given the few "guideposts for responsible decisionmaking in this unchartered area," **[****72]** Collins, 503 U.S., at 125, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261, "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, 52 L. Ed. 2d 531 (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 ___ - ___, 192 L. Ed. 2d, at 623-624, does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' **[*699]** 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 **[***647]** this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades **[**2619]** 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 **[****73]** 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 ___, ___, ___, ___, 192 L. Ed. 2d, at 619, 620, 621, 635. 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, 54 L. Ed. 2d 618*; see *Loving, 388 U.S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010*. 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. **[*700]** 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 **[****74]** 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 ___ - ___, n. 5, 192 L. Ed. 2d, at 666* (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 ___, 192 L. Ed. 2d, at 624*.

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 808, 133 S. Ct. 2675, 186 L. Ed. 2d at 852* (Alito, J., dissenting) ("What Windsor and the United States **[****75]** 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.

**[***648]** 2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. *Ante, at ___, 192 L. Ed. 2d, at 624*. Although not entirely clear, this reference seems to correspond **[*701]** to a line of cases discussing an implied fundamental "right of privacy." *Griswold, 381 U.S., at 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. 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, 14 L. Ed. 2d 510*. The Court stressed the invasive nature of the ban, **[**2620]** which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." *Id., at 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510*. 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 **[****76]** 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, 156 L. Ed. 2d 508*.

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 ___, 192 L. Ed. 2d, at 635*. 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, 6 L. Ed. 2d 989. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that **[*702]** courts implying fundamental rights are not "free to roam where unguided speculation might take them." *Ibid.* They must instead have "regard **[****77]** 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, 6 L. Ed. 2d 989.

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek **[***649]** 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 ___ - ___, 192 L. Ed. 2d, at 664-667 (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 **[****78]** from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights **[**2621]** taken by this Court in *Glucksberg*. Ante, at ___, 192 L. Ed. 2d, at 628 (quoting 521 U.S., at 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772). 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 **[*703]** 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 ___ - ___, 192 L. Ed. 2d, at 618. The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." Ante, at ___, 192 L. Ed. 2d, at 625. 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, 49 L. Ed. 937 (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 **[****79]** 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 ___, ___, 192 L. Ed. 2d, at 624, 624. 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 ___, 192 L. Ed. 2d, at 629. 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, 49 L. Ed. 937 ("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 **[***650]** the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." Ante, at ___, 192 L. Ed. 2d, at 632. On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to **[*704]** implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives **[*****80]** 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* ***[**2622]*** *___, 192 L. Ed. 2d, at 625*, 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 **[****81]** couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," *ante, at ___, 192 L. Ed. 2d, at 627*, 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 ___, 192 L. Ed. 2d, at 631*, 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 **[*705]** 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. **[****82]** 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, ___, 192 L. Ed. 2d,* ***[***651]*** *at 634*. 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, 49 L. Ed. 937*.

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 **[****83]** the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice **[*706]** 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 **[**2623]** 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 **[****84]** "nature of injustice is that we may not always see it in our own times." *Ante, at ___, 192 L. Ed. 2d, at 624*. 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 ___, 192 L. Ed. 2d, at 630*. Absent from this portion of the opinion, however, **[*707]** 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, & **[***652]** P. Karlan, Constitutional Law 453 (7th ed. 2013). **[****85]** 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 co-extensive, 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 ___, 192 L. Ed. 2d, at 629*.

The majority goes on to assert in conclusory fashion that the *Equal Protection Clause* provides an alternative basis for its holding. *Ante, at ___, 192 L. Ed. 2d, at 631*. 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, 156 L. Ed. 2d 508* (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners **[****86]** have challenged. Although they discuss some of the ancillary **[*708]** 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 **[**2624]** 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 **[****87]** 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 ___ - ___, 192 L. Ed. 2d, at 621-623*.

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate **[***653]** 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 **[*709]** in these cases alone. *Ante, at ___, ___, ___, 192 L. Ed. 2d, at 623, 623, 632*. 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 ___, 192 L. Ed. 2d, at 629*. 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 **[****88]** 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 ___, 192 L. Ed. 2d, at 622*. 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. 291, 313, 134 S. Ct. 1623, 188 L. Ed. 2d 613, 628 (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, **[****89]** 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 **[*710]** reexamining their positions, and either reversing **[**2625]** 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 **[****90]** is exactly **[***654]** how our system of government is supposed to work." *Post, at ___ - ___, 192 L. Ed. 2d, at 656* (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 **[*711]** 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 **[****91]** 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 ___, 192 L. Ed. 2d, at 634*. The *First Amendment* guarantees, however, the freedom to "*exercise*" religion. **[****92]** 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 **[**2626]** 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 **[*712]** 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 **[***655]** 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 ___, 192 L. Ed. 2d, at 629*. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary **[****93]** consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. *Ibid*. 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 ___, ___, ___, ___, 192 L. Ed. 2d, at 628, 629, 631, 633*. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post, at ___ - ___, 192 L. Ed. 2d, at 672-673* (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 ___, 192 L. Ed. 2d, at 629*.

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 **[****94]** 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 **[*713]** 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 **[****95]** is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements **[**2627]** it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval **[***656]** 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 **[*714]** 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 **[****96]** 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 **[*715]** of speech, **[****97]** [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?

**[***657]** Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author **[**2628]** 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 **[****98]** 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 **[*716]** 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

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[1] Brief for Respondents in No. 14-571, p. 14.

[2] Accord, *Schuette v. BAMN, 572 U.S. 291, 311, 134 S. Ct. 1623, 188 L. Ed. 2d 613, 628 (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*.

[10] *United States v. Windsor, 570 U.S. 744, 766, 133 S. Ct. 2675, 186 L. Ed. 2d 808 at 814 (2013*) (internal quotation marks and citation omitted).

[11] *Id., at 767, 133 S. Ct. 2675, 186 L. Ed. 2d 808 at 824*)

[12] See *Town of Greece v. Galloway, 572 U.S. 565, 576-577, 134 S. Ct. 1811, 188 L. Ed. 2d 835, 846 (2014*).

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 **[****99]** 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 **[***658]** of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries." [16] Thus, **[*717]** 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]

**[**2629]** This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with **[****100]** 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 **[*718]** character of the body voting **[****101]** 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 **[****102]** 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* **[***659]** 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—

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[13] *Ante, at ___, 192 L. Ed. 2d, at 624*.

[14] *Ibid*.

[15] *Ibid*.

[16] *Ibid*.

[17] *Ante, at ___ - ___, 192 L. Ed. 2d, at 624-629*.

[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)*.

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 **[**2630]** 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 **[*719]** 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 **[****103]** 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 **[****104]** can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty **[*720]** [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" **[***660]** 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 **[****105]** this Court's reputation for clear thinking and sober analysis.

* * *

**[**2631]** 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.

**[*721]** 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

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[21] *Windsor, 570 U.S., at 808, 133 S. Ct. 2675, 186 L. Ed. 2d at 830* (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 ___, 192 L. Ed. 2d, at 625*.

[24] *Ante, at ___, 192 L. Ed. 2d, at 629*.

[25] *Ante, at 672, 192 L. Ed. 2d, at 629*.

[26] The Federalist No. 78, pp. **[****106]** 522, 523 (J. Cooke ed. 1961) (A. Hamilton).

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 **[****107]** "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 **[***661]** views" as to the "'fundamental rights'" protected by that document. *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 953, 964, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)* (Rehnquist, C. J., concurring in judgment in part and dissenting in **[*722]** 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 **[****108]** 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 **[**2632]** this Court, *ante, at ___, 192 L. Ed. 2d, at 632*, 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 **[****109]** 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*.

**[*723]** A

1

As used in the *Due Process Clauses*, "liberty" most likely refers to "the power of loco-motion, 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,

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[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 ___, 192 L. Ed. 2d, at 629*. Despite the "synergy" it finds "between th[ese] two protections," *ante, at ___, 192 L. Ed. 2d, at 630*, 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.

**[***662]** 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: **[****110]** "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 process 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 **[*724]** 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 loco-motion, of changing situation, **[**2633]** or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." **[****111]** *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 **[*725]** 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 **[****112]** 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 **[***663]** 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 **[**2634]** 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

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[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." **[****113]** *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.

earliest *Fourteenth Amendment* decisions appear to interpret the Clause as **[****114]** 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, 24 L. Ed. 77*, and implicitly rejected the dissent's argument that "'liberty'" **[*726]** encompassed "something more . . . than mere freedom from physical restraint or the bounds of a prison," *id., at 142, 24 L. Ed. 77* (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 **[****115]** "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, **[***664]** 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]

**[*727]** 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* ***[**2635]*** *Nature*" was the "inherent natural Right" "of each Man" "to make a free Use **[****117]** 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 **[*728]** 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 **[****118]** 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

[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 **[****116]** by human laws." 1 Blackstone 121-122. And in a "treatise routinely cited by the Founders," *Zivotofsky v. Kerry, ante, at ___, 135 S. Ct. 2076, 192 L. Ed. 2d 83* (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.

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 **[***665]** 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 **[****119]** 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, **[*729]** 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 **[**2636]** and benefits that exist solely *because of* the government. They want, for example, to receive the State's **[****120]** *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 **[****121]** 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 **[*730]** 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 **[***666]** 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, 18 L. Ed. 2d 1010*. [5] They **[**2637]** were each

[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 **[****123]** doubt that

sentenced to a year **[*731]** 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, 18 L. Ed. 2d 1010*. [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 **[****122]** obligations, *id., at 387, 98 S. Ct. 673, 54 L. Ed. 2d 618*; see *id., at 377-378, 98 S. Ct. 673, 54 L. Ed. 2d 618*. 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, 96 L. Ed. 2d 64*. 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 ___, 192 L. Ed. 2d, at 618*.

But "liberty" is not lost, nor can it be found in the way petitioners **[***667]** 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 ___, 192 L. Ed. 2d, at 629*,—better informed, we must assume, than that of the people who ratified **[*732]** 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 **[****125]** 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 **[**2638]** of a State would agree. See Locke §98, at 49 (suggesting that **[****126]** 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 **[*733]** People themselves. In 32 of

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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 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 **[****124]** 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.

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 **[***668]** religious practice. **[****127]** *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 **[*734]** 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 **[****128]** 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 ___, 192 L. Ed. 2d, at 634*. 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]

**[**2639]** Although **[****129]** 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.

**[*735]** 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 ___, ___, ___, ___, 192 L. Ed. 2d, at 619, **[***669]** 625, 633, 635*. [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

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[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 ___, 192 L. Ed. 2d, at 619*. 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" **[****130]** than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

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 **[****131]** demeans. Its mischaracterization of the arguments presented by the States and their *amici* can **[*736]** 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 **[**2640]** 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 **[****132]** 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 **[***670]** 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.

**[*737]** 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 **[****133]** 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. 744, 808, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808, 830 (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

[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 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 **[*738]** cause for both caution and humility." *Id., at 809, 133 S. Ct. 2675, 186 L. Ed. 2d 808, 851* (footnote omitted).

For today's majority, it does not matter **[****134]** that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in **[**2641]** 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 **[***671]** 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 **[****135]** 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.

**[*739]** 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 **[****136]** 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 **[****137]** of marriage in 21st-century America have changed, those States that do not want to **[**2642]** 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 **[*740]** 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 **[***672]** 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

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[2] See, *e.g.,* Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, J. 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/nvsr64nvsr64_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 Nonmarital Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at http://www.cdc.gov/nchs/data/databrief/db18.pdf .

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 **[****138]** 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 **[*741]** 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 **[****139]** through their elected officials." *570 U.S., at 809-810, 133 S. Ct. 2675, 186 L. Ed. 2d 808 at 852* (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 ___ - ___, 192 L. Ed. 2d, at 624-625*. 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 ___ - ___, 192 L. Ed. 2d, at 633-634*. 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 **[***673]** of their homes, but if they repeat **[**2643]** 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 **[****140]** 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 **[*742]** 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 **[****141]** 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.

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OPINION

# 'Abortion Is Just the Beginning': Six Experts on the Decision Overturning Roe

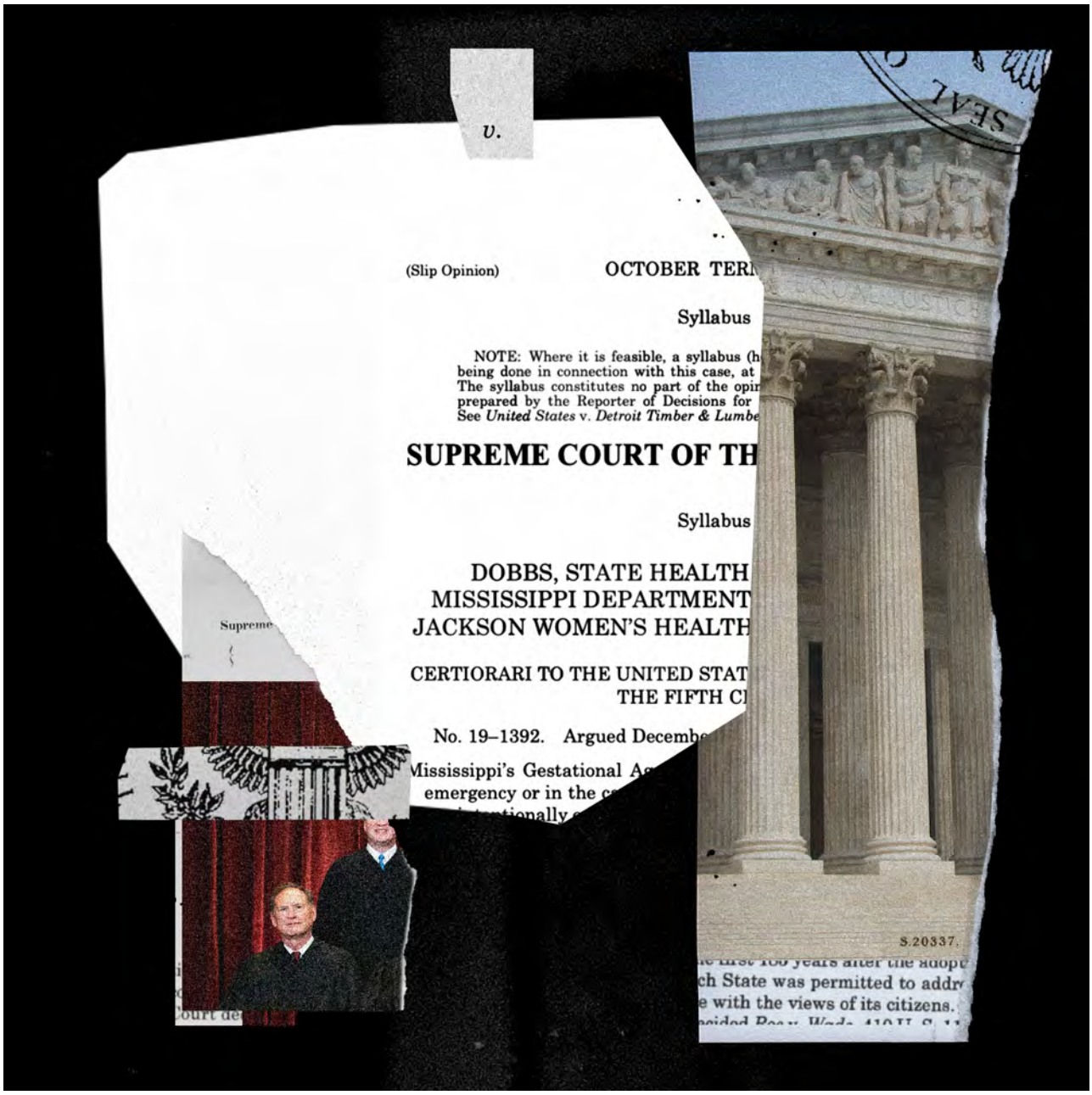


Illustration by Shoshana Schultz/The New York Times; photographs by Grant Faint, via Getty, and Erin Schaff/The New York Times

By overturning Roe v. Wade, Dobbs is sure to go down as one of the most consequential Supreme Court decisions, undoing a constitutional right that's been in place for nearly half a century and delivering a decisive victory to the anti-abortion movement.

As people try to make sense of this moment, we've asked six experts — among them, an abortion historian, a university president and two lawyers who've argued major cases before the high court — to select one paragraph from the majority opinion, written by Justice Samuel Alito, or from the concurring opinions or the dissent, and unpack what it tells us about both the ruling and the future of America.

# Thomas Hints at Future Battles

**Melissa Murray** is a law professor at New York University and a co-host of the "Strict Scrutiny" podcast. She has written that the Dobbs decision could threaten the right to birth control.

THOMAS, J., CONCURRING

> For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell. Because any substantive due process decision is "demonstrably erroneous," … we have a duty to "correct the error" established in those precedents …. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment ….To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects any rights that are not enumerated in the Constitution and, if so, how to identify those rights

> ….That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach.

There is so much to say about the opinions in Dobbs — from the maximalist majority opinion to Chief Justice John Roberts's and Justice Brett Kavanaugh's concurrences, which seek to impose some restraint on the majority, to the dissenters' righteous indignation that their colleagues have laid waste to almost 50 years' worth of precedents. But for me, the most interesting opinion is Justice Clarence Thomas's concurrence.

Justice Thomas often writes separate opinions that fail to garner the votes of other justices. No matter. They always hit their intended targets: the conservative judges of the lower federal courts. Though Justice Thomas's legal theories seem off the wall to many, in the hands of these acolytes, many of whom are former Thomas clerks, they flourish in the lower courts, widening the Overton window of mainstream opinion and shifting the terms of our debates. In his concurring opinion, despite the majority's assurances that the Dobbs decision is limited to abortion and does not implicate other rights, Justice Thomas endorses reconsidering the Griswold, Lawrence and Obergefell rulings. These decisions recognize a right to use contraception, the right to engage in same-sex relationships and the right to same-sex marriage.

This is all to say that for Justice Thomas, and indeed, for the conservative legal movement writ large, abortion is just the beginning. The logic of this concurrence will invite and underwrite a raft of challenges to the rights of heart and home that so many of us take for granted.

# When Precedent Isn't the Most Important Thing

**John Garvey** is the president of the Catholic University of America and an expert in constitutional law and religious liberty. He has written that overturning Roe "would only be the beginning" of the effort to end abortion.

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> Roe and Casey have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions.

According to Einstein's theory of gravity, massive objects can warp the fabric of space around them, distorting the trajectories of nearby objects. This has been the effect of Roe v. Wade on the law. Settled doctrines have been twisted beyond recognition when they are applied in cases about abortion. Dobbs rightly recognized this as a reason to set aside the rule of stare decisis and overturn the precedent of Roe.

Consider the law of religious liberty. The court's zealous protection of Roe has squelched peaceful religious speech by sidewalk counselors. It has invited laws conscripting religious people (in

pharmacies, crafts stores, even nuns) into plans to distribute contraceptives. It has led to attempts at aggressive regulation of pro-life pregnancy centers. It has undermined support for the Religious Freedom Restoration Act, passed in 1993 by a unanimous House and a Senate vote of 97-3. That act, which the A.C.L.U. testified in favor of, was designed to accommodate a variety of beliefs and creeds hemmed in by government regulation. Today the A.C.L.U. says it can no longer support the act because it might affect "access to or referrals for abortion and contraception services."

Reducing the constitutional magnitude of abortion will have a healthy effect on adjacent areas of the law. This is a sure sign that the court has moved in the right direction.

# The Court's Legitimacy Is at Stake

**Mary Ziegler** is a law professor and the author of "Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment." She wrote recently about a shift in the anti-abortion movement toward punishing women who have abortions.

KAVANAUGH, J., CONCURRING

> The Roe Court took sides on a consequential moral and policy issue that this Court had no constitutional authority to decide. By taking sides, the Roe Court distorted the Nation's understanding of this Court's proper role in the American constitutional system and thereby damaged the Court as an institution.

Justice Kavanaugh's concurrence seeks to reassure Americans that the overruling of Roe will be the end of the story. Neutrality will reign, he writes; there will be no threat to any other constitutional right, no thorny questions about interstate travel or punishment for anyone who performed an abortion when the procedure was legal. These predictions ring hollow in the face of steps already taken by red states and the protests raging outside the court.

Justice Kavanaugh's view of neutrality also seems misguided, at least insofar as the court's legitimacy is concerned. This decision will be perceived as anything but neutral — it was unnecessary for the court to intervene in this case in the first place, much less overturn Roe this quickly; in doing so, the court fulfilled Donald Trump's promise to see the end of abortion rights. If this is the kind of neutrality we should expect, the damage to the court is just beginning.

# The Court Retreats From Protecting Rights

**Mary Bonauto**, the civil rights project director at GLAD, argued Obergefell v. Hodges before the Supreme Court in 2015. She has spoken about how same-sex marriage and reproductive rights are intertwined.

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> Ordered liberty sets limits and defines the boundary between competing interests. Roe and Casey each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed

> "potential life." … But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that Roe and Casey recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being."... Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.

As the Obergefell decision explained, "Courts are open to injured individuals" who seek "to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection" – such as whether the individual or the government decides on your choice of marriage partner or sexual partner, whether you bear or raise a child and how to raise that child – "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.'"

This paragraph in the Dobbs opinion signals a possible retreat from the court's bedrock constitutional duty to declare and protect our rights. It tees up some constitutional rights as matters for states to decide at a time when some states are trying to limit voting access. Submitting basic rights to votes and elections imperils those rights and introduces uncertainty about our protections as we cross state lines.

The Dobbs ruling should be a call to action for anyone concerned about protecting civil rights and civil liberties. We should take seriously what the Supreme Court says about the decision being limited to abortion, which is devastating enough. Going forward, we must advance our constitutional ideals and equal justice under law in the courts, and also recognize that organizing, action and voting matter more than ever.

# An Abortion Ruling That Ignores Women

**Kathryn Kolbert**, the co-founder of the Center for Reproductive Rights, argued Planned Parenthood v. Casey before the Supreme Court in 1992. She wrote last year that a new strategy is needed to protect abortion rights.

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

I'm struck that while the majority opinion repeatedly gives great weight to the importance of protecting fetal life, it fails to discuss the effect of its ruling on women's lives and health. The court cavalierly dismisses the fact that bans on abortion will force women to travel hundreds of miles to receive care, risk criminal prosecution for seeking abortion medication on the gray or black market, and will disadvantage those women with the least resources: women of color, poor women, young women, disabled women. The majority opinion brushes off the import of these effects by arguing that the state legislative process will protect women's interests, because they can vote or drop their babies on the doorsteps of fire stations.

Those of us who believe that the rights of women to make decisions about their lives ought to be constitutionally protected need to work to elect politicians who agree with us.

# What the Dissenters Got Wrong About Early Feminists

**Erika Bachiochi** is a conservative legal scholar who has argued that Roe v. Wade should be overturned. She is the author of "The Rights of Women: Reclaiming a Lost Vision."

BREYER, SOTOMAYOR, AND KAGAN, J.J., DISSENTING

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

In an attempt to negate the majority's reliance on the 14th Amendment in its reasoning, the dissent thinks it has thrown a trump card here. Sure, the ratifiers of the 14th Amendment did not understand liberty to include an abortion right. But how could they have? the dissent asks. Women could not vote; the ratifiers were all men!

This may be. But it is worthwhile to note that the first wave of American feminists, to whom the dissent refers, were quite attuned to the relationship between abortion and women's liberty and

equality; indeed, that some women felt the need to end the lives of their unborn children revealed to them just how deeply society had failed women. Recognizing, as Victoria Woodhull did, that the rights of children "begin while yet they remain the fetus," these early women's-rights advocates sought equal rights – in marriage, education, property, the professions and the franchise – in part so they could carry out their responsibilities to their children, born and unborn.

In doing so, they held not a "foreshortened view" of women's rights, as the dissent patronizingly argues, but one based on a rich understanding of human beings as fundamentally interdependent. For 19th-century women's advocates, rights were properly grounded not in male-normative ideals of unencumbered "autonomy," as the now-repudiated "right" to abortion was, but in our responsibilities to one another. They offer a model for how we might approach a Roe-free future that, in fact, does better by women than the past 50 years.

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Legal Sidebar

# Privacy Rights Under the Constitution: Procreation, Child Rearing, Contraception, Marriage, and Sexual Activity

September 14, 2022

A line of Supreme Court cases establishes that the U.S. Constitution guarantees a person's ability to make certain decisions in matters related to procreation, child rearing, contraception, marriage (including interracial marriage and same-sex marriage), and consensual sexual activity. In some instances, the Supreme Court has interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments to provide substantive protections against government interference in these personal matters. The Supreme Court has also characterized the Equal Protection Clause as supplementing these due process protections when a state seeks to limit the exercise of protected rights to particular groups, resulting in the Court striking down laws that, for example, denied the "fundamental" right to marriage to interracial or same-sex couples. The Court's approach to identifying rights protected by the Constitution has changed over the years. In the 1997 decision *Washington v. Glucksberg*, the Court stated that the standard for recognizing such rights is that they must be "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" Before and after *Glucksberg*, however, the Court acknowledged that some rights do not necessarily fit into that historical framework.

In the 2022 decision *Dobbs v. Jackson Women's Health Organization*, the Supreme Court upheld a Mississippi law prohibiting abortion after 15 weeks on the ground that the Constitution does not protect a right to abortion. Employing the *Glucksberg* framework, *Dobbs* overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which recognized and then reaffirmed a right to the procedure under the Due Process Clause. *Dobbs* is the first decision in recent history in which the Supreme Court overruled prior decisions recognizing a right the Court had previously characterized as "fundamental" under the Constitution. Some have suggested that other rights, such as the right to contraceptive access, that were recognized by the Court under a different framework than *Glucksberg* may be reassessed. Yet, the *Dobbs* majority explicitly averred that its ruling does not cast doubt on the continuing validity of Court precedents recognizing rights outside the abortion context, and, furthermore, considerations for continuing to recognize these precedents may be different, and more compelling, than in *Dobbs*.

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This Legal Sidebar outlines the constitutional framework for privacy rights, reviews select Supreme Court decisions, discusses legal considerations following the *Dobbs* decision, and presents considerations for Congress.

# Constitutional Framework

## Due Process

The Due Process Clauses of the Fifth and Fourteenth Amendments generally prohibit federal and state governments from "depriv[ing] any person of life, liberty, or property, *without due process of law*." Due process, while not "precisely defined," generally refers to a "fundamental fairness" requirement when the government seeks to burden an individual's life, liberty, or property interests. According to the Supreme Court, the "touchstone" of due process is "the protection of the individual against arbitrary action of government." The Court has determined that the Due Process Clauses contain both "substantive" and "procedural" components. While procedural due process is concerned with the fairness of the *procedures* employed when the government seeks to deprive an individual of one of the aforementioned interests, the substantive component "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" The substantive due process inquiry revolves around whether the government's deprivation of a person's life, liberty, or property is justified by a sufficient purpose. The Supreme Court has long held that some protected liberty interests are so important that they are deemed "fundamental rights," subjecting governmental deprivations of those interests to greater judicial scrutiny as described below.

But when is a liberty interest considered "fundamental"? Justices and scholars have debated how the Court should decide this question, and the Court often refrained in older decisions from "defin[ing] with exactness the liberty thus guaranteed" by the Due Process Clause. In recent decades, though, the Court has often employed a historical approach to guide and restrain the scope of substantive due process. In the 1997 decision *Washington v. Glucksberg*, the Court held that assistance in committing suicide is not a fundamental liberty interest protected under the Due Process Clause. The Court declared that fundamental liberties are those "deeply rooted in this Nation's history and tradition." The Court also called for a "careful description" of any asserted right. The Court in *Dobbs*—the most recent case considering whether a claimed liberty interest qualifies as fundamental—cited *Glucksberg* in concluding that access to abortion is not a fundamental right.

If a liberty interest is deemed a fundamental right, the challenged law or government action must generally satisfy the most stringent standard of judicial review: strict scrutiny. Strict scrutiny requires the government to justify the law by demonstrating that it serves a compelling government interest and is narrowly tailored to achieve that interest (the law is not too broad or too limited). If a liberty interest is *not* considered fundamental, a court generally need only apply the rational basis test; the law or government action must be rationally related to a legitimate government purpose. For instance, as addressed in *Dobbs*, rational basis review applies to abortion restrictions because abortion is not a fundamental right.

## Equal Protection

The Fourteenth Amendment's Equal Protection Clause has also played a role in the Supreme Court's recognition of certain fundamental rights protected by the Constitution. The Clause provides that states must not "deny to any person ... the equal protection of the laws." (Equal protection principles apply to the federal government through the Fifth Amendment's Due Process Clause.) At times, a government restriction may draw a distinction among people. The equal protection inquiry asks whether the

government's classification is justified by a sufficient purpose. While most classifications drawn by the government are subject to rational basis review, some distinctions are subject to heightened scrutiny. For example, race-based classifications are subject to strict scrutiny, and gender-based classifications are subject to an intermediate standard between strict scrutiny and rational basis.

The Court has also employed equal protection principles to expand rights recognized under substantive due process to new classes of persons. For instance, the Court held that restricting the use of contraception to married couples denied unmarried individuals equal protection and violated their fundamental right to contraception. Laws and government actions that seek to limit particular groups' exercise of a fundamental right are subject to strict scrutiny, whether or not the government employs a classification that would typically trigger more stringent review under the Equal Protection Clause.

# Privacy Rights

The Supreme Court has held that the Constitution protects as fundamental an individual's autonomy to make certain decisions, relying on substantive due process and sometimes equal protection principles to supplement due process protections. The discussion below outlines major decisions in this area.

## Child Rearing

Since the early 20th century, the Supreme Court has recognized a parent's right to control the upbringing of their children under substantive due process. In *Meyer v. Nebraska*, the Court struck down a state law that prohibited teaching in any language other than English in public schools. The Court reasoned that the statute invaded "liberty" guaranteed by the Fourteenth Amendment and declared that parents have a right to make decisions regarding the upbringing of their children. The Court reaffirmed this right in *Pierce v. Society of Sisters*, in which the Court voided a state law requiring children to attend public schools. The right of a parent to control the upbringing of their child is not absolute, however; a state may intervene if necessary to protect a child, as such an action may "be necessary to accomplish [a state's] legitimate objectives."

## Marriage

Other cases have established a fundamental right to marry. In 1967, the Court first recognized the fundamental right to marry as a liberty interest protected under the Due Process Clause. In *Loving v. Virginia*, the Court declared unconstitutional a Virginia statute that prohibited interracial marriage. Chief Justice Warren, writing for a unanimous court, first held that the state anti-miscegenation law was an equal protection violation based on an impermissible racial classification. The *Loving* court then also recognized a right to marry as a fundamental right protected under substantive due process. The Court has reaffirmed the right to marry on several occasions. In 2015, the Court held in *Obergefell v. Hodges* that same-sex couples can exercise the fundamental right to marry in all states, and that states must recognize marriages validly performed out-of-state. The Court reasoned that state laws limiting marriage to opposite-sex couples excluded a category of persons from exercising the fundamental right to marry under substantive due process. The majority also discussed in the substantive due process analysis that such laws deny equal protection to individuals because of their sexual orientation.

## Sexual Activity

In the 2003 decision *Lawrence v. Texas*, the Court held that the substantive component of the Due Process Clause protects a right to engage in private, consensual sexual activity. Two men engaging in sexual activity had been convicted under a Texas law prohibiting "deviate sexual intercourse." The Court struck

down the law, ruling that states may not prohibit private sexual activity between consenting adults. Yet, the *Lawrence* Court did not specify whether such right is fundamental, and it is unclear what level of scrutiny would apply upon a future legal challenge. One circuit court concluded shortly after *Lawrence* that sexual activity is not a fundamental right subject to strict scrutiny. *Lawrence* expressly overruled *Bowers v. Hardwick*, in which the Court held that the right to privacy does not protect a right to engage in private, consensual same-sex activity.

## Reproductive Autonomy

The Court has generally recognized a constitutionally protected right to make certain choices related to reproduction. At first, in the 1926 decision *Buck v. Bell*, the Court upheld a state's ability to sterilize an 18-year-old woman, described as "feeble-minded," under a law that allowed for the involuntary sterilization of "mental defectives" held in state institutions. The Court rejected the due process argument that no circumstance could justify a sterilization order. Though it did not expressly overrule *Buck*, the Court later held in *Skinner v. Oklahoma* that the right to procreate is a fundamental right, and that government-imposed involuntary sterilization (certain criminal defendants in the *Skinner* case) must satisfy the strict scrutiny test.

One of the most significant cases recognizing a right to make certain personal decisions was the Court's 1965 decision in *Griswold v. Connecticut*. There, the Supreme Court declared unconstitutional a state law that prohibited the use and distribution of contraceptives to married couples. Justice Douglas, writing for the majority, reasoned that a right to privacy was implicit in the Bill of Rights, particularly the First, Third, Fourth, and Fifth Amendments, and protected "the sacred precincts of the martial bedroom." The Court expressly rejected the argument that privacy was a liberty interest under the Due Process Clause.

The Court's approach, however, quickly shifted. Less than a decade later, the Court moved away from the recognition of a generalized "right to privacy" found in the Bill of Rights to instead identifying certain matters of personal intimacy as being among the liberties protected by the Due Process Clause. The denial of these protected liberties to specific groups, in turn, were sometimes found to violate equal protection principles as well. In the 1972 decision *Eisenstadt v. Baird*, the Supreme Court expanded the right to contraception to unmarried individuals on equal protection grounds because the state law treated unmarried individuals differently from married couples. The Court also highlighted the right to privacy: "[i]f the right to 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." In the term after *Eisenstadt*, the Court decided *Roe v. Wade*, in which it held that the Constitution protects a right to terminate pregnancy before viability. In the 7-2 decision, the Court in *Roe* identified the right to privacy as a "liberty" interest under the Due Process Clause. The *Roe* court explained that the right to terminate pregnancy accords with the right to privacy as laid out in *Griswold* and *Eisenstadt*, specifically the right to decide "whether or not to bear or beget a child." *Roe* acknowledged a valid state interest in "protecting potential life," and the Court's decision included a trimester framework to strike a balance between a woman's choice and a state's interest in potential life. Then, in another challenge to state contraception restrictions, the Court in the 1977 decision *Carey v. Population Services International* nullified a New York law that made it a crime to sell or distribute contraceptives to minors younger than 16 years old. The Court reiterated that the right to privacy, as laid out in *Griswold*, *Eisenstadt*, and *Roe*, is a liberty interest under the Fourteenth Amendment, and clarified that laws restricting contraceptives must satisfy strict scrutiny.

Nearly two decades later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court affirmed *Roe* but added that the government may regulate abortions before viability if the regulation does not impose an undue burden. Like *Roe*, *Casey* recognized a larger reproductive right but sought to strike a balance between potential state interests prior to viability and the choice to seek an abortion. (For more information on the judicial history of abortion, see CRS Report RL33467, *Abortion: Judicial History and*

*Legislative Response*, by Jon O. Shimabukuro.) However, in the 2022 decision *Dobbs v. Jackson Women's Health Organization*, the Court revisited whether the Constitution protects abortion as a fundamental right under substantive due process. The Court upheld a Mississippi law prohibiting abortion after 15 weeks. Overruling *Roe* and *Casey*, the Court reasoned that the Constitution neither expressly mentions abortion nor implicitly guarantees a right to abortion under substantive due process.

# Legal Considerations Post-Dobbs

*Dobbs* may provide guidance in future legal challenges outside the abortion context on how fundamental rights are identified under substantive due process, though much remains unclear. The *Dobbs* court identified a historical approach—the *Glucksberg* framework—as the controlling method to identify rights protected under the Due Process Clause. The claimed right "must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" This approach appears to call for consideration of the level of abstraction at which the right should be stated and what historical evidence constitutes a sufficient record of history and tradition. It seems unlikely that the current Court would recognize other fundamental rights unless the claimed right satisfies the *Glucksberg* framework.

The reversal of *Roe* and *Casey* has raised question over whether other Court decisions recognizing certain fundamental rights may be reexamined, however. Justice Thomas's concurrence and the joint dissent by three Justices of the Court reflect some skepticism in the continued recognition of certain privacy rights in light of *Dobbs*, particularly *Griswold*, *Lawrence*, and *Obergefell*. The *Dobbs* majority, however, emphasized that the ruling does not "undermine" other decisions, and distinguished abortion from these other rights as involving a valid state interest in protecting fetal life. This "critical moral question," according to the Court, is better reserved for the people and their elected representatives.

In overruling *Roe* and *Casey*, the Court not only considered whether the right to abortion comported with the *Glucksberg* framework, but also whether principles of stare decisis counseled against overruling prior decisions recognizing a right to abortion. The doctrine of stare decisis generally provides that courts should adhere to precedent unless there is sufficient reason to change course, even when a later Court may have decided an issue differently. In *Dobbs*, the majority considered whether stare decisis counseled to adhering to *Roe* and *Casey*'s holdings, and concluded that five factors favored overruling these decisions. First, the Court held that *Roe* and *Casey* erroneously interpreted the Constitution to provide for a right to abortion. Second, the Court reasoned that *Roe* "stood on exceptionally weak grounds," criticizing *Roe* for failing "to ground its decision in text, history, or precedent" and relying "on an erroneous historical narrative," among other shortcomings. Third, the Court concluded that *Casey*'s undue burden framework was not sufficiently "workable." Fourth, the Court stated that *Roe* and *Casey* distorted other legal doctrines. Lastly, the Court concluded that there was a lack of concrete reliance on *Roe* and *Casey* because abortions are generally unplanned and reproductive planning can be adjusted.

The doctrine of stare decisis, according to the *Dobbs* court, would likely inform the Supreme Court's decision on whether to reassess other substantive due process rights that it has previously recognized. Although the *Dobbs* majority pointed to several factors in its stare decisis analysis counseling overruling *Roe* and *Casey*, two of the most notable were the majority's conclusions that "*Roe* was egregiously wrong from the start" and "[i]ts legal reasoning was exceptionally weak." Other stare decisis factors may be important, as well. For example, in the contexts of marriage and contraception, the stare decisis factors of reliance interests and workability may be different, and perhaps more compelling to a future Court than they were in the abortion context.

While *Dobbs* stated that *Glucksberg*'s historical approach is the proper one, the Court has, at times, declined to rely on historical practices when determining who can exercise certain rights. *Loving* first recognized the fundamental right to marry and did not define the bounds of this fundamental right by reference to who was allowed to marry historically. Writing for the majority in *Obergefell*, in which the

Court extended the fundamental right to marry to same-sex couples, Justice Kennedy declared that the *Glucksberg* historical approach did not necessarily conflict with holding that same-sex couples could exercise the fundamental right to marry. He rejected the argument that the "careful description" of the right at issue was a right to same-sex marriage. Justice Kennedy stated that the issue at hand involved the "right to marry in its comprehensive sense, asking if there was sufficient justification for excluding the relevant class from the right." The Court observed that "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification." How the Court describes a right and how it applies historical practice may thus be instrumental in determining whether it deems the right constitutionally protected.

In addition, whether or not a claimed fundamental right is at issue, the Equal Protection Clause may protect against certain government infringements if a law or action by the government treats one class of persons differently from another. Laws and government actions encompassing suspect classifications (e.g., race or sex) must satisfy a more stringent level of judicial scrutiny, either strict or intermediate scrutiny depending on the classification (though the *Dobbs* Court stated that the denial of abortion access is not a sex-based classification subject to heightened scrutiny).

Regardless of whether *Dobbs* suggests a willingness by the Supreme Court to reconsider its prior recognition of a fundamental right using the *Glucksberg* framework, lower courts remain bound by the Court's earlier decisions in these cases. As the Court has repeatedly advised, even when a Supreme Court decision "appears to rest on reasons rejected in some other line of decisions," the lower courts "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." In other words, whether or not *Dobbs* leads to the Supreme Court's reconsideration of its prior recognition of other rights outside the abortion context, lower courts must adhere to those decisions until and unless a future Court overrules them.

# Congressional Considerations

Congress may consider whether to use its legislative authority to enact legislation that protects or otherwise regulates areas of concern in matters related to procreation, child rearing, contraception, marriage, and consensual sexual activity between adults. Examples of potential sources of congressional authority include the Commerce Clause, the spending power, and Section 5 of the Fourteenth Amendment. Congress's ability to codify an individual right currently or formerly held by the Supreme Court to be constitutionally protected is discussed in CRS Legal Sidebar LSB10787, *Congressional Authority to Regulate Abortion*, by Kevin J. Hickey and Whitney K. Novak.

The 117th Congress has introduced several pieces of legislation related to privacy rights. The House of Representatives passed the Right to Contraception Act (H.R. 8373), which would establish a federal right for individuals to obtain and use contraceptives. The Respect for Marriage Act (H.R. 8404), another bill the House passed, would provide some protections for marriage, including same-sex and interracial marriages. The legislation would repeal provisions in federal law that define marriage as between a man and woman. (The Supreme Court nullified this provision in 2013 in *United States v. Windsor*, but the provision remains on the books.) H.R. 8404 would also require states to recognize valid marriages performed out-of-state—regardless of sex, race, ethnicity, or national origin—through Congress's authority under the Full Faith and Credit Clause. Other bills introduced aim to restrict states from adopting laws that interfere with individuals exercising fundamental rights, such as consensual sexual activity.

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## Disclaimer

US Law Week

# Same-Sex Marriage Victors Ready to Refight Battle Already Won

By Maia Spoto

Aug. 16, 2022, 4:45 AM

- Lawyers prepare for worst, but don't think marriage rights will fall
- LGBTQ legal advocates fighting 'tsunami' of anti-LGBTQ state laws

Three attorneys on the team that drove the US Supreme Court's 2015 ruling to legalize gay marriage feel new anxiety after the high court's June opinion overturning *Roe v. Wade.*

The court's *Dobbs v. Jackson Women's Health Organization* opinion voided the rationale that underpinned *Roe*, and *Obergefell v. Hodges* stood on similar reasoning. Although the majority opinion in *Dobbs* stressed the ruling was limited to abortion, Justice Clarence Thomas' concurrence called out *Obergefell* as a ruling to reconsider.

That left *Obergefell's* legal team in a position some didn't think they'd be in just seven years after winning their case—strategizing in case the Supreme Court strikes down that opinion, too.

"I absolutely thought that was not something our country would ever revisit. I still hope that it's not," said Shannon Minter, legal director of the National Center for Lesbian Rights. Now, marriage equality lawyers must "go back and fight battles that I thought we would never again have to fight," he said.

Thomas' concurrence was just one of many setbacks this year in the legal battle for gay rights. Advocates also are grappling with state laws limiting discussion of LGBTQ issues in schools and targeting transgender youth.

Nevertheless, after 40 years of fighting for marriage equality, Mary Bonauto, who argued *Obergefell* before the high court, remains undaunted at the prospect of years more litigation ahead.

"We're in fight mode," Bonauto said.

**Different Histories**

Bonauto said she is preparing for the worst, but doesn't think *Obergefell* will be the next precedent to fall.

The histories are different, she said. Marriage has long been legally understood as a base of liberty, and *Obergefell* is rooted partially in the equal protection clause, while *Dobbs* isn't. Additionally, lower courts are bound to follow the majority opinion in *Dobbs,* which says the ruling is limited to abortion.

"I believe we are right, and I believe that at the same time, like others, I am concerned about the environment we are in," Bonauto said.

Douglas Hallward-Driemeier, who argued *Obergefell* alongside Bonauto, sees marriage protections as inseparable from other substantive due process precedents Thomas threatened in his concurrence. Marriage rights build on the historic advances of the civil rights movement, he said.

**State Battles**

Minter said he's never been busier in his three-decade career.

State lawmakers have filed anti-LGBTQ legislation at record numbers this year even prior to the *Dobbs* ruling, much of which targets transgender people. Minter's team had already challenged an Alabama law criminalizing medical care for transgender youth, a Utah ban on transgender girls participating in school sports, and Florida's law limiting discussion of LGBTQ issues in schools.

"It's not that we're waiting for something bad to happen in the wake of *Dobbs*," said Minter. "It already had begun, and it's now accelerating at a frantic pace."

Just as decades of state-by-state litigation laid *Obergefell*'s roots, Hallward-Driemeier said he expects challenges to marriage equality will push "around the edges of marriage."

Protections afforded to same-sex married couples are likely to get targeted first, he said.

States have attempted to hollow out marriage protections "since day one" of the *Obergefell* ruling, Bonauto said. Rearguard attacks include an effort to keep nonbiological same-sex parents from being listed on their children's birth certificates, which legal advocates successfully challenged.

Calls to the GLBTQ Legal Advocates and Defenders (GLAD), where Bonauto works as director of the Civil Rights Project, have shot up since the *Dobbs* ruling. Parents wonder how a potential challenge to *Obergefell* could impact their families, Bonauto said

GLAD, alongside other organizations, published an advisory explaining how people can protect their parent-child relationships, Bonauto said. The group is also working on legislation in states such as Massachusetts to strengthen protections for same-sex parents.

While standing guard over threats to marriage equality, *Obergefell*'s legal team is ushering in the next cohort of young attorneys to take up the mantle, Minter said.

"I hope they feel a sense of responsibility," Minter said. "They are in the generational position to make an enormous difference."

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## Topics

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The Washington Post
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POLITICS

# Biden, other critics fear Thomas's 'extreme' position on contraception

By Meryl Kornfield, Timothy Bella and Amy B Wang

Updated June 26, 2022 at 3:01 p.m. EDT | Published June 24, 2022 at 4:33 p.m. EDT

In an opinion concurring with his conservative colleagues on the Supreme Court to overturn the fundamental right to an abortion, Justice Clarence Thomas wrote on Friday that striking down *Roe v. Wade* should also open up the high court to review other precedents that may be deemed "demonstrably erroneous."

Among those, Thomas wrote, was the right for married couples to buy and use contraception without government restriction, from the landmark 1965 ruling in *Griswold v. Connecticut*.

"In future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*," Thomas wrote on Page 119 of the opinion in *Dobbs v. Jackson Women's Health*, also referring to the rulings that legalized same-sex relationships and marriage equality, respectively. "Because any substantive due process decision is 'demonstrably erroneous' ... we have a duty to 'correct the error' established in those precedents."

Thomas added, "After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated."

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>
> As SCOTUS overturns Roe today, Justice Clarence Thomas's concurrence lays out other rights enshrined in settled case law that he says the high court should "reconsider."
>
> - Griswold, aka contraception
> - Lawrence, aka same-sex intimate relationships

- Lawrence, aka same-sex intimate relationships
- Obergefell, aka gay marriage

11:28 AM · Jun 24, 2022

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Following Friday's culture-shaking opinion in *Dobbs,* health advocates, legal experts and Democrats are wondering whether the Supreme Court's conservative majority could eye the right to contraception in the future. The *Griswold* case is mentioned or cited nearly two dozen times in the *Dobbs* ruling, which was widely celebrated by Republicans and the antiabortion movement.

The five other conservative justices who joined in the decision, however, explicitly tried to reassure in their opinion that those other rights will not be targeted. The opinion by the dissenting justice "suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. … But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion," they wrote.

In an address to the nation, President Biden denounced Thomas's explicit focus on the right of couples to make their own choices on contraception — "a married couple in the privacy of their bedroom, for God's sake."

"This is an extreme and dangerous path the court is now taking us on," Biden said.

Audrey Sandusky, the National Family Planning and Reproductive Health Association's senior policy and communications director, told The Washington Post that the opinion shows there is an "appetite among at least some on the Court to dismantle a whole landscape of rights, including the right to access contraception and the fundamental right to privacy."

Pointing to instances when states have deemed certain contraceptive methods as abortifacients, or substances that can induce abortions, Sandusky said the court's decision will embolden more of those kinds of state policies.

"Today's ruling throws chaos into reproductive health and rights in this country at a time when the family planning provider network is already stretched far too thin and is in dire need of more support," she wrote in an email.

The interest around *Griswold* stems from how the constitutional protections for abortion and birth control have long been linked. In *Griswold*, the Supreme Court invalidated a law prohibiting birth control, arguing that the prohibition violated a fundamental "right to privacy." This right to privacy was the foundation for *Roe v. Wade*.

"Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" Justice William O. Douglas wrote for the majority on June 7, 1965. "The very idea is repulsive to the notions of privacy surrounding the marriage relationship."

But the precedent on contraception has come up decades later with the justices on today's Supreme Court. During her confirmation hearing in 2020, Amy Coney Barrett declined to answer whether *Griswold* was decided correctly, on the grounds that a full ban on contraception at the state level was "unthinkable." The case came up again from Justice Sonia Sotomayor during oral arguments for *Dobbs*, which looked at a Mississippi law that would ban almost all abortions after 15 weeks of pregnancy.

"In *Roe*, the court said … that there are certain personal decisions that belong to individuals and the states can't intrude on them," the liberal justice said at the time. "We have recognized that sense of privacy in people's choices about whether to use contraception or not."

Since a draft opinion of the *Dobbs* case was leaked last month, several Republican lawmakers have signaled their willingness to restrict emergency contraception in addition to abortion, a subject legislators have rarely discussed in public.

In May, Mississippi Gov. Tate Reeves (R) refused to rule out the possibility that his state would ban certain forms of contraception. Blake Masters, a GOP Senate candidate in Arizona, had said on his website that he would "vote only for federal judges who understand that *Roe* and *Griswold* and *Casey* were wrongly decided."

Republicans cheered the Supreme Court's decision, with former vice president Mike Pence calling for a national abortion ban. Democrats like Rep. Jerrold Nadler (N.Y.) called Thomas's suggestion to review contraception "merely the beginning of a radical right-wing effort to roll back" people's rights.

House Minority Leader Kevin McCarthy (R-Calif.) declined to answer whether he'd support the high court reviewing the rights to contraception and same-sex marriage.

"The Supreme Court is a different branch of government. They can look at whatever comes before them," McCarthy said. "I just know what we are doing, and what we have today is that life matters."

When he was asked again, he repeated, "The Supreme Court is a separate branch of government; they take their positions."

In March, Sen. Marsha Blackburn (R-Tenn.) called the *Griswold* decision "constitutionally unsound." On Sunday, her spokesperson Spencer Hurwitz told The Post that she "does not support banning birth control, nor did she call for a ban."

Legal experts echoed Biden's remarks regarding the path Thomas's opinion could take the high court. Thomas's opinion "has more or less set a road map for future litigation," Laurie Sobel, the Kaiser Family Foundation's associate director for women's health policy, told The Post.

"Here's how you can bring this litigation and claim that this was decided wrongly," she added.

Sobel said that there is a possibility that litigation may come, such as if a state were to ban IUDs or contraception and someone sued.

Critics decried Thomas for saying precedents like contraception should be reviewed by the Supreme Court, despite being established law for decades.

"It does not end at abortion," wrote Rahna Epting, the executive director of the liberal group MoveOn. "Republicans will not stop until they have stripped away every freedom they can't load with bullets."

Some legal experts say they saw this ripple effect coming if *Roe* was ever defeated. It was inevitable that the decision overruling *Roe* would open to the door to the reconsideration of precedents, said Stephen Vladeck, a professor at the University of Texas Law School. But now that the justices aren't as hesitant to overrule precedent and GOP state leaders are more willing to push the envelope, it is possible *Griswold* could be headed toward a reversal.

"I don't think that anyone can say for certain that *Griswold* is on the chopping block," he said. "But I also don't think anyone can say for certain that it isn't."

*Caroline Kitchener, Rachel VanSickle-Ward and Kevin Wallsten contributed to this report.*

**Inn of Court *Dobbs* Touro Law Student Presentation Outline**

Madison Scarfaro
Won Han
Amerra Bukhari
Waheda Islam

**Touro Student Question:** Ethical implications of lawyers presented through Dobbs

I. ABA Models Rules of Professional Responsibility

A. **Rule 1.6 Confidentiality of Information →**

1. "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or other disclosure permitted by paragraph (b)"

B. **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law**

1. "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."
2. Will conduct that is legal in the attorney's state of licensure but illegal in the state where pro hac vice admission is sought preclude admission?
3. Challenge for attorneys throughout each of the 50 states and the risk of practicing law in a state where you are not licensed to practice.

C. **Rule 8.3: Reporting Professional Misconduct**

1. "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."
2. The polarizing nature of the abortion debate is likely to end this kind of widespread agreement about what is and is not ethical when it concerns abortion.

D. **Rule 1.2(d) Scope of Representation & Allocation of Authority Between Client & Lawyer →** A lawyer should not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

1. *Pre-Obergerfell v. Hodges*

a. Attorney's were bound by confidentiality when advising same sex couples to engage in legal marriages that would otherwise be illegal in their state.

E. **Rule 4.1(b) *crime-fraud exception* Truthfulness in Statements to Others →** in the course ofrepresenting a client a lawyer shall not knowingly: fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6

1. In New York, for example, a client's intent to commit a future crime is not a protected confidence for purposes of the privilege. However, sharing a past offense or crime with a lawyer is a protected communication under the privilege. Whether a crime has been committed or will be committed is a fact question; but in light of the public policy promoting the liberal use of legal advice, courts are often reluctant to breach the privilege unless there is probable cause to believe that a crime has been committed and that the lawyer's communication was made to further that crime.
2. The attorney-client privilege does not cover statements made by a client to their lawyer if the statements are meant to further or conceal a crime. For this exception to apply, the client must have been in the process of committing a crime or planning to commit a crime. The exception may apply in some types of civil cases as well, such as when a client is planning to perpetrate fraud or another tort. (The line between criminal and civil cases can be blurred because some conduct, such as an assault, can result in both criminal and civil liability.)

a. Counterargument: (ABA 1.6 exception)

1. A lawyer is not bound by ABA 4.1 if he/she reasonably believes it necessary to prevent reasonably certain death or substantial bodily harm. ABA 1.6(b)(1)

F. **Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer**

1. "A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
2. Law firms assisting employees/ clients in gaining access to abortion and their reproductive rights
3. The threats and coming legislation from the overturn of Roe across the country raise important issues of professional responsibility for attorneys and firms whose conduct is perfectly legal in some states and arguably criminal in others. Firms need to consider those issues now so they can act to protect themselves and their clients from the possibly unexpected consequences of laws criminalizing abortion services.
4. Law firms across the country reacted to Dobbs by announcing policies to help attorneys and staffers obtain abortion services that might be illegal in their home states.

5. Examples of differences across the same firm located in different states
6. It will be even harder to decide how to assign ethical responsibility for supposed crimes authorized by a few firm managers, especially if the firm practices in many jurisdictions.
7. If the Texas-based members of a firm's management committee vote against providing abortion-related services to the staff but the law firm's management implements policies to provide those services, have the Texas-based attorneys engaged in an ethical violation by remaining associated with the firm?

Citations

- Model Rules Prof'l Conduct § 1.6
- Model Rules Prof'l Conduct § 5.5
- Model Rules Prof'l Conduct § 8.3
- Model Rules Prof'l Conduct § 1.2(d)
- Model Rules Prof'l Conduct § 4.1(b)
- Model Rules Prof'l Conduct § 5.1
- Model Rules Prof'l Conduct § 1.6
- *Obergefell v. Hodges*, 135 S.Ct. 2584, 2590, 576 U.S. 644(2015)

**Life After Dobbs**

*Olivia Lewis & Alexandra Licitra*

## A. Introduction

a. Criminalization and other implications post-Dobbs.

## B. States Response to Roe

a. Troubling Statistics
   i. As of Oct. 2, 100 days after the June 24 Dobbs decision, 66 clinics across 15 states have been forced to stop offering abortions.
   ii. Those 15 states account for one-third (29%) of the total US population of women of reproductive age.
   iii. Of those 15, 14 currently have no providers offering abortions in the state.

b. Near Total Bans
   i. Laws prohibiting abortions even in cases of rape and incest have been enacted in 13 states, including Missouri, Alabama and Tennessee.

c. Partial Bans - Gestational Limits
   i. 5 states have laws setting gestational limits on abortion. The lowest is 6 weeks and the highest is 20.

d. Some States Courts have Blocked Abortion Ban
   i. 8 states have tried to pass laws but have been temporarily blocked by judges

## C. Implications

a. Doctor-Patient Relationship May Change
   i. Doctor's Confused - vague laws; forced to consult lawyers before caring for patients.
   ii. Lawyers Confused - don't have medical expertise to advise properly
   iii. Doctors are Scared - threat of criminal penalties/fines/losing licenses is resulting in delays and denial of care.
   iv. Delays Imperil Women - high-risk pregnancies forced to wait (see above)

b. Pregnant People Traveling Out-of State for Care
   i. Clinics Will Struggle - States where abortion is still legal have seen/will see an uptick in out-of-state patients
      1. Number of abortion patients from Texas more than doubled from previous year at Planned Parenthood Centers in New Mexico.
   ii. Backlogs - Wait times for abortions will increase - more late term abortions.
      1. More costly, riskier, less providers have the skill to do them.
      2. This will affect women who live in those states as well.

c. Prohibition of medication abortions, plan-b, contraceptives, I.V.F.
   i. States may try to ban/pharmacies may decline to offer
   ii. Raises civil rights issue

d. Increased Inequities & Disproportionate Impact
   i. Marginalized communities that already lack adequate access to healthcare, i.e. low-income, black and brown people, immigrants, young people,
   ii. those with disabilities, and rural populations will face most difficulty.
   iii. Many will be unable to obtain care altogether.

## D. Criminalization

a. "Abolitionists", "Fetal Personhood", & "Fetal Rights"
   i. SCOTUS just declined to hear a case over whether fetuses have constitutional rights.
   ii. The issue is gaining traction w/ conservatives
      1. Could impact IVF
      2. Could lead to criminal prosecutions

b. Legislation/Proposed Legislation
   i. Texas law went into effect in Aug. - makes it a felony to provide an abortion.
   ii. HB813 Louisiana Bill (if passed - most radical bill on the books)
      1. Pregnant ppl could face murder charges even if raped/even if doctors determined abortion necessary to save mothers life
      2. Doctors who do IVF could be jailed for "destroying embryos"
      3. Contraception such as plan B could be banned
   iii. Five male lawmakers in TX authored a bill last year that would have made abortion punishable by the death penalty if it had passed. (good thing it didn't!)
   iv. Male lawmaker from Kansas lawmaker proposed a bill that would amend the state's constitution to allow abortion laws to pass without an exception for the life of the mother.

## E. Conclude

a. Hopeful note???

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By Blake Ellis and Melanie Hicken, CNN
Updated 12:33 AM EDT, Wed September 21, 2022

Hillary Scheinuk/The Advocate/AP

Rep. Danny McCormick, R-Oil City, speaks on his bill, HB813, concerning abortion during legislative session, Thursday, May 12, 2022, in the House Chambers of the Louisiana State Capitol in Baton Rouge, La. (Hillary Scheinuk/The Advocate via AP)

**(CNN) —** All but one of the laws would have passed with Republican votes alone, and a few were passed without a single vote from a Democratic lawmaker. Republican legislators almost always voted in favor of the restrictions, which experts say shows how the issue has been much more of a litmus test for Republican state lawmakers than it has for Democrats.

They were adamant that a woman who receives an abortion should receive the same criminal consequences as one who drowns her baby.

Under a bill they promoted, pregnant people could face murder charges even if they were raped or doctors determined the procedure was needed to save their own life. Doctors who attempted to help patients conceive through in-vitro fertilization, a fertility treatment used by millions of Americans, could also be locked up for destroying embryos, and certain contraception such as Plan B would be banned.

"The taking of a life is murder, and it is illegal," state Rep. Danny McCormick told a committee of state lawmakers who considered the bill in May, right after the Supreme Court's decision to overturn Roe v. Wade was leaked.

"No compromises, no more waiting," Brian Gunter, the pastor who suggested McCormick be the one to introduce the legislation, told the committee.


Louisiana House of Representatives

Louisiana State Rep. Danny McCormick, pastor Brian Gunter and attorney Bradley Pierce (right to left) urged state lawmakers to move their bill, HB 813, out of committee earlier this year.

Only four people spoke against the bill during the committee meeting— all women. They pleaded with the lawmakers to grasp the gravity of the proposed restrictions, which went farther than any state abortion law currently on the books, and warned of unintended consequences.

"We need to take a deep breath," said Melissa Flournoy, a former state representative who runs the progressive advocacy group 10,000 Women Louisiana. She said the bill would only punish women and that there wasn't enough responsibility being placed on men.

But in the end, only one man and one woman, an Independent and a Democrat, voted against it in committee. Seven men on the committee, all Republicans, voted in favor of the bill, moving it one step closer to becoming law.

## Men at the helm

A faction of self-proclaimed "abolitionists" are seeking to make abortion laws more restrictive and the consequences of having the procedure more punitive than ever before.

Emboldened by the overturning of Roe v. Wade, they say they will not be satisfied until fetuses are given the same protections as all US citizens — meaning that if abortion is illegal, then criminal statutes should be applied accordingly. While major national anti-abortion groups say they do not support criminalizing women, the idea is gaining traction with certain conservative lawmakers. And the activists and politicians leading the charge are nearly always men, CNN found.

**What should we investigate next?**

Email us: watchdog@cnn.com.

This year, three male lawmakers from Indiana attempted to wipe out existing abortion regulations and change the state's criminal statutes to apply at the time of fertilization. In Texas, five male lawmakers authored a bill last year that would have made getting an abortion punishable by the death penalty if it had gone into law. A state representative in Arizona introduced legislation that included homicide charges — saying in a Facebook video that anyone who undergoes an abortion deserves to "spend some time" in the Arizona "penal system." And a male Kansas lawmaker proposed a bill that would amend the state's constitution to allow abortion laws to pass without an exception for the life of the mother.

While most in the anti-abortion movement believe that human life begins at conception, "abolitionists" are particularly uncompromising in how they act on their beliefs — comparing abortion to the Holocaust and using inflammatory terms such as "slaughter" and "murder" to describe a medical procedure that most Americans believe should be legal in all or most cases.

Video Ad Feedback

Why a woman's doctor warned her not to get pregnant in Texas

03:50 - Source: CNN

Bradley Pierce, the attorney who helped draft the Louisiana bill, said his organization has been involved with many of the "abolition" bills that have been introduced in more than a dozen states. All of this proposed legislation would make it possible for women seeking abortions to face criminal charges.



An overwhelming majority of Americans said in a Pew Research Center poll they don't believe men should have a greater say on abortion

policy, but that is what is happening. Experts told CNN that the male dominance fits within the anti-abortion movement's current framing as being focused on "fetal personhood" and "fetal rights" as opposed to maternal rights.

Eric Swank, an Arizona State University professor who has studied gender differences in anti-abortion activists, said his research found that while men aren't necessarily more likely to consider themselves to be "pro-life" than women, they "are more willing to take the adamant stance of no abortion under any conditions."

The most restrictive bills, which don't include explicit "life of the mother" exceptions and would charge those who receive abortions with homicide, have failed to make it to the full vote needed for passage. But others that prohibit abortions even in cases of rape and incest have taken hold in around a dozen states, including Missouri, Alabama and Tennessee, according to Guttmacher Institute.

**RELATED ARTICLE**
Republicans have unlikely allies in their fight to restrict abortion at the state level: Democrats

Those laws, CNN found, were also overwhelmingly passed into law by male legislators. While female Republicans almost always voted in favor of the legislation, gender imbalances within state legislatures, as well as the fact that female lawmakers were more likely to be Democrats, fueled the voting gap. And male Democratic lawmakers were far more likely than female Democrats to cross the aisle to vote in favor of the abortion bans, according to CNN's analysis.

The Texas Heartbeat Act, for example, outlawed nearly all abortions in the state when it criminalized the procedure as soon as a heartbeat could be detected — as early as six weeks of pregnancy. While men made up nearly three quarters of the 177 lawmakers who voted, nearly 90% of those who voted in favor of the bill were men.

## Encouraging 'sacrificial behavior'

Scott Herndon, a bearded Idaho man and father of eight, once believed abortion was an issue that should be discussed "between a woman and her physician."

He remembers watching the classic 80s movie, "Fast Times at Ridgemont High," and being relatively ambivalent about the fact that one of the characters received an abortion. He didn't become a Christian until 1996, the same year he drove his pregnant girlfriend along the streets of San Francisco on his motorcycle. The pregnancy was unexpected, but that life development, along with a newfound religious practice, led Herndon to spend a lot of thinking about "the miraculous nature of life." Over the years he began to feel compelled to get involved with the anti-abortion movement.

His daughter is now 25, and he and his wife went on to have seven more children. A longtime member of the Idaho Republicans, he told CNN he decided to run for state Senate this year with a mission of fighting government encroachment. Herndon, who touts his competitive shooting experience in high school and college, is a staunch supporter of the right to bear arms and strongly opposes vaccine mandates. He describes himself as a "true family-values conservative," noting that his sons help him with his home-building business while his five daughters live on the family farm, milking cows, and raising chickens and pigs.

One of his longterm goals if elected, he said, is to abolish abortion in the state.

"Success depends on changing hearts and minds," he said. "I liken the effort to Martin Luther King Jr.'s civil rights movement for desegregation and equal treatment of African Americans."

This comparison is one that abortion rights activists take serious issue with. "Let's be clear: appropriating the word 'abolition' is particularly contemptuous," a spokesperson for Planned Parenthood Federation of America said in a statement to CNN. "That word is a symbol of freedom and this group wants to put people behind bars for exercising their right to bodily autonomy."


Yasin Ozturk/Anadolu Agency/Getty Images

Abortion rights demonstrators gathered outside the US Supreme Court after the overturning of Roe v. Wade.

Herndon, however, says women should embrace their instinctual "sacrificial behavior."

"If a mother is in a life raft with a child and there's only enough food and water to save one, I'm guessing most mothers would not throw their child overboard and drown them," he said in an interview with CNN when asked about medical circumstances where a doctor may deem an abortion necessary to save a woman's life, such as a cancer diagnosis that requires aggressive treatment.

As part of their efforts to abolish abortion, which is generally defined as the termination of a pregnancy, Herndon and others in the anti-abortion movement are attempting to redefine the term to the "intentional killing" of a fetus.

That way, they claim, the lives of mothers could still be saved as long as doctors make an equal attempt to save the fetus.

Gunter, meanwhile, said he disagrees with the medical establishment and does not believe abortion is ever medically necessary.

Rebecca Blackwell/AP

Doctors point to a variety of medical situations where an abortion may be needed to protect a pregnant person's life.

Medical and legal experts told CNN this is a dangerous and inaccurate claim, saying there are plenty of situations that could result in

women dying or being put through unnecessary bodily harm if explicit exceptions for the health and life of the mother are not included in the laws regulating abortion.

Louise King, a gynecologic surgeon and professor at Harvard Medical School, said the claims are "disingenuous at best and intentional dissemination of misinformation at worst" and questioned why they "can't simply trust medical professionals to do their job."

"Most of these 'arguments' are attempts to impose a minority religious view on the majority of our citizens," she said. "This is not a matter of belief or opinion. This is a highly inappropriate way to use our legislative system."

**RELATED ARTICLE**
Conservatives have pushed infant safe haven laws as an alternative to abortion. But few American women use them

An immediate abortion may be needed if a pregnant person's water breaks before 20 weeks, King said, or when patients have pre-existing conditions that could lead to heart or liver failure or they need aggressive treatment for a disease like cancer that would severely harm — if not destroy — the fetus. An "equal attempt to save the fetus" would require putting the life of the pregnant person at risk," she said, adding that it is also not the well established standard of care.

Doctors also note that abortion bans take away a patient's ability to make decisions about their own health and pregnancy, sometimes forcing them to endure pregnancies and deliveries of fetuses that will not survive.

Stories like this are already making headlines as laws become increasingly restrictive. In some cases, doctors are already afraid to perform abortions in cases where a mother's health is at risk, even with so called "life of the mother" exceptions in place. In Texas, one woman learned that her baby had heart, lung, brain, kidney and genetic defects and would either be stillborn or die within minutes of birth. At the same time, doctors warned her that carrying the baby to term threatened her own life, but she says she was still refused an abortion by doctors who said it could run afoul of the state's strict six-week abortion ban. She ultimately drove 10 hours to a New Mexico abortion clinic to undergo the procedure. "I'm still so angry and hurt about it that I can hardly see straight," she wrote on Facebook the next day.

Another Texas woman spoke out about being forced to carry her dead fetus for weeks after suffering a miscarriage. In Louisiana, a woman carrying a fetus without a skull was reportedly not allowed to get an abortion, while another was reportedly denied an abortion and instead forced into hours of labor when her water broke at 16 weeks, long before the fetus was viable.

Brook Joyner/CNN

Idaho State Senate candidate Scott Herndon supports a total abortion ban in the state.

Herndon agreed that the health of the pregnant woman should be considered, but he worries that the medical community automatically prioritizes the mother's life and does not treat the fetus as a person until birth, saying this needs to change. And he said that while locking up women is not his objective, it only makes sense for homicide charges to apply to a woman who chooses to undergo an abortion if fetuses are given equal protections under the law.

As chair of his county's Republican Party, he attended the Idaho Republican convention in July and proposed an official change to the party platform in support of an amendment to the state constitution that would "strengthen" the rights of fetuses.

After it easily passed the vote, a fellow Republican delegate took the floor with a proposal that was not met with the same support. She wanted to make sure an exception was included in the party platform for abortions needed for a woman's physical and mental health, Herndon recounted.

A heated debate ensued, with Herndon describing the proposal as not carefully crafted and unnecessary. The proposal was ultimately rejected by a margin of nearly 3 to 1, according to news reports. The Idaho Republican Party did not respond to requests for comment.

## No exceptions

Back in 2019, a bill that would criminalize abortion even in cases of rape and incest was placed in front of Alabama's legislature — a move so extreme that a number of high-profile Republicans initially said it went too far.

When the bill reached the state Senate, 25 male legislators voted on party lines to enact it, and the state's female governor signed it into law.

A federal judge blocked it from taking effect, but it had an immediate domino effect as other states followed suit. Most of the laws, including near-total abortion bans known as "trigger" laws and six-week "heartbeat" bills, weren't able to take effect at the time either, but they are being implemented across the country now that Roe v. Wade has been overturned.

This wave of unprecedented restrictions shows the power of the anti-abortion movement and how the Republican Party has shifted to appeal to a small but fervent group of voters, experts said.

"The idea that a fully human life with full moral worth begins at conception is not an extreme view in the pro-life movement," said Ziad Munson, a sociology professor at Lehigh University who has researched the movements on both sides of the abortion debate. "The real issue is the degree of power the movement has over the Republican Party in the political arena, where such viewpoints have – at least until recently – been outside the mainstream."

Jon Cherry/Getty Images

Anti-abortion protesters gathered at the Indiana State Capitol this summer.

And in recent years, a particular brand of Republican candidate has become more prominent — one that touts the "Big Lie" that the 2020 election was stolen, doesn't trust science and consider themselves to be Christian Nationalists, said Mary Ziegler, a law professor at the University of California, Davis.

"Even a more moderate candidate may feel that they have to toe the line in what the anti-abortion movement is saying, and what (the movement) wants is changing," said Ziegler, who has studied the anti-abortion movement's influence on US politics. "So who you are catering to if you're the Republican Party is changing."

As a result, she said, what would have previously been considered a disqualifying stance on abortion for most voters is one of the issues now being used by a growing number of Republican candidates for state and federal office in the hopes of securing their party's nomination.

During the primary season earlier this year, two of the leading Republican candidates for governor of Pennsylvania said in a debate that they support banning abortion under any circumstances, including if the mother's life is at risk. "I don't give way to exceptions," said Doug Mastriano, who will be on the ticket in November to succeed incumbent Democratic governor Tom Wolf, who has vetoed a number of abortion bans passed by the Republican-controlled state legislature.

Men running for a number of statewide offices in Georgia have also vocalized their support of total abortion bans. "There's no exception in my mind," former football star Herschel Walker, a Republican who is running for the US Senate, told reporters.

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Some big-city district attorneys vow not to prosecute abortion cases, setting up legal clashes in red states

Mastriano and Walker have not expressed support for prosecuting women who have abortions. They did not respond to CNN's requests for comment.

While an overwhelming majority of Americans support legalized abortion when a woman's life or health is at risk, Ziegler said the disappearing "life of the mother" exception stems from a deep distrust of both women, science and the medical establishment. The new focus on punishing women for undergoing abortions — as seen in several bills recently proposed — is also only likely to intensify, she said. As abortion providers close up shop in states with bans, it is going to become increasingly difficult to charge doctors if women travel to other states for the procedure.

"That's going to make it more appealing to punish women," Ziegler said.

## 'Abolitionist, not pro-life'

For pastor Gunter in Lousiana, the "pro-life establishment" is not taking a hard enough stand against abortion.

He told CNN he doesn't think someone can be truly "pro-life" while also believing that abortion is acceptable in certain circumstances. He said he will support nothing short of an all-out abortion ban with homicide charges and that unlike some of his peers, he refuses to sacrifice his principles for political reasons.

Gunter, who "grew up in church in diapers" and is now in his 30s, said in a recent speech that he once believed that opposing abortion simply meant voting for "pro-life" candidates. But when a seminary professor invited him and other men to spread the gospel outside an abortion clinic in 2008, he said everything changed.

Austin Steele/CNN

Pastor Brian Gunter said he approached Rep. Danny McCormick about the Louisiana bill that included homicide charges for women who receive abortions.

That day, he said he watched 15 women go inside the clinic and "murder their children." One of them, Gunter said, couldn't have been older than 13 and he believed she was being forced to undergo the procedure by her mother.

"She's a child, and her mother pulled her into that clinic," said Gunter. "That day changed my life. I went home, and I was newly married... (my wife) was pregnant with our first child. I'd been seeing ultrasound pictures of my son and I thought to myself 'My God, someone killed a child just like my son, same age as my son, looks like my son. How can they do that?"

After that, he says he began confronting women as they entered abortion clinics every week. And in an attempt to create more sweeping change, he decided to get involved politically. He said he approached Rep. McCormick, who did not respond to CNN's requests for comment, earlier this year about the Louisiana bill that ended up making waves across the country. It even sparked outrage from the largest anti-abortion group in the state — one that Gunter said he had worked for but recently parted ways with because he felt it wasn't doing enough to outlaw abortion.

Gunter's impassioned plea at the committee hearing in May was met with applause, and the vote in favor of moving the bill to the full House ultimately came down to a group of state lawmakers that included a former law enforcement officer, a criminal defense and personal injury attorney and an entrepreneur who makes a living designing "man caves" and selling game room furniture.

Chris Graythen/Getty Images/File

Anti-abortion "abolitionists" gathered at the Louisiana State Capitol in support of a bill that would charge pregnant people who receive abortions with murder.

Lawmakers then gathered on the House floor to debate the bill while dozens of supporters gathered outside the chambers in what resembled a church service, reciting Bible passages and swaying together while singing hymns such as “Amazing Grace.” Jeff Durbin, an Arizona-based pastor and head of a Christian production company Apologia Studios, which has more than 300,000 subscribers on YouTube, emceed and live-streamed the event. Durbin, who once played Michelangelo and Donatello in the Teenage Mutant Ninja Turtles franchise and became fervently religious after overdosing on ecstasy, is now “unapologetically seeking to criminalize and eliminate all forms of abortion without exception.” He did not respond to requests for comment.

He and five other men addressed the crowd at the state capitol, citing proverbs and describing women who get abortions as murderers.

“We have… a righteous bill that punishes those who choose to murder their children,” T. Russell Hunter, the founder of anti-abortion group Free the States, yelled into the microphone, saying that any truly “pro-life” law should hold pregnant women accountable for their decisions — not just the medical providers. “Abortionists do not wake up and go out into the culture looking for children to kill; mothers bring their babies to them to be murdered. They are guilty…they have murdered their children under the color of law and the Lord God hates it.”

Hunter’s group describes itself as “abolitionist, not pro-life” — echoing Gunter’s argument that many in the movement are compromising on their values. “While many who call themselves pro-life agree with us that abortion is murder,” Free the States writes on its website, “abortion has not been opposed by the pro-life political establishment in a manner consistent with its being murder.” Hunter told CNN this movement is not “about wanting to punish women or something silly like that,” and that anyone involved in the decision to terminate a pregnancy should face criminal charges — including fathers.

“Pray for the legislators here,” Durbin, who also runs End Abortion Now, said at the capitol rally.

**RELATED ARTICLE**
See where abortion access is banned — and where it's still in limbo

But this time, the prayers went unfulfilled.

Inside the House chamber, one of seven men to initially vote in favor of the proposed legislation, Rep. Alan Seabaugh, a Republican who describes himself as “pro-life,” apologized for his vote. He said he believed the bill was unconstitutional, “makes criminals out of women.” Other Republican lawmakers and anti-abortion advocates in the state also came out hard against the bill, saying it went too far — including a state representative who said her grandson wouldn’t exist if it weren’t for in vitro fertilization (IVF).

The bill never went to a full vote.

It was the first time such an extreme anti-abortion measure made it out of any state committee, however, and the vocal opposition has not deterred Gunter. He plans to work with McCormick, the Louisiana lawmaker, to introduce a similar bill next year.

Momentum, he told CNN, is only building in the wake of the Supreme Court’s recent decision.

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TIME

# 'Am I a Felon?' The Fall of *Roe v. Wade* Has Permanently Changed the Doctor-Patient Relationship


A family physician and her resident perform an ultrasound on a 39-year-old woman the day before the Supreme Court overturned Roe v. Wade, at the Center for Reproductive Health clinic in Albuquerque, N.M., on June 23, 2022. Gina Ferazzi—Los Angeles Times/Getty Images

BY **ABIGAIL ABRAMS**

OCTOBER 17, 2022 7:00 AM EDT

A few days after the Supreme Court eliminated the constitutional right to abortion in June, Dr. Mae Winchester got a call late at night. One of her patients had developed sepsis after her water broke at 19 weeks of pregnancy.

Sepsis can be fatal, and normally Winchester, a maternal-fetal medicine physician in Ohio, would rush her patient into the operating room and provide an abortion. But this time, she felt she had to call her hospital's lawyers first.

The lawyers agreed that treating this patient with an abortion would be legal under Ohio's new abortion ban, which contained an exception to prevent the death of the mother. But in other cases, Winchester says care has been delayed, or the lawyers have disagreed with her, and she hasn't been allowed to provide the care she deems necessary. "Meanwhile, the patient is just sitting in the operating room by herself," Winchester says, "not knowing what I can do."


Winchester is just one of many doctors throughout the country struggling to navigate the complicated and rapidly shifting legal landscape of abortion after the Supreme Court overturned *Roe v. Wade* with its decision in *Dobbs v. Jackson Women's Health Organization.* With abortion rights now left up to the states, physicians and other medical providers are confused about what services they are legally allowed to provide, often forced to consult lawyers on decisions they used to be able to make on their own, and scared for their patients' lives.

In Wisconsin, where a ban dating back to 1849 prohibits all abortions except to save the life of the pregnant patient, groups of lawyers and doctors are collectively trying to come up with guidance on what situations pose a serious enough threat to a patient's health to justify an abortion. In Texas, some hospitals have created committees to review such situations, while others have established protocols requiring multiple doctors to sign off on medically necessary abortions. With a state law allowing private-citizen lawsuits in effect, physicians are concerned that anyone—from a local politician to a patient's family member to a nurse or cleaning staff member—could file suit if the person disagrees with their decision. And in Idaho, the state's total abortion ban has led doctors to discuss medically transporting patients out of state if they need serious treatment and drastically affected care for even ectopic pregnancies, a condition in which a fertilized egg implants outside the uterus, making the pregnancy nonviable and potentially life-threatening if untreated.

TIME spoke with more than a dozen doctors, health care lawyers, and hospital ethics committee members in nine states, who all said their efforts to interpret state laws are failing to clarify the chaos of conflicting, sometimes century-old or hastily written laws. Those laws have created new regulations, reporting requirements, penalties, and definitions that many argue do not take into account the complex and inherently dangerous reality of pregnancy.

For a half-century, physicians have provided abortions to treat a wide range of medical situations including hemorrhaging, miscarriages and even cancer. Now 14 states ban or tightly restrict abortion, with at least 10 other laws tied up in court. Most provide only narrow exceptions. The laws are often vague, and the few that try to spell out conditions that qualify for abortions do not cover all possibilities. Doctors say they are being forced to navigate legal concepts they don't have the training for while being prohibited from using their own expertise to treat patients. Attorneys with little experience in reproductive health care say they are likewise scrambling to understand complex medical situations and develop procedures for ever-growing lists of complications, knowing their guidance could be challenged any time someone disagrees with their interpretation of untested laws. Many warn the dynamic will permanently change the doctor-patient relationship.

While some physicians and lawyers have spoken out about this dynamic, many others are afraid to do so. Some universities and hospitals have told their staff not to give interviews about abortion, while others have made it clear they would rather their staff not speak publicly or have said they can only do so without identifying their employer. Doctors and lawyers at major private and public institutions in multiple states told TIME they weren't comfortable speaking about their handling of abortion post-*Roe*, and many of those who did said they would only do so as private citizens, unaffiliated with their official positions.

Already, doctors and lawyers say that the threat of criminal penalties, massive fines, or lost licenses is affecting how and when they decide to proceed with abortions, often leading to delays in care. "This assignment of criminal penalties has made our physicians much more interested in trying to interpret

the statute, and they're taking a much more conservative view," says Lisa Larson-Bunnell, a lawyer at a hospital in Missouri, where a trigger law banned all abortions except in cases of medical emergency hours after the Supreme Court's decision.

The doctors who spoke with TIME all emphasized that when patients are imminently dying, they have intervened and would do so again. But there are plenty of situations when a pregnancy is seriously harming a patient's health or a patient is experiencing a problem that could quickly become dire, doctors say, and delays caused by the new laws make those situations more dangerous. Doctors are not used to discussing their medical decisions with hospital lawyers, says Dr. Alison Haddock, an emergency medicine physician in Houston and board chair of the American College of Emergency Physicians. Before her state outlawed abortion, it was "exceedingly rare" to talk to a lawyer during her shift, and those conversations would more likely revolve around guardianship for an elderly patient or someone with psychiatric or social work needs. "Not where you have a patient who is medically quite ill in front of you, and you know the treatment plan and can't complete it," she says.

For many doctors, explaining the new order of operations to patients is just as difficult as processing it themselves. "I went into this field to be able to help patients and their families get the best pregnancy outcome that's possible and to be their support and their guidance through difficult times," says Dr. Kylie Cooper, a maternal-fetal medicine physician in Boise, Idaho. "I have patients asking me, 'Are you going to be able to help me if something unexpected or dangerous happens?' And for the first time in my career, I have to tell them that I don't know."

## Varying guidance

In many states, decisions about how to comply with abortion bans vary by city or even by hospital, as different institutions establish their own guidance. This variation is "one of the worst things that can happen," says Larson-Bunnell. "There is solidarity in numbers. And when you have individual physicians and you have individual hospitals or health systems that are behaving differently,

that causes there to be more scrutiny on hospitals when they do decide to proceed with an abortion."

Cooper and other ob-gyns at her hospital have formed a committee to help advise other physicians and medical staff on how to care for patients under the state's new abortion ban, which technically has no exceptions that would protect doctors from being charged, and says that providers can defend themselves from criminal prosecution by arguing an abortion was necessary to save the pregnant woman's life. A judge ruled in August that physicians in Idaho must be allowed to provide abortions in medical emergencies, but Cooper says the law is still causing confusion and adding legal and logistical hurdles for all pregnancy care in the state. In many cases, the lawyers advising physicians on navigating these laws are malpractice attorneys or hospitals' general counsels, not specialists in reproductive health.

Winchester's hospital added forms that are designed to document how any abortion situation falls under the law's exceptions. "Our physician notes used to be just for physicians to communicate, and now it has become: this is what's going to protect me if someone comes after me because of my medical care," Winchester says. (Ohio's abortion ban is now blocked, but the state's attorney general is appealing the judge's decision.)

**Read More:** *'Never-Ending Nightmare.' An Ohio Woman Was Forced to Travel Out of State for an Abortion*

When Texas implemented new laws last fall banning abortions after about six weeks and limiting abortion medications, Dr. Patrick Ramsey, maternal-fetal medicine fellowship director at University of Texas Health Science Center in San Antonio, worked with the legal department at his institution to create a list that could serve as a starting point for discussions about which conditions would threaten a pregnant patient's life or be considered a medical emergency. They then instituted new policies requiring two attending physicians to sign off on procedures in some cases, added extra documentation to their electronic medical records to match the state's new laws, and decided that no residents, who are still completing their training, would be responsible for documenting

these cases. “It’s creating more administrative headaches and taking away from patient care,” Ramsey says.

The confusion extends beyond obstetrician-gynecologists to include emergency physicians, family medicine doctors, oncologists, pediatricians, and more. In large hospitals, doctors can ask an ob-gyn to advise on a pregnant patient, but in smaller hospitals or rural areas, emergency physicians often provide obstetric care and may have to make decisions on their own or wait to hear back from a larger institution elsewhere, says Dr. Daniel Elliott, board president of the Indiana chapter of the American College of Emergency Physicians.

Some hospitals are involving ethics committees or clinical ethicists, who can provide bedside consultations for doctors making tough decisions. But this will be limited by each state’s law and a given institution’s risk tolerance, says Micah Hester, who chairs the department of medical humanities and bioethics at the University of Arkansas for Medical Sciences College of Medicine and consults on cases at UAMS hospitals. Even in risky medical situations, “any ethics committee or ethicist would be hard pressed to recommend going against the law,” he says, “knowing that doing so puts the provider and the woman at certain kinds of very important legal risks.”

The varied statutes and penalties, combined with frequent legal changes, have made it difficult to provide uniform advice. The American College of Obstetricians and Gynecologists (ACOG), for example, recommended that hospitals form task forces to help doctors make decisions about what medical emergencies fall under their state laws’ exceptions, but it cautioned that it would be “impossible” and “dangerous” to create a finite list of conditions for doctors to follow. The Wisconsin Medical Society moved away from providing specific recommendations and has opted for webinars and ongoing updates to its members about the state’s ban. The American College of Emergency Physicians (ACEP) has formed a national task force of doctors, policy experts, and lawyers to try to help its members navigate emergency care under state abortion bans. But even when groups do issue documents breaking down their state’s laws, they can’t predict how individual prosecutors will react.

Even some hospitals that have provided guidance or put committees in place have sometimes told physicians to make decisions on their own on a case by case basis because if they are performing an abortion, it should be a true emergency. "It's just, there you are, out there on an island," says Dr. Jennifer Smith, an ob-gyn in the St. Louis area.

## 'Am I a felon?'

The restrictive state laws put physicians "between a rock and a hard place," says Dr. Wendy Molaska, a family medicine physician in Wisconsin and president of the Wisconsin Medical Society.

The federal Emergency Medical And Labor Treatment Act (EMTALA) requires emergency departments to stabilize any patient who arrives in an emergency or in labor, or transfer them to a facility that can treat them. If physicians trying to comply with abortion bans that only include life exceptions wait too long, Molaska says they fear hurting the patient—and violating federal law in the process. That gives them an impossible choice, she says: "Am I a felon? Or am I a malpracticing physician?"

Medical malpractice insurance doesn't cover criminal charges, and most doctors don't have their own legal advisers. Dr. Judith Williams, an ob-gyn in Memphis, works in private practice and treats patients at two hospitals in her area. Neither of them have provided guidance on the state's abortion law, which, like Idaho's ban, prohibits abortion in all circumstances—with no exceptions for lifesaving care—and only allows providers to argue they were acting to save the patient's life or prevent "serious risk of substantial and irreversible impairment of a major bodily function" as an affirmative defense. Williams asked how her hospitals were handling the new law, and says she was told the institutions wouldn't offer guidance because their lawyers did not handle criminal cases. So instead, she spoke to a patient who is a criminal defense attorney for legal advice. And when Williams recently had a different patient whose fetus was diagnosed at 19 weeks with anencephaly—a condition in which the fetus' brain doesn't develop—she called her lawyer patient to ask whether she could help the other woman find an abortion in another state.

"When I called her, she said, 'Probably the best thing that you can do is just give the patient her prenatal records and don't have on paper anywhere that you facilitated this,'" Williams says. "That is terrible."

A number of high-profile cases of patients being denied care in life-threatening or emergency situations have emerged in the months since the Supreme Court overturned *Roe*. But while some anti-abortion doctors have argued that these instances are rare and that state laws do allow providers to treat those patients, other physicians say such situations are happening regularly. High-risk ob-gyns in multiple states told TIME they are seeing patients on a weekly basis whose care is affected negatively by their states' abortion laws.

Evidence backs them up. A study of two hospitals in Dallas from the first nine months after Texas' six-week abortion ban took effect in September 2021 found that patients had to wait an average of nine days for their pregnancy complications to be considered life-threatening enough to qualify for an abortion. Because of these delays, most of the patients observed experienced serious health consequences, including hemorrhaging, sepsis, and in one case a hysterectomy.

Some anti-abortion politicians have acknowledged the laws are causing issues in recent months. Republican lawmakers in South Carolina spoke out after hearing stories of harrowing experiences from their constituents, and despite the state calling a special session to pass new abortion restrictions last month, lawmakers have not been able to agree on a new bill. But in other cases, they are insisting the laws provide appropriate exceptions and doctors are interpreting them incorrectly. In Texas, state Sen. Bryan Hughes, who helped author his state's six-week ban, wrote a letter to the Texas Medical Board in August raising concerns about "allegations that hospitals, their administrations, or even their lawyers may be wrongfully prohibiting or seriously delaying physicians from providing medically appropriate and possibly life saving services" to patients with pregnancy complications. "Texas law makes it clear that a mother's life and major bodily function should be

protected," and any allegation "should be investigated," he wrote, according to the letter, which has not been previously reported.

More doctors have started to speak up about their concerns. A coalition of medical groups, including the ACEP, ACOG, and the American Medical Association, filed amicus briefs in two cases about EMTALA laying out the many harms they say the laws can cause, and other providers have written op-eds in their local newspapers and testified when states have considered new abortion bans. But in the meantime, doctors worry about how the confusion and stress will affect their patients and their ability to practice long-term. Doctors in multiple states told TIME that they or their colleagues are relocating to states with fewer abortion restrictions.

Shortages of ob-gyns and primary care providers are common around the country, and maternity care deserts are growing. A new report released Oct. 12 by March of Dimes found that 36% of counties nationwide have no obstetric hospital or birth center and no obstetric providers, with many of the highest concentrations of these care deserts in states that now ban abortion. States that restrict abortion also have high maternal and infant mortality rates and worse birth outcomes, something that doctors predict will worsen if more providers decide they can't practice there. "The price that citizens of Texas are going to pay for this over the next decade or two will be unfixable," says Dr. Charles Brown, chair of the Texas district of the American College of Obstetricians and Gynecologists.

Those that do remain say they are still worried about practicing under the new laws, but are trying to provide the best treatment they can. "Do you want your patient to be the example of what can go wrong?" says Williams in Tennessee. "I really do not want that to occur at my hands. And I simply am not going to let it occur at my hands."

**WRITE TO ABIGAIL ABRAMS AT** ABIGAIL.ABRAMS@TIME.COM.

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# Interactive Map: US Abortion Policies and Access After Roe

The abortion landscape is fragmented and increasingly polarized. Many states have abortion restrictions or bans in place that make it difficult, if not impossible, for people to get care. Other states have taken steps to protect abortion rights and access. To help people understand this complex landscape, our interactive map groups states into one of seven categories based on abortion policies they currently have in effect. Users can select any state to see details about abortion policies in place, characteristics of state residents and key abortion statistics, including driving distance to the nearest abortion clinic.

The map reflects state policies in effect as of October 24, 2022.
**FAQ** | **Methodology** | **Contact Us**

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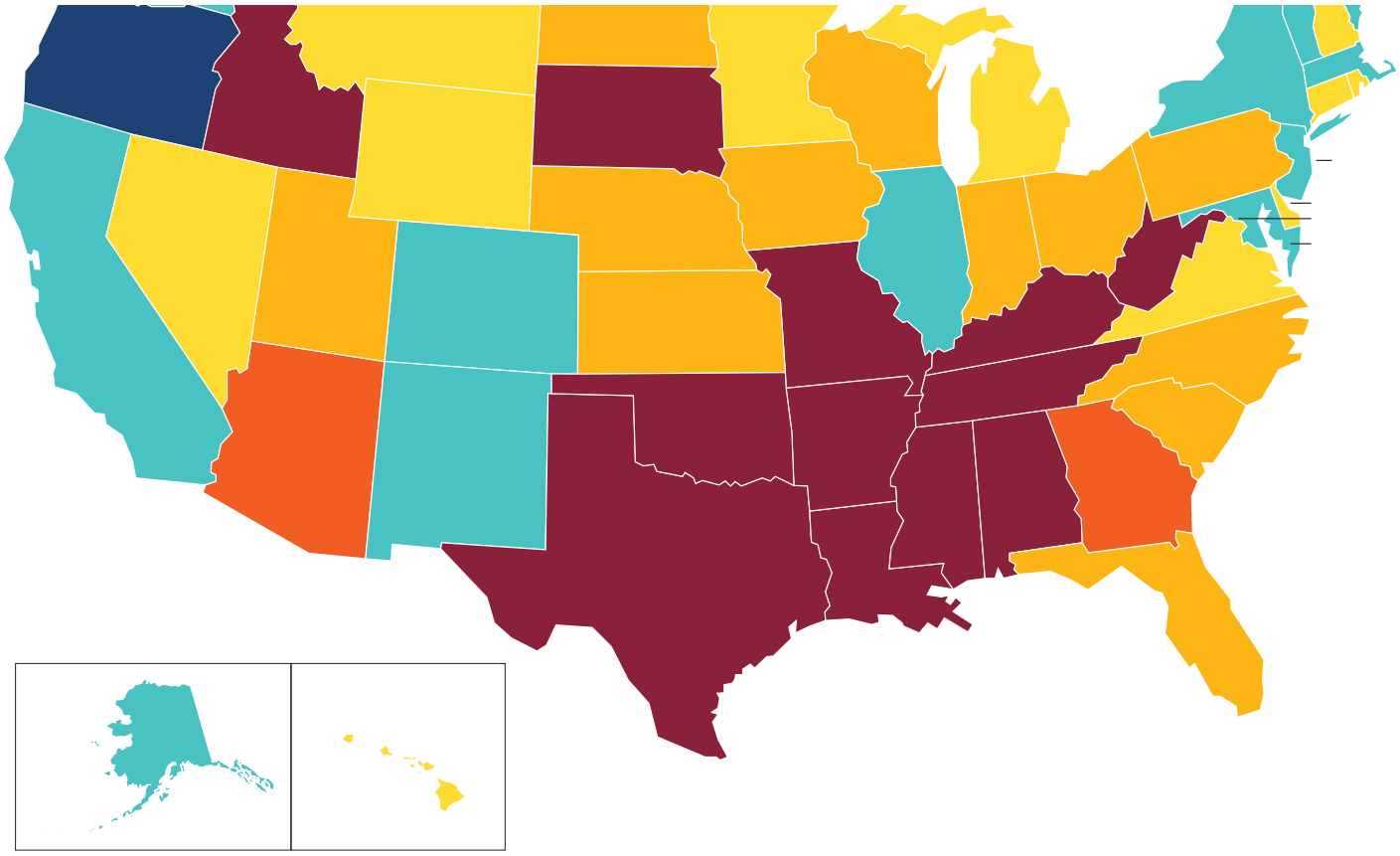

Most restrictive

Very restrictive

Restrictive

Some restrictions/protections

Protective

Very protective

Most protective

# Texas

ABORTION POLICIES DEMOGRAPHIC INFO ABORTION STATISTICS

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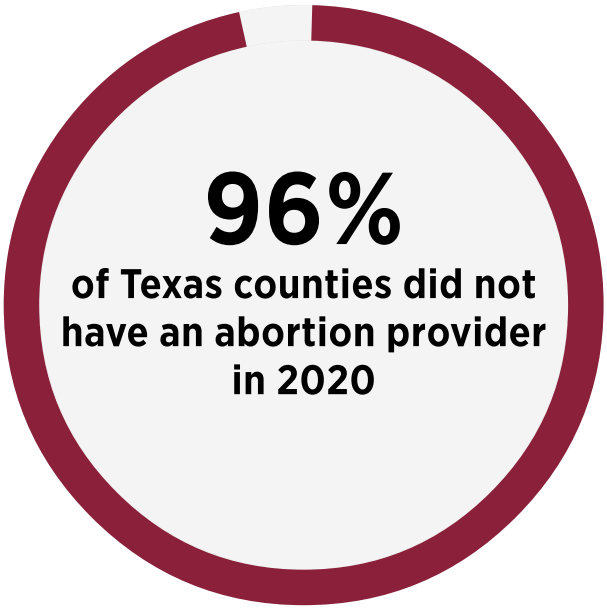
distance patients have to travel to reach the nearest abortion provider can offer important context for each state. It is important to note that abortion data often take several years to become available and may not reflect recent changes. This is especially true in any state that has recently enacted restrictions on abortion or has seen a recent increase in patients traveling from states with restrictions or bans.

**58,030**
**abortions were obtained in Texas in 2020**

**9.5 ABORTIONS PER 1,000 WOMEN**
**aged 15-44 in Texas in 2020**

**21 CLINICS**
**provided abortion care in Texas in 2020**



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**43%**

**of women aged 15–44 in Texas lived in a county without an abortion provider in 2020**

# 250 MILES

**Average one-way driving distance for women aged 15-49 in Texas to the nearest clinic that performs abortions up to 20 weeks = 250 miles**

## BEFORE 22 WEEKS

# 547 MILES

**Average one-way driving distance for women aged 15-49 in Texas to the nearest clinic that performs abortions up to 22 weeks = 547 miles**

## BEFORE 24 WEEKS

# 705 MILES

**Average one-way driving distance for women aged 15-49 in Texas to the nearest clinic that performs abortions up to 24 weeks = 705 miles**

## AFTER 24 WEEKS

# 786 MILES

**Average one-way driving distance**

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**abortions after 24 weeks – 790 miles**

**Notes:**

The age range for "women of reproductive age" varies depending on the underlying data source. Some sources categorize women of reproductive age as 15–44 and others as 15–49.

Average distances refer to the median distance women aged 15–49 in each state would need to drive to reach the nearest abortion clinic. This means that half the women of reproductive age live within and half live farther than the stated number of miles.

The map accounts for differing gestational age limits at abortion clinics, which are either mandated by law or set by the provider.

Driving distances were calculated to the nearest US abortion clinic. In border states, a clinic in Canada or Mexico may be a shorter driving distance than a clinic in the United States.

This content represents driving distances as of September 20, 2022.

Percentages may not add to 100 because of rounding.

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JULY 15, 2022

# Key facts about the abortion debate in America

BY CARRIE BLAZINA

A woman receives medication to terminate her pregnancy at a reproductive health clinic in Albuquerque, New Mexico, on June 23, 2022, the day before the Supreme Court overturned Roe v. Wade, which had guaranteed a

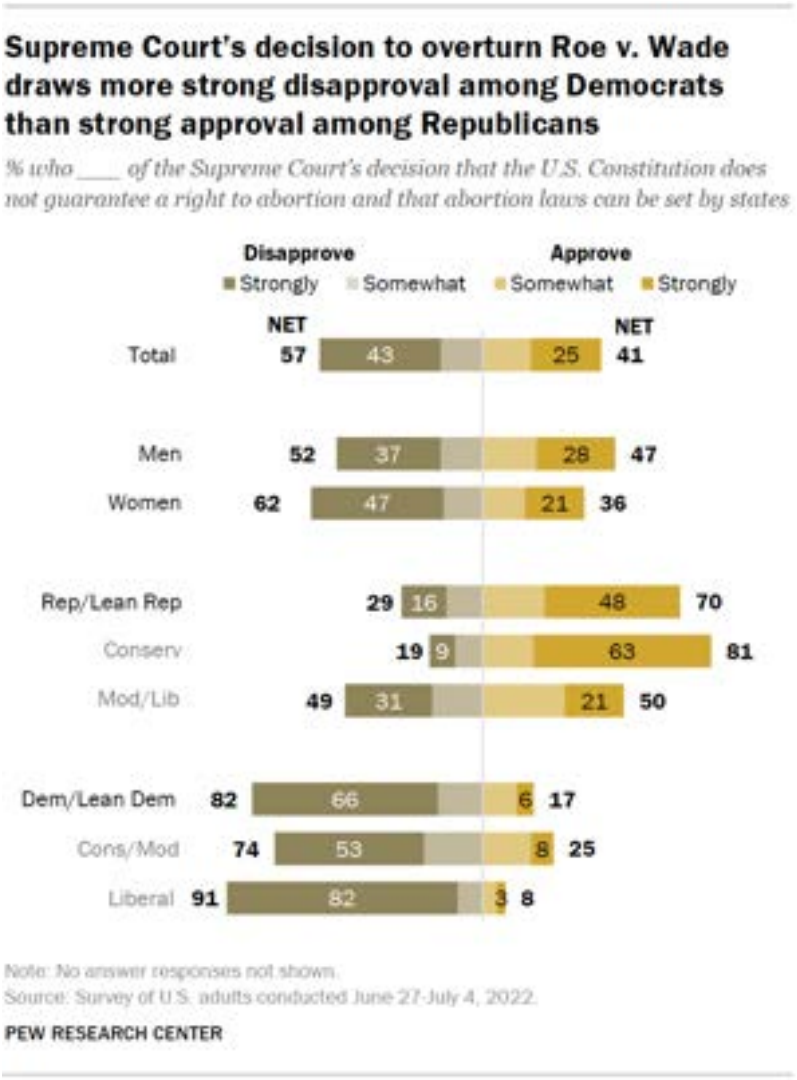
constitutional right to an abortion for nearly 50 years. (Gina Ferazzi/Los Angeles Times via Getty Images)

The U.S. Supreme Court's June 2022 ruling to overturn Roe v. Wade – the decision that had guaranteed a constitutional right to an abortion for nearly 50 years – has shifted the legal battle over abortion to the states, with some prohibiting the procedure and others moving to safeguard it.

As the nation's post-Roe chapter begins, here are key facts about Americans' views on abortion, based on two Pew Research Center polls: one conducted from June 25-July 4, just after this year's high court ruling, and one conducted in March, before an earlier leaked draft of the opinion became public.

**How we did this** ⊕

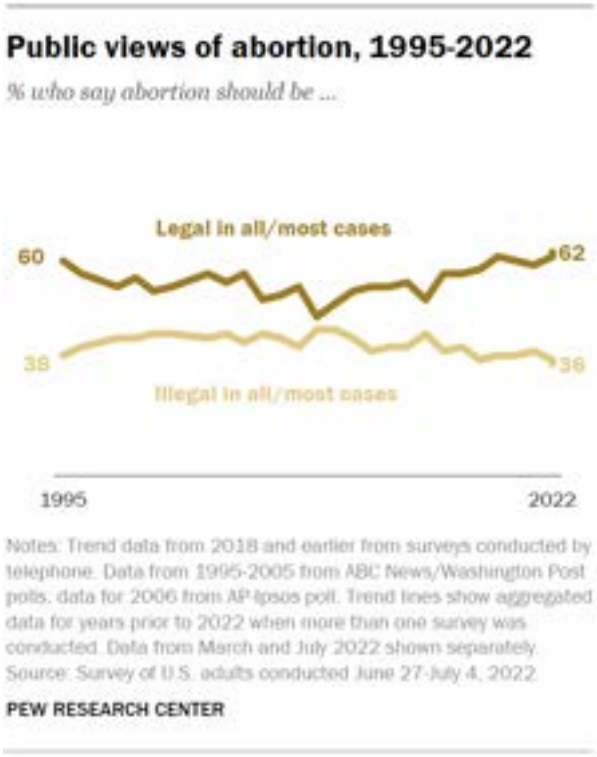
**1 A majority of the U.S. public disapproves of the Supreme Court's decision to overturn Roe.** About six-in-ten adults (57%) disapprove of the court's decision that the U.S. Constitution does not guarantee a right to abortion and that abortion laws can be set by states, including 43% who strongly disapprove, according to the summer survey. About four-in-ten (41%) approve, including 25% who strongly approve.




About eight-in-ten Democrats and Democratic-leaning independents (82%) disapprove of the court's decision, including nearly two-thirds (66%) who strongly disapprove. Most Republicans and GOP leaners (70%) *approve*, including 48% who strongly approve.

Most women (62%) disapprove of the decision to end the federal right to an abortion. More than twice as many women strongly disapprove of the court's decision (47%) as strongly approve of it (21%). Opinion among men is more divided: 52% disapprove (37% strongly), while 47% approve (28% strongly).

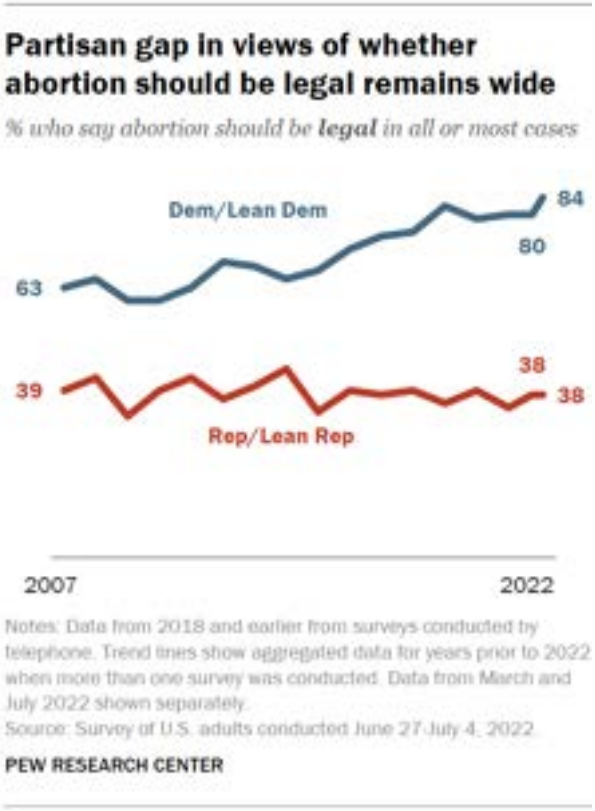
**2 About six-in-ten Americans (62%) say abortion should be legal in all or most cases,** according to the summer survey – little changed since the March survey conducted just before the ruling. That includes 29% of Americans who say it should be legal in all cases and 33% who say it should be legal in most cases. About a third of U.S. adults (36%) say abortion should be *illegal* in all (8%) or most (28%) cases.




Generally, Americans' views of whether abortion should be legal remained relatively unchanged in the past few years, though support fluctuated somewhat in previous decades.

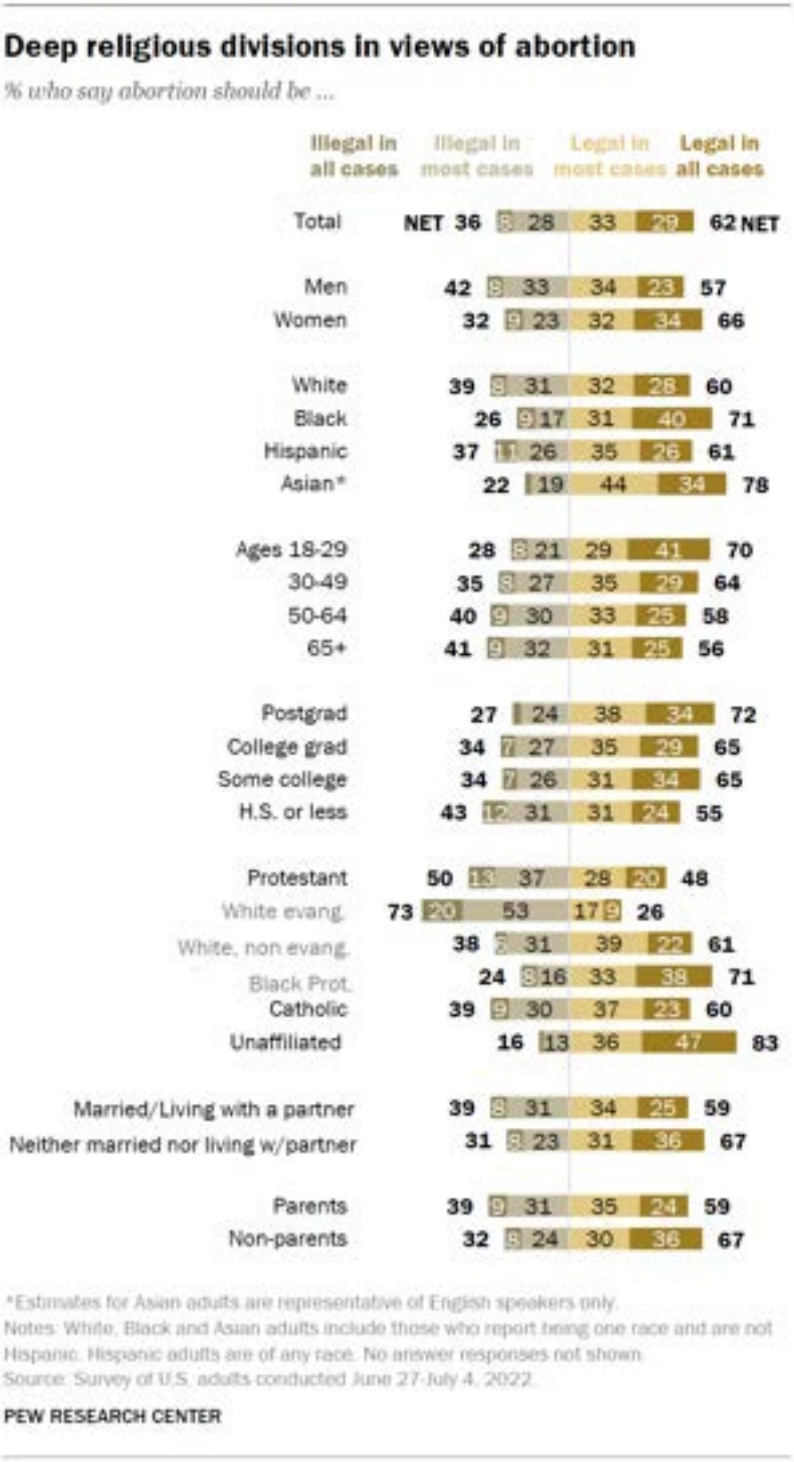
Relatively few Americans take an absolutist view on the legality of abortion – either supporting or opposing it at all times, regardless of circumstances. The March survey found that support or opposition to abortion varies substantially depending on such circumstances as when an abortion takes place during a pregnancy, whether the pregnancy is life-threatening or whether a baby would have severe health problems.

**3 While Republicans' and Democrats' views on the legality of abortion have long differed, the 46 percentage point partisan gap today is considerably larger than it was in the recent past,** according to the survey conducted after the court's ruling. The wider gap has been largely driven by Democrats: Today, 84% of Democrats say abortion should be legal in all or most cases, up from 72% in 2016 and 63% in 2007. Republicans' views have shown far less change over time: Currently, 38% of Republicans say abortion should be legal in all or most cases, nearly identical to the 39% who said this in 2007.




However, the partisan divisions over whether abortion should generally be legal tell only part of the story. According to the March survey, sizable shares of Democrats favor restrictions on abortion under certain circumstances, while majorities of Republicans favor abortion being legal in some situations, such as in cases of rape or when the pregnancy is life-threatening.

**4 There are wide religious divides in views of whether abortion should be legal,** the summer survey found. An overwhelming share of religiously unaffiliated adults (83%) say abortion should be legal in all or most cases, as do six-in-ten Catholics. Protestants are divided in their views: 48% say it should be legal in all or most cases, while 50% say it should be *illegal* in all or most cases. Majorities of Black Protestants (71%) and White non-evangelical Protestants (61%) take the position that abortion should be legal in all or most cases, while about three-quarters of White evangelicals (73%) say it should be *illegal* in all (20%) or most cases (53%).




In the March survey, 72% of White evangelicals said that the statement "human life begins at conception, so a fetus is a person with rights" reflected their views extremely or very well. That's much greater than the share of White non-evangelical Protestants (32%), Black Protestants (38%) and Catholics (44%) who said the same. Overall, 38% of Americans said that statement matched their views extremely or very well.

Catholics, meanwhile, are divided along religious and political lines in their attitudes about abortion, according to the same survey. Catholics who attend Mass regularly are among the country's strongest opponents of abortion being legal, and they are also more

likely than those who attend less frequently to believe that life begins at conception and that a fetus has rights. Catholic Republicans, meanwhile, are far more conservative on a range of abortion questions than are Catholic Democrats.

**5** **Women (66%) are more likely than men (57%) to say abortion should be legal in most or all cases,** according to the survey conducted after the court's ruling.

More than half of U.S. adults – including 60% of women and 51% of men – said in March that women should have a greater say than men in setting abortion policy. Just 3% of U.S. adults said men should have more influence over abortion policy than women, with the remainder (39%) saying women and men should have equal say.

The March survey also found that by some measures, women report being closer to the abortion issue than men. For example, women were more likely than men to say they had given "a lot" of thought to issues around abortion prior to taking the survey (40% vs. 30%). They were also considerably more likely than men to say they personally knew someone (such as a close friend, family member or themselves) who had had an abortion (66% vs. 51%) – a gender gap that was evident across age groups, political parties and religious groups.

**6** **Relatively few Americans view the morality of abortion in stark terms,** the March survey found. Overall, just 7% of all U.S. adults say having an abortion is morally acceptable in all cases, and 13% say it is morally wrong in all cases. A third say that having an abortion is morally wrong in most cases, while about a quarter (24%) say it is morally acceptable in most cases. An additional 21% do not consider having an abortion a moral issue.

**Wide religious and partisan differences in views of the morality of abortion**

*% of U.S. adults who say having an abortion is ...*

| | Morally wrong in all cases | Morally wrong in most cases | Morally acceptable in most cases | Morally acceptable in all cases | Abortion is not a moral issue |
|---|---|---|---|---|---|
| | % | % | % | % | % |
| All U.S. adults | 13 | 33 | 24 | 7 | 21 |
| Republican/lean Rep | 20 | 48 | 16 | 3 | 12 |
| Democrat/lean Dem | 6 | 23 | 32 | 11 | 28 |
| Protestant | 21 | 41 | 18 | 4 | 14 |
| *White evangelical* | 30 | 51 | 10 | 2 | 6 |
| *White, not evangelical* | 11 | 38 | 28 | 4 | 17 |
| *Black Protestant* | 14 | 29 | 22 | 7 | 24 |
| Catholic | 16 | 38 | 24 | 4 | 17 |
| Religiously unaffiliated | 3 | 19 | 32 | 13 | 32 |
| *Atheist* | 1 | 6 | 32 | 25 | 37 |
| *Agnostic* | 1 | 18 | 39 | 15 | 27 |
| *Nothing in particular* | 4 | 23 | 30 | 9 | 32 |
| *Among those who say abortion should be ...* | | | | | |
| Legal in all cases | 1 | 6 | 22 | 27 | 44 |
| Legal, some exceptions | 2 | 26 | 43 | 4 | 24 |
| Illegal, some exceptions | 17 | 69 | 6 | 1 | 5 |
| Illegal, no exceptions | 86 | 8 | 1 | 1 | 3 |

Note: Those who did not answer are not shown
Source: Survey of U.S. adults conducted March 7-13, 2022.
"America's Abortion Quandary"

PEW RESEARCH CENTER

Among Republicans, most (68%) say that having an abortion is morally wrong either in most (48%) or all cases (20%). Only about three-in-ten Democrats (29%) hold a similar view. Instead, about four-in-ten Democrats say having an abortion is morally *acceptable* in most (32%) or all (11%) cases, while an additional 28% say it is not a moral issue.

White evangelical Protestants overwhelmingly say having an abortion is morally wrong in most (51%) or all cases (30%). A slim majority of Catholics (53%) also view having an abortion as morally wrong, but many also say it is morally acceptable in most (24%) or all cases (4%), or that it is not a moral issue (17%). Among religiously unaffiliated Americans, about three-quarters see having an abortion as morally acceptable (45%) or not a moral issue (32%).

Topics Abortion, Religion & Abortion

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Carrie Blazina *is a digital producer at Pew Research Center.*

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FACT SHEET | MAY 17, 2022

# Public Opinion on Abortion

For a detailed analysis of Pew Research Center's latest data on the U.S. public's abortion attitudes, see "America's Abortion Quandary."

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2022

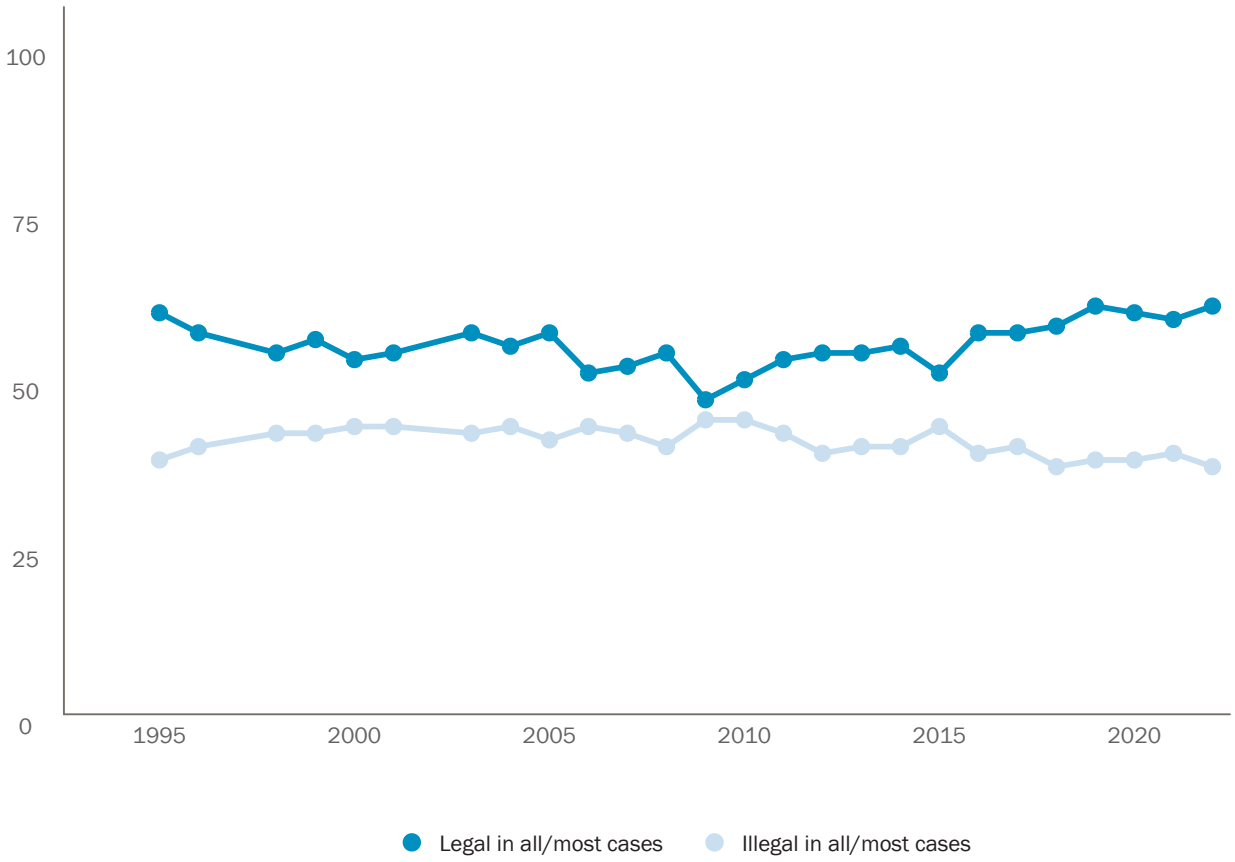
Views on abortion by level of education, 2022

## Views on abortion, 1995-2022

While public support for legal abortion has fluctuated some in two decades of polling, it has remained relatively stable over the past several years. Currently, 61% say abortion should be legal in all or most cases, while 37% say it should be illegal in all or most cases.

CHART TABLE SHARE

*% of U.S. adults who say abortion should be legal/illegal (1995-2022)*




Data from 1995-2005 from ABC News/Washington Post polls; data for 2006 from AP-Ipsos poll.

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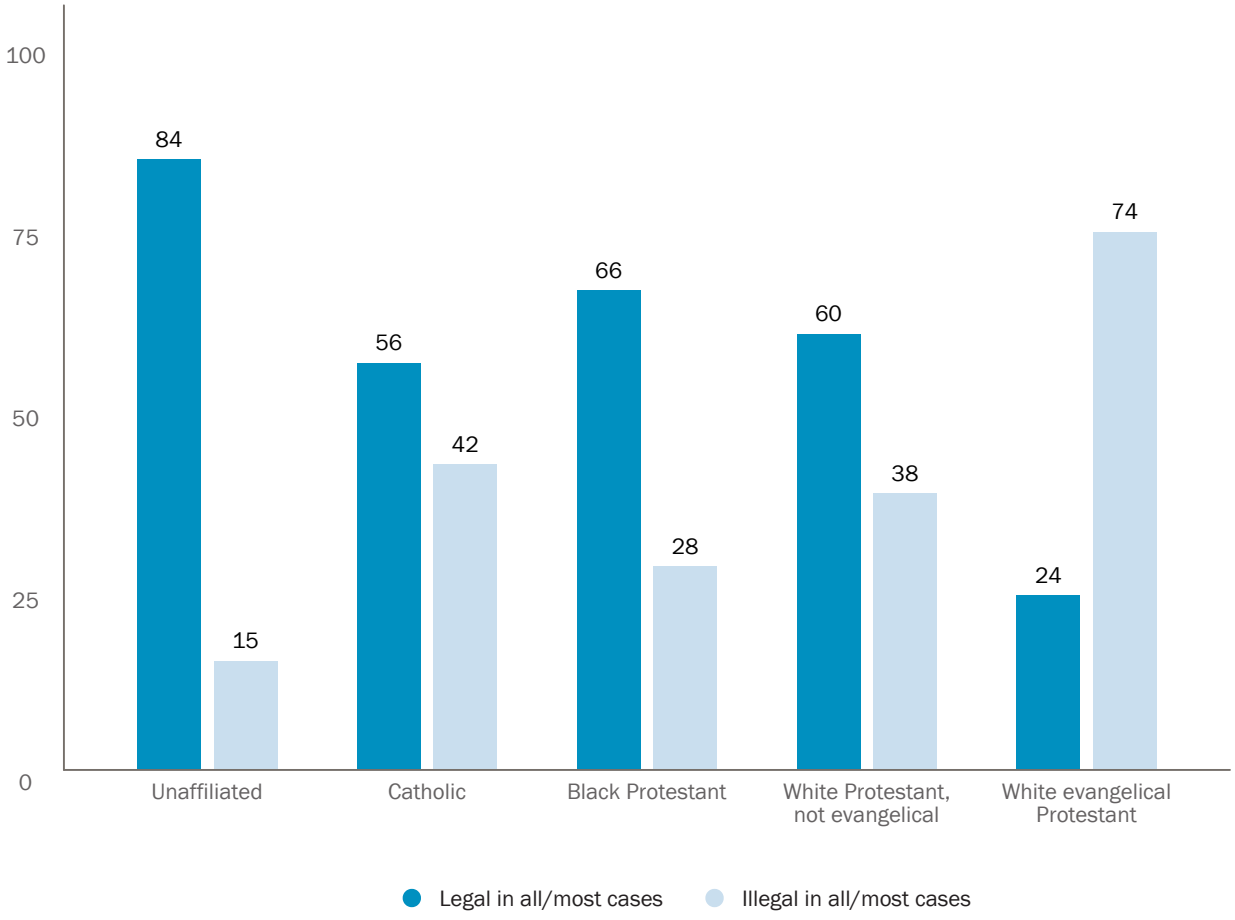
## Views on abortion by religious affiliation, 2022

About three-quarters of White evangelical Protestants (74%) think abortion should be illegal in all or most cases.

By contrast, 84% of religiously unaffiliated Americans say abortion should be legal in all or most cases, as do 66% of Black Protestants, 60% of White Protestants who are not evangelical, and 56% of Catholics.

**CHART** TABLE SHARE

*% of U.S. adults who say abortion should be legal/illegal, by religion (2022)*

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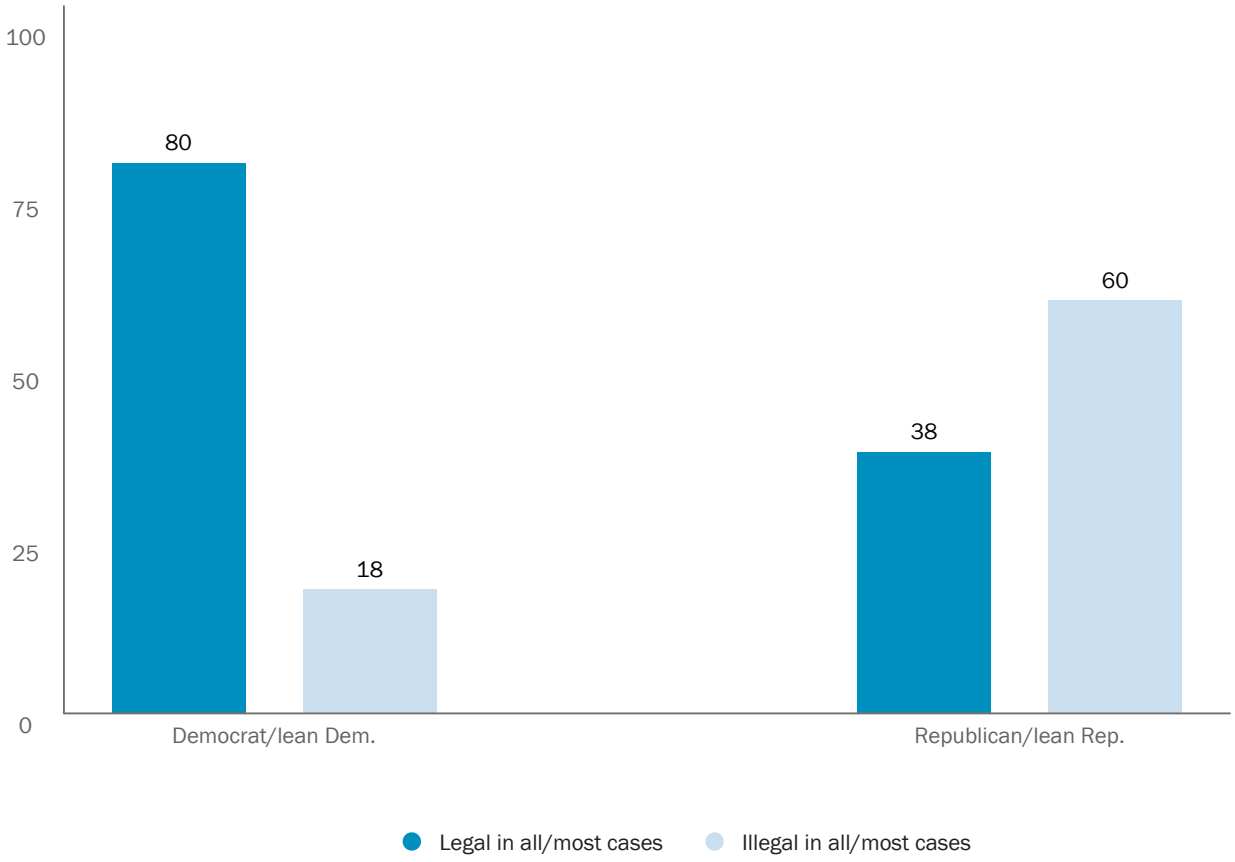
## Views on abortion by party identification, 2022

Six-in-ten Republicans and those who lean toward the Republican Party (60%) say abortion should be illegal in all or most cases. By contrast, 80% of Democrats and those who lean toward the Democratic Party say abortion should be legal in all or most cases.

CHART TABLE SHARE

*% of U.S. adults who say abortion should be legal/illegal, by party identification (2022)*

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## Views on abortion by political party and ideology, 2022

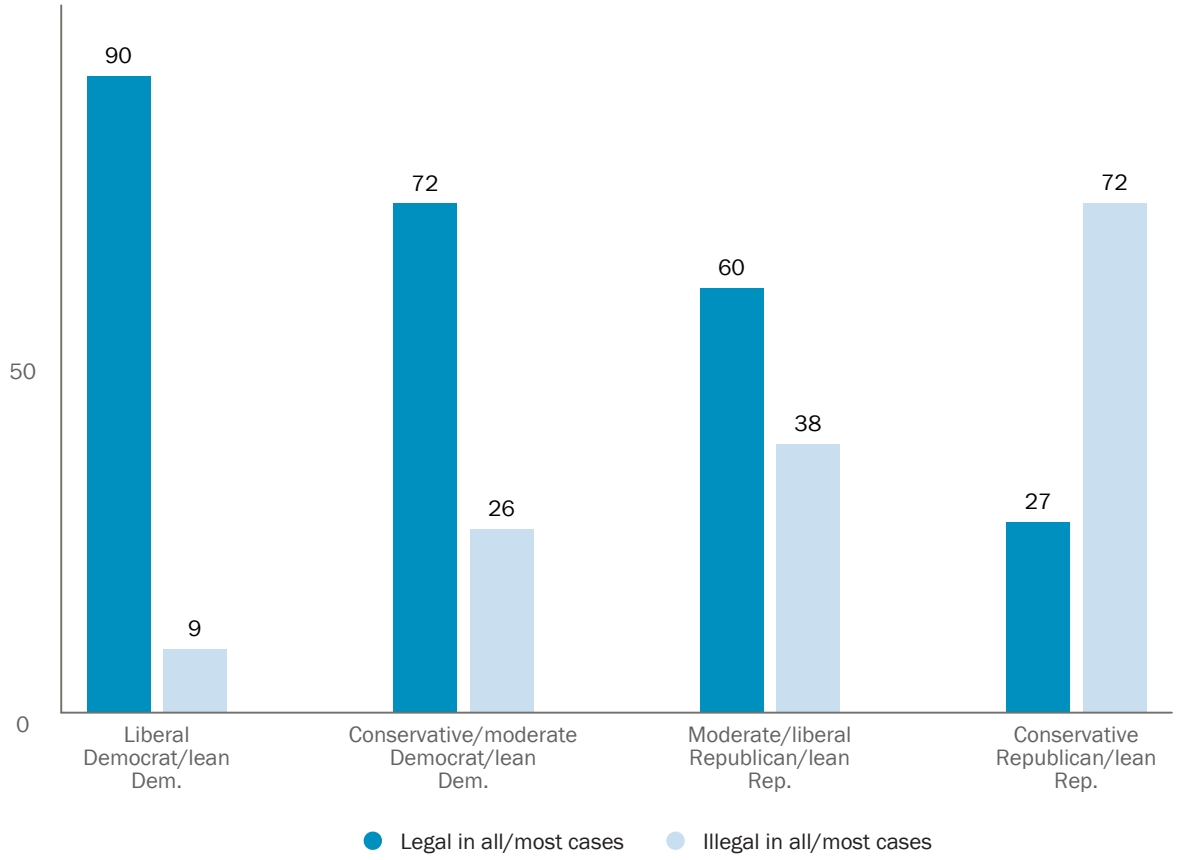
Conservative Republicans and Republican leaners are far more likely to say abortion should be illegal in all or most cases than to say that it should be legal (72% vs. 27%).

Among moderate and liberal Republicans, 60% say abortion should be legal, while 38% say it should be illegal.

The vast majority of liberal Democrats and Democratic leaners support legal abortion (90%), as do seven-in-ten conservative and moderate Democrats (72%).

CHART TABLE SHARE

*% of U.S. adults who say abortion should be legal/illegal, by party and ideology (2022)*

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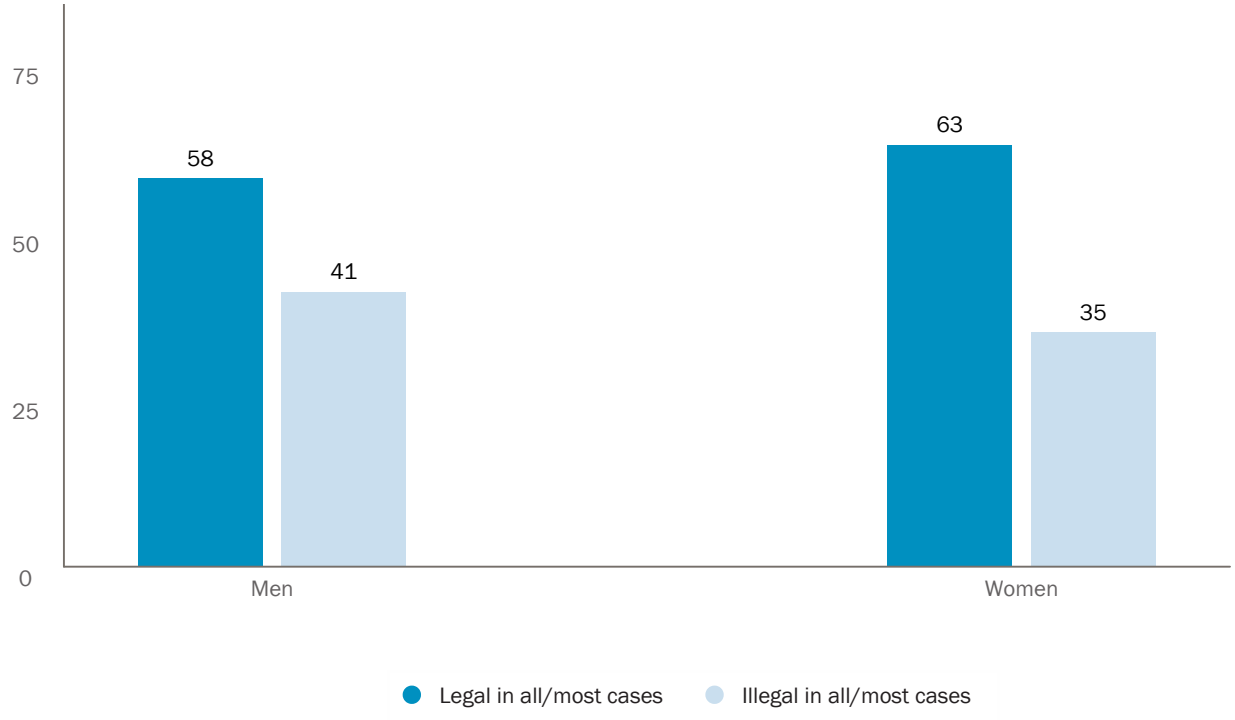
## Views on abortion by gender, 2022

Majorities of both men and women express support for legal abortion, though women are somewhat more likely than men to hold this view (63% vs. 58%).

**CHART** TABLE SHARE

*% of U.S. adults who say abortion should be legal/illegal, by gender (2022)*

100

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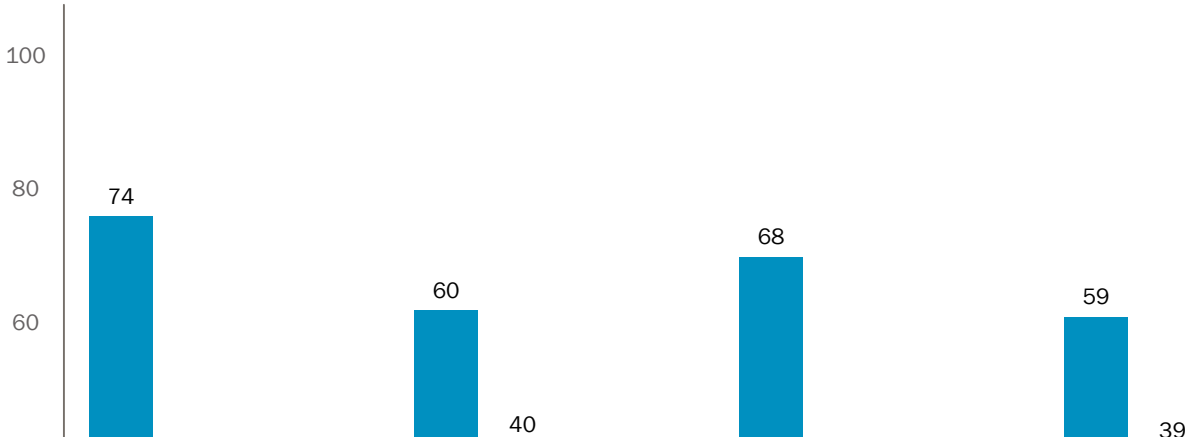
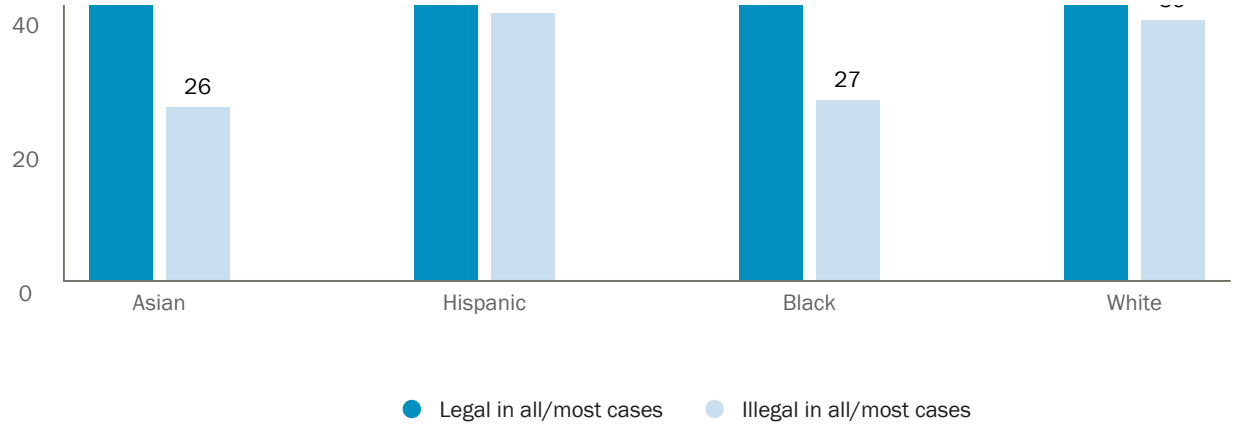
## Views on abortion by race and ethnicity, 2022

Majorities of adults across racial and ethnic groups express support for legal abortion. About three-quarters of Asian (74%) and two-thirds of Black adults (68%) say abortion should be legal in all or most cases, as do 60% of Hispanic adults and 59% of White adults.

**CHART** TABLE SHARE

*% of U.S. adults who say abortion should be legal, by race and ethnicity (2022)*



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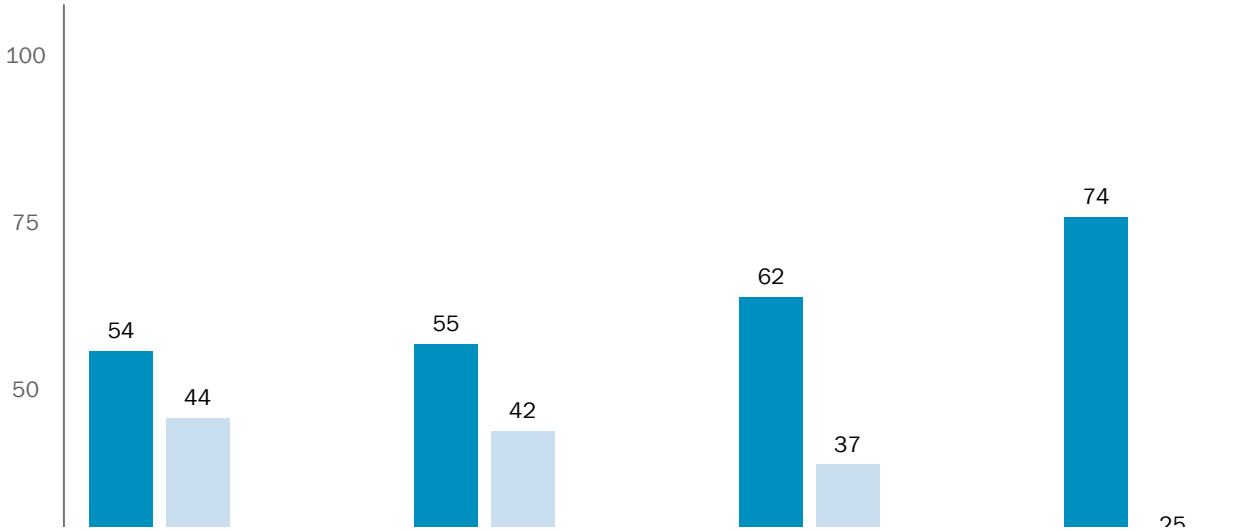
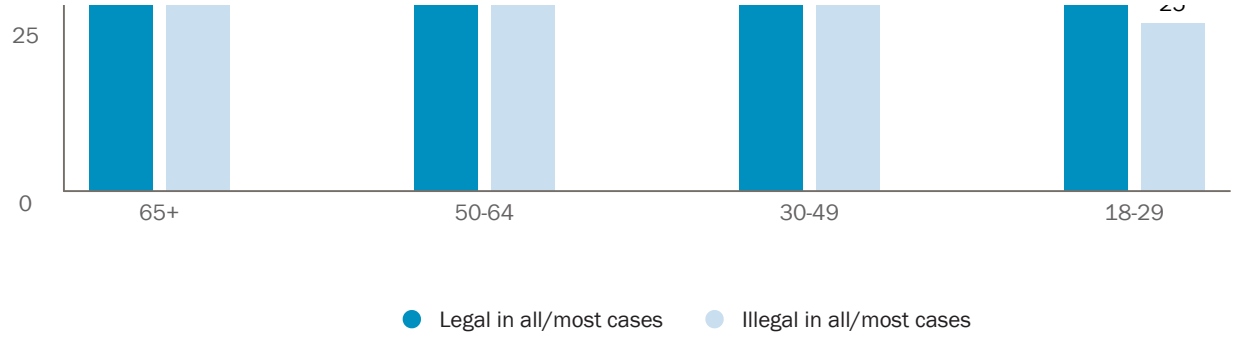
## Views on abortion by age, 2022

Among adults under age 30, 74% say abortion should be legal in all or most cases, as do 62% of adults in their 30s and 40s. Among those in their 50s and early 60s, 55% express support for legal abortion, as do 54% of those ages 65 and older.

**CHART** TABLE SHARE

*% of U.S. adults who say abortion should be legal/illegal, by age (2022)*



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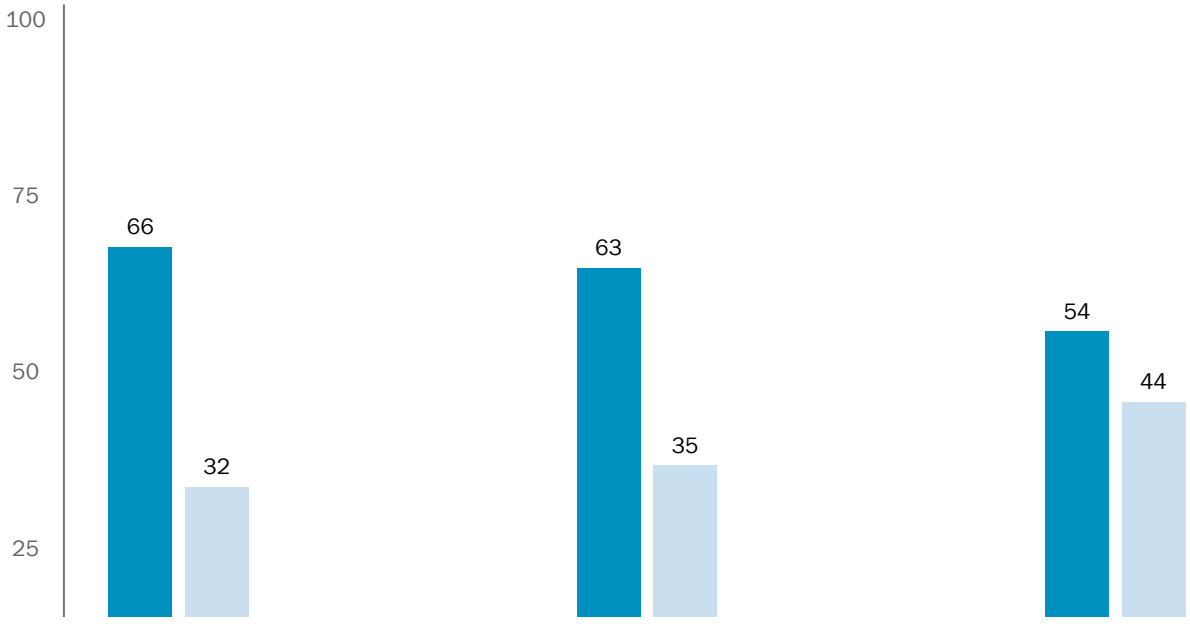
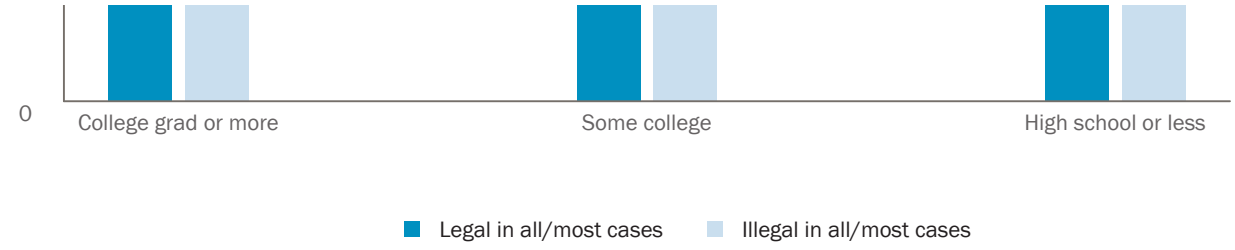
## Views on abortion by level of education, 2022

Two-thirds of college graduates (66%) say abortion should be legal in all or most cases, as do 63% of those with some college education. Among those with a high school degree or less education, 54% say abortion should be legal in all or most cases, while 44% say it should be illegal in all or most cases.

**CHART** TABLE SHARE

*% of U.S. adults who say abortion should be legal/illegal, by education level (2022)*



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**Source:** Survey conducted March 7-13, 2022. Trend lines show aggregated data from polls conducted in each year. Data from 2019 and later come from Pew Research Center's online American Trends Panel; prior data from telephone surveys. See report for more details on changes in survey mode. Question wording can be found here, and information on the Pew Research Center's polling methodology can be found here. White, Black and Asian adults include those who report being one race and are not Hispanic. Hispanics are of any race. Estimates for Asian adults are representative of English speakers only.

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PEW RESEARCH CENTER | MAY 6, 2022

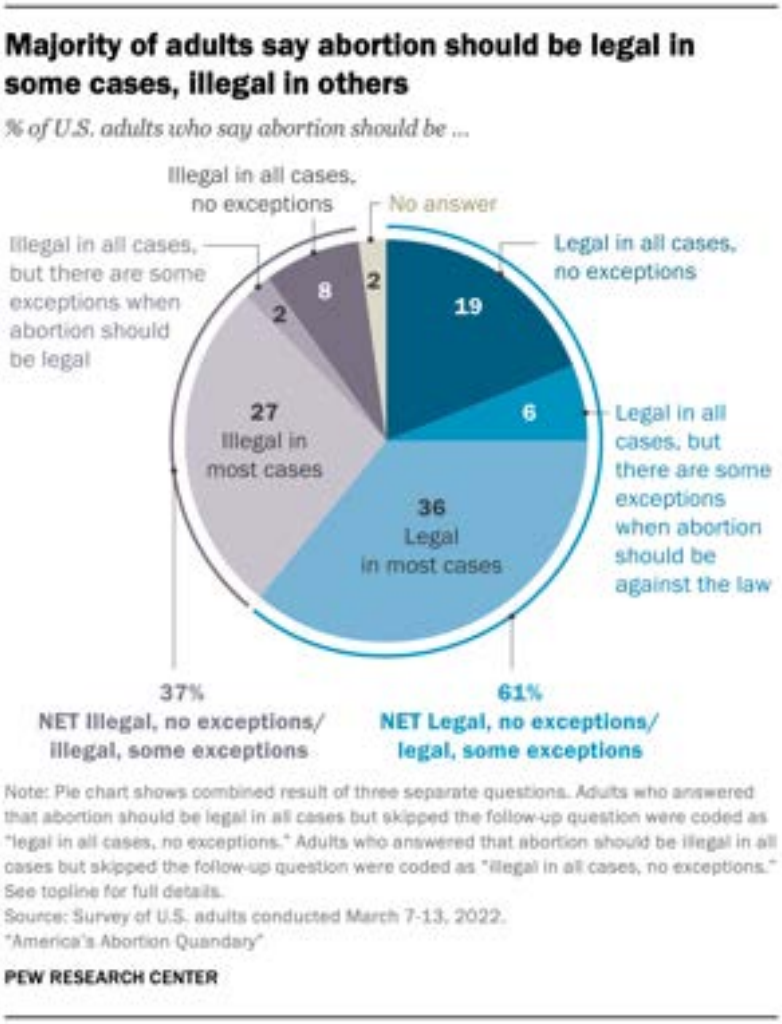
# America's Abortion Quandary

*A majority of Americans say abortion should be legal in all or most cases, but many are open to restrictions; many opponents of legal abortion say it should be legal in some circumstances*

Protesters gather outside the U.S. Supreme Court on Dec. 1, 2021, as the court was hearing oral arguments over a Mississippi law restricting abortions in the state after 15 weeks of pregnancy. (Melina Mara/The Washington Post/Getty Images)

**How we did this** ⊕

The abortion debate in America is often framed as a legal binary, with “pro-life” people on one side, seeking to restrict abortion’s availability, and “pro-choice” people on the other, opposing government restrictions on abortion.




But as the country approaches what could be a watershed moment in the history of abortion laws and policies, relatively few Americans on either side of the debate take an absolutist view on the legality of abortion – either supporting or opposing it at all times, regardless of circumstances.

A new Pew Research Center survey explores in detail the nuances of the public's attitudes on this issue. The survey was conducted March 7-13, 2022 – after the Supreme Court's oral arguments on a case this term challenging the 1973 Roe v. Wade decision that established a federal right to abortion, but before the May 2 publication of a leaked draft of a Supreme Court majority opinion that suggests the court is poised to strike down Roe.

Nearly one-in-five U.S. adults (19%) say that abortion should be legal in all cases, with no exceptions. Fewer (8%) say abortion should be illegal in every case, without exception. By contrast, 71% either say it should be mostly legal or mostly illegal, or say there are exceptions to their blanket support for, or opposition to, legal abortion.

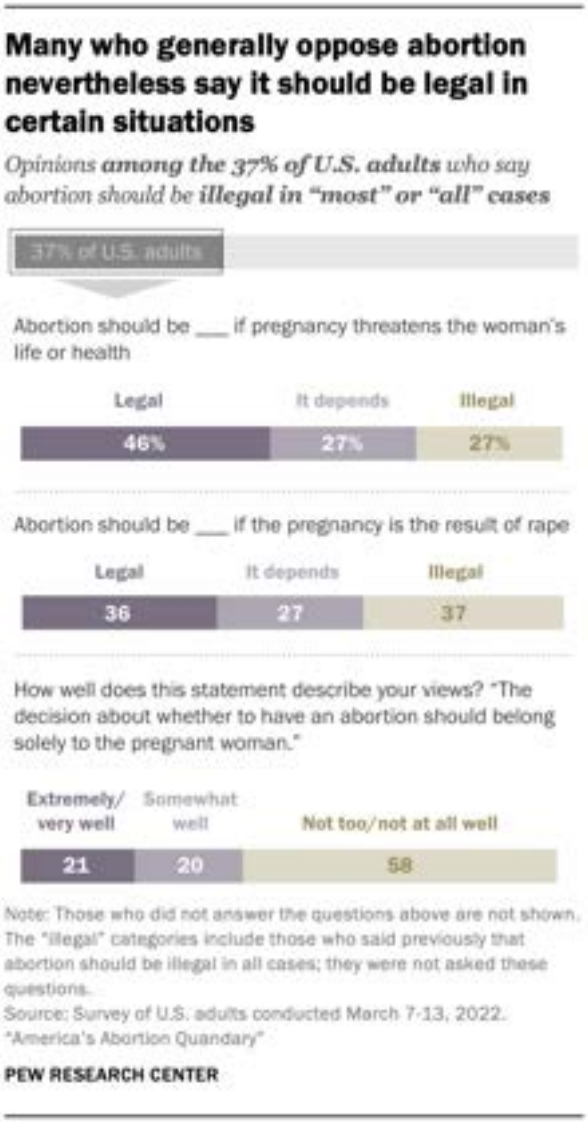

As in the past, more Americans say abortion should be legal in all or most circumstances (61%) than illegal in all or most circumstances (37%). But in many ways, the public's attitudes are contingent upon such circumstances as when an abortion takes place during a woman's pregnancy, whether the pregnancy endangers a woman's life and whether a baby would have severe health problems.

There is evidence that many people are cross-pressured on this issue. For example, more than half of Americans who generally support abortion rights – by saying it should be legal in "most" or "all" cases – also say the timing of an abortion (i.e., how far along the pregnancy is) should be a factor in determining its legality (56%).

The same share of people who generally support legal abortion say abortion providers should be required to get the consent of a parent or guardian before performing an abortion on a minor (56%).

And about a third of Americans who generally support legal abortion (33%) say the statement "human life begins at conception, so a fetus is a person with rights" describes

their own view at least “somewhat” well.

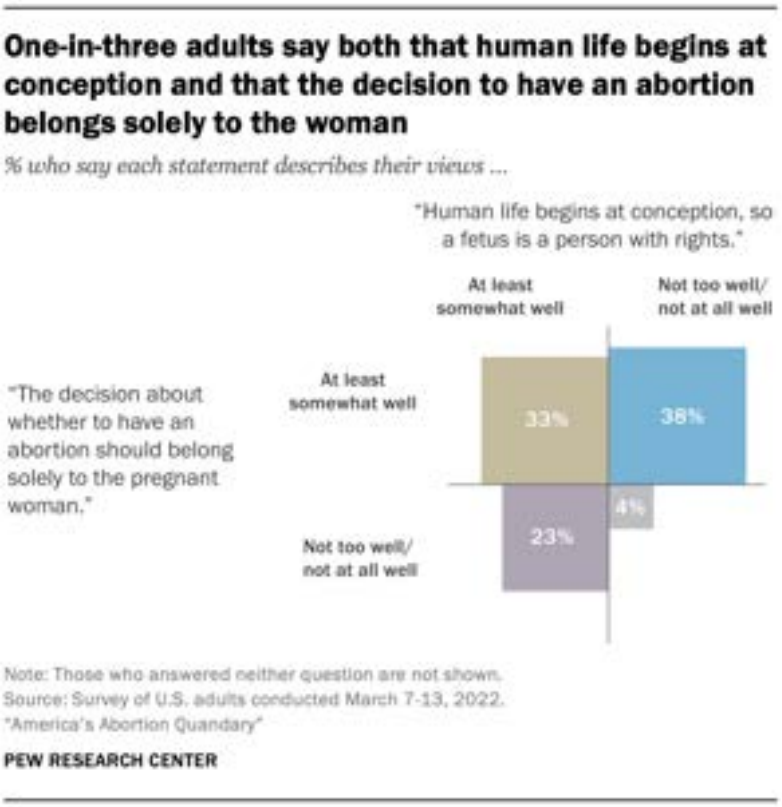



At the same time, large shares of those who generally oppose abortion say it should be legal in certain situations or say their position depends on the circumstances. For example, among those who say abortion should be against the law in most or all cases, nearly half (46%) say it should be legal if the pregnancy threatens the health or life of the woman. An additional 27% say “it depends” in this situation, while 27% say abortion should be illegal even in circumstances that threaten the health or life of the pregnant woman.

More than a third of abortion opponents (36%) say it should be legal if the pregnancy results from rape, with 27% saying “it depends” and 37% expressing opposition to legal abortion even in this situation. And four-in-ten abortion opponents (41%) say the statement “the decision about whether to have an abortion should belong solely to the pregnant woman” describes their own view at least “somewhat” well.

Among Americans overall, most people (72%) say that “the decision about whether to have an abortion should belong solely to the pregnant woman” describes their views at least

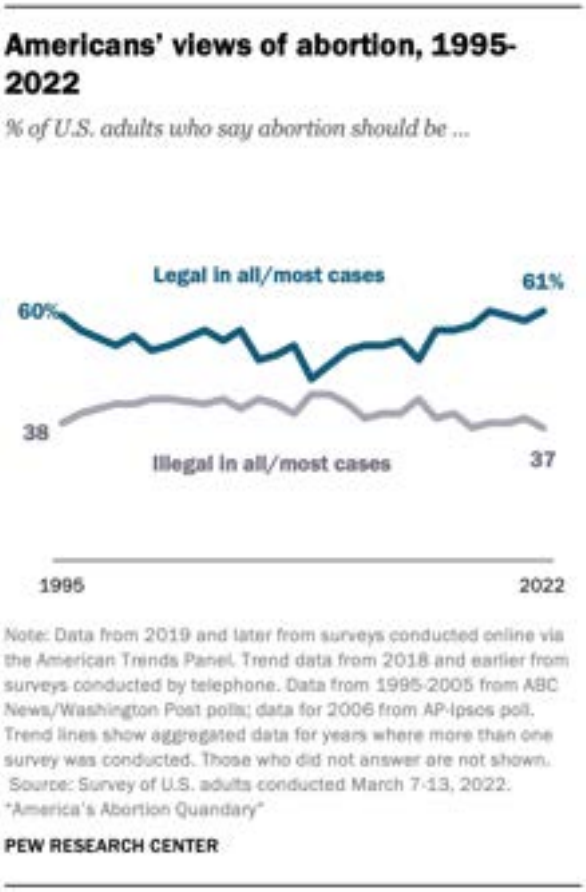
somewhat well, and more than half (56%) say the same about the statement "human life begins at conception, so a fetus is a person with rights."




A third of Americans hold these seemingly conflicting views about the autonomy of pregnant women and the rights of the fetus at the same time, saying that *both* statements describe their views either extremely well, very well, or somewhat well.

Moreover, the survey finds a distinction between how Americans feel about abortion in moral terms and in legal terms. While many (47%) see abortion as morally wrong in most or all cases, fewer (22%) say that abortion should be illegal in every situation where they believe it is immoral. Nearly half of U.S. adults (48%) say there are circumstances in which abortion is morally wrong but should nevertheless be legal.

And while nearly six-in-ten adults (57%) say they think stricter abortion laws would reduce the number of abortions performed in the United States, similar or larger shares say that increasing support for pregnant women (65%), expanding sex education (60%) and increasing support for parents (58%) would have the same effect.




These are among the key findings of a new Pew Research Center survey, conducted among 10,441 adults on the Center's American Trends Panel. The Center has asked the public about their opinions on abortion for decades, but many of the questions in this survey are new, aimed at providing a more nuanced picture of public opinion.

On the Center's long-running question about the legality of abortion – which asks whether it should generally be illegal in all cases, illegal in most cases, legal in most cases, or legal in all cases – public views have remained relatively stable in recent years. But support for legal abortion is as high today as at any point in surveys asking this question since 1995.

Most Americans typically do not give a lot of thought to issues around abortion: 36% say, prior to taking the survey in March, they had given a lot of thought to abortion-related issues.

## Broad public agreement that abortion should be legal if pregnancy endangers a woman's health or is the result of rape


While most Americans do not have absolutist views about abortion – desiring neither to see it completely outlawed nor permitted without exception – there are certain situations in which there is clear consensus abortion should be legal.

Nearly three-quarters of adults (73%) say abortion should be legal if the woman's life or health is endangered by the pregnancy, while just 11% say it should be illegal. And about seven-in-ten say abortion should be legal if the pregnancy is a result of rape, with just 15% saying it should be illegal in this case.

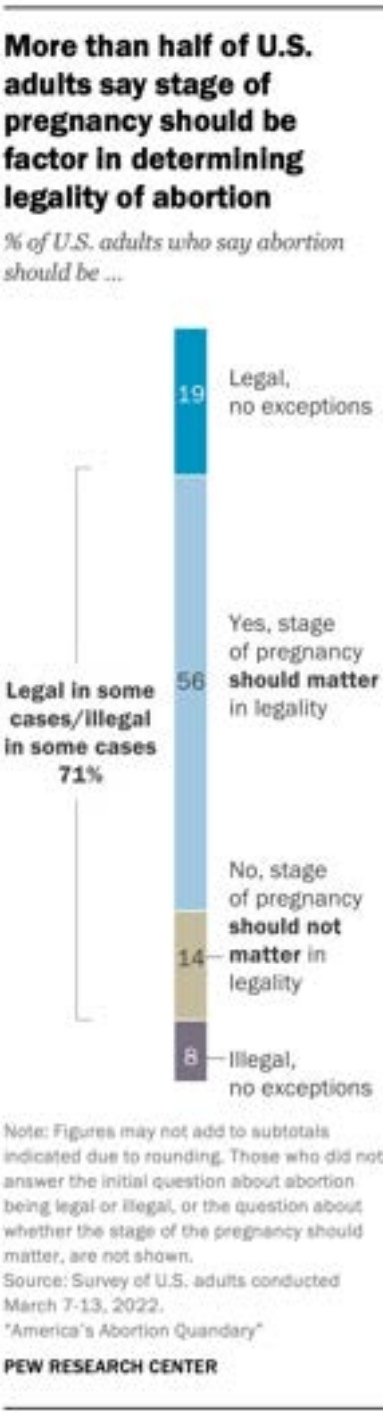
A smaller majority of U.S. adults (53%) say abortion should be legal if the baby is likely to be born with severe disabilities or health problems – though in this situation, too, a far larger share say abortion should be legal than say it should be against the law (19% say it should be illegal in such cases, while a quarter say "it depends").

## Most Americans open to some restrictions on abortion

At the same time, the survey shows that large numbers of Americans favor certain restrictions on access to abortions. For example, seven-in-ten say doctors should be required to notify a parent or legal guardian of minors seeking abortions. And most of those who say abortion should be legal in some cases and illegal in others say that how

long a woman has been pregnant should be a factor in determining whether abortion is legal or illegal (56% among all U.S. adults).

Combined with the 8% of U.S. adults who say abortion should be against the law in all cases with no exceptions, this means that nearly two-thirds of the public thinks abortion either should be entirely illegal at *every* stage of a pregnancy or should become illegal, at least in some cases, *at some point* during the course of a pregnancy.




On the other side, combining the 56% of U.S. adults who say how long a woman has been pregnant should matter in determining the legality of abortion with the 19% who say abortion should be legal in all cases also means that about three-quarters of the public

thinks abortion either should be entirely legal at *every* stage of a pregnancy or should be legal, at least in some cases, *at some point* in a pregnancy.

When, exactly, during a pregnancy should abortion be legal, and at what point should it become illegal? To help answer this question, the survey posed follow-up queries about three periods: six weeks (when cardiac activity – sometimes called a fetal heartbeat – can be detected), 14 weeks (roughly the end of the first trimester), and 24 weeks (near the end of the second trimester).

The survey data shows that as pregnancy progresses, opposition to legal abortion grows and support for legal abortion declines. Americans are about twice as likely to say abortion should be legal at six weeks than to say it should be illegal at this stage of a pregnancy: 44% of U.S. adults say abortion should be legal at six weeks (including those who say it should be legal in *all* cases without exception), 21% say it should be illegal at six weeks (including those who say abortion should *always* be illegal), and another 19% say whether it should be legal or not at six weeks "depends." (An additional 14% say the stage of pregnancy shouldn't factor into determining whether abortion is legal or illegal, including 7% who generally think abortion should be legal, and 6% who generally think it should be illegal.)

At 14 weeks, the share saying abortion should be legal declines to 34%, while 27% say illegal and 22% say "it depends."

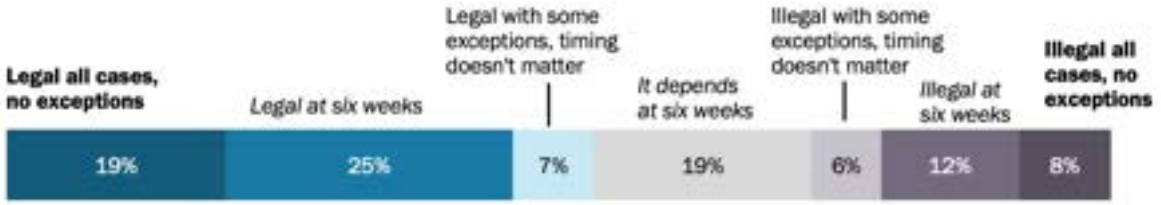
When asked about the legality of abortion at 24 weeks of pregnancy (described as a point when a healthy fetus could survive outside the woman's body, with medical attention), Americans are about twice as likely to say abortion should be illegal as to say it should be legal at this time point (43% vs. 22%), with 18% saying "it depends."

However, in a follow-up question, 44% of those who initially say abortion should be illegal at this late stage go on to say that, *in cases where the woman's life is threatened or the baby will be born with severe disabilities*, abortion should be legal at 24 weeks. An additional 48% answer the follow-up question by saying "it depends," and 7% reiterate that abortion should be illegal at this stage of pregnancy even if the woman's life is in danger or the baby faces severe disabilities.

**Opposition to legal abortion increases at later stages of pregnancy; at 24 weeks, roughly twice as many adults say abortion should be illegal as say it should be legal**

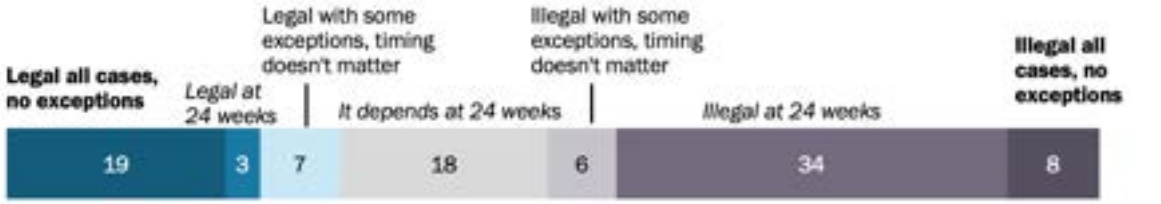
*% of U.S. adults who say ...*

*As you may know,* ***six weeks into a pregnancy*** *is about when cardiac activity (sometimes called a fetal heartbeat) can be detected, and before many women know they are pregnant. Should abortion at that point be ...*




*Thinking specifically about a pregnancy that is* ***14 weeks along*** *(roughly at the end of the first trimester), do you think abortion at that point should be ...*


*As you may know,* ***24 weeks into a pregnancy*** *(near the end of the second trimester) is about when a healthy fetus could survive outside the woman's body with medical attention. Do you think abortion at that point should be ...*




Note: Adults who said abortion should be legal or illegal in all cases with no exceptions were not asked questions about whether how long a woman has been pregnant should factor into determining abortion's legality or specific time points when abortion should be legal. Adults who said abortion should be legal with some exceptions or illegal with some exceptions, but the stage of pregnancy should not matter in determining whether abortion should be legal or illegal, were not asked any questions about specific time points when abortion should be legal. Those who said abortion should be legal at 14 weeks were coded as also saying it should be legal at six weeks, but were not asked the question about abortions performed six weeks into pregnancy. Those who said abortion should be illegal at 14 weeks were coded as also saying it should be illegal at 24 weeks, but were not asked the question about 24 weeks. See topline for full details about filtering logic.
Source: Survey of U.S. adults conducted March 7-13, 2022.
"America's Abortion Quandary"

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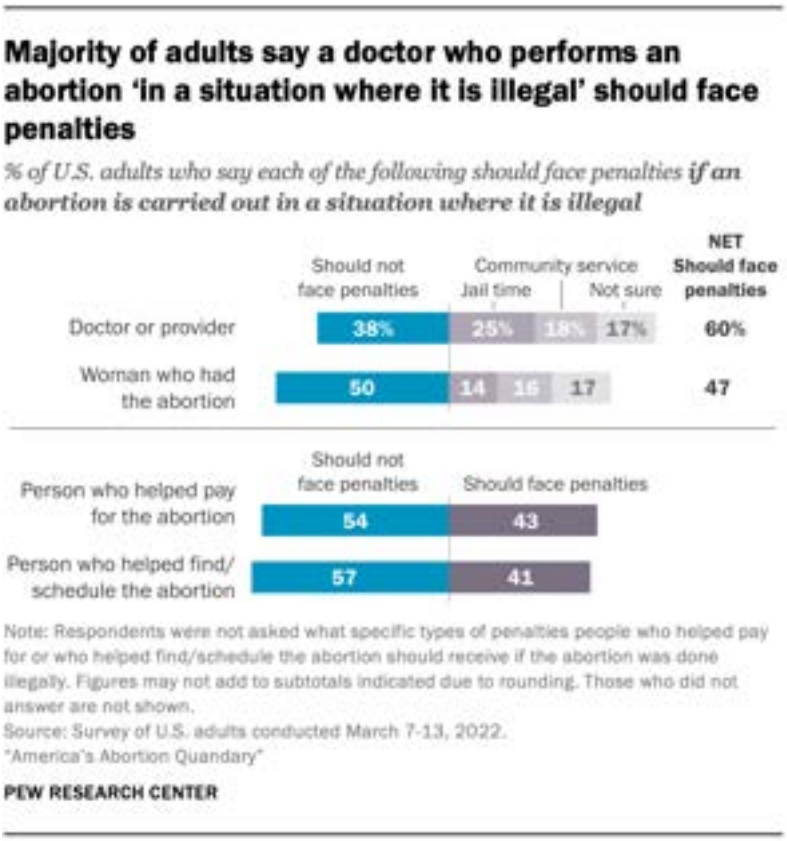
## Views of penalties for abortion in situations where it is illegal




If most people think there are at least some situations in which abortion should be against the law, an obvious follow-up question is: Who should face legal penalties if an abortion is performed illegally? And what should those penalties entail?

The survey asked whether four types of people should face penalties if an abortion takes place in a situation where it is illegal: doctors or medical providers who perform abortions, women who have abortions, people who help pay for abortions and people who help find or schedule abortions.

Six-in-ten U.S. adults say that if doctors and other providers perform abortions in situations where it is illegal, then they should face penalties – including 25% who say the doctors/providers should serve jail time for performing abortions illegally, 18% who say they should face fines or community service, and 17% who aren't sure what type of penalty would be appropriate. In response to a separate question, 31% of Americans say doctors should lose their medical licenses for performing an abortion illegally.

Compared with views on penalizing doctors, there is less support for punishing women who obtain an abortion illegally or for punishing people who help find, schedule and pay for the procedures. Nearly half of U.S. adults (47%) say women who obtain an abortion illegally should be penalized for doing so, while half say such women should not face penalties. Roughly four-in-ten favor legal punishments for people who help pay for an abortion that is performed illegally (43%) or who help find and schedule it (41%).

Support for punishing those who perform or obtain abortions illegally is tied to views about whether abortion should be legal or illegal in the first place. Still, 55% of those who say abortion should be legal, with some exceptions, say doctors who perform abortions in situations where it is illegal should face penalties, as do overwhelming shares of those who say abortion should always or mostly be illegal. See Chapter 1 for details.

## Partisan differences in views of abortion

**Majorities of Democrats and Republicans say abortion should be legal in some cases, illegal in others**

*% of U.S. adults who say ...*

| | Rep/ lean Rep | Dem/lean Dem |
|---|---|---|
| | % | % |
| **Abortion should be legal in all cases, no exceptions** | **6** | **30** |
| **There are some cases where abortion should be legal, others where it should be illegal** | **79** | **65** |
| Mostly legal | 31 | 50 |
| Mostly illegal | 47 | 15 |
| **Abortion should be illegal in all cases, no exceptions** | **13** | **4** |
| Abortion should be legal if pregnancy threatens woman's life/health* | 62 | 84 |
| Should be illegal* | 16 | 6 |
| It depends | 20 | 8 |
| Abortion should be legal if pregnancy is result of rape* | 56 | 83 |
| Should be illegal* | 23 | 7 |
| It depends | 19 | 8 |
| *Should how long a woman has been pregnant matter in determining whether it is legal or illegal to have an abortion?* | | |
| Yes, stage of pregnancy should be factor in legality | 64 | 52 |
| No, stage of pregnancy should not factor into legality | 14 | 13 |
| Refused | 1 | <1 |
| **NET Abortion should be legal in some cases, illegal in others** | **79** | **65** |

* Figures shown for those who say abortion should be legal (or illegal) in these situations include those who say abortion should be legal (or illegal) in all cases without exception.
Note: Figures may not add to subtotals indicated due to rounding. Those who did not answer are not shown.
Source: Survey of U.S. adults conducted March 7-13, 2022.
"America's Abortion Quandary"

PEW RESEARCH CENTER

There are wide differences between the views of Democrats and Republicans on abortion. Democrats are far more likely than Republicans to say abortion should be legal in most or all cases, while Republicans are more likely than Democrats to say it should be *illegal* in most or all cases.

And in every specific scenario asked about in the survey – including situations where pregnancy threatens the life or health of the woman, or where pregnancy is the result of rape – Democrats are more likely than Republicans to say abortion should be legal.

Still, most Democrats say there are at least some instances in which abortion should be illegal, and most Republicans say there are at least some instances in which abortion should be legal, including when the life or health of the pregnant woman is at risk and when the pregnancy is the result of rape.

About half of Democrats and roughly two-thirds of Republicans say the stage of pregnancy should be a factor in determining abortion's legality. Four-in-ten Democrats and independents who lean toward the Democratic Party (40%) say the statement "human life begins at conception, so a fetus is a person with rights" describes their own view at least somewhat well, and more than half of Republicans and GOP leaners (55%) say the same about the statement "the decision about whether to have an abortion should belong solely to the pregnant woman."

## Women are more likely than men to have thought 'a lot' about abortion, but there are only modest gender differences in views of legality

More than half of U.S. adults – including 60% of women and 51% of men – say that women should have a greater say than men in setting abortion policy. Just 3% of U.S. adults say men should have more influence over abortion policy than women, with the remainder (39%) saying women and men should have equal say when it comes to making abortion policy.

**Modest gender differences in views of whether abortion should be legal**

*% of U.S. adults who say ...*

| | Women | Men |
|---|---|---|
| | % | % |
| **Abortion should be legal in all cases, no exceptions** | **21** | **17** |
| **There are some cases where abortion should be legal, others where it should be illegal** | **68** | **74** |
| Mostly legal | 42 | 41 |
| Mostly illegal | 26 | 33 |
| **Abortion should be illegal in all cases, no exceptions** | **9** | **8** |
| Abortion should be legal if pregnancy threatens woman's life/health* | 71 | 74 |
| Should be illegal* | 12 | 10 |
| It depends | 14 | 13 |
| Abortion should be legal if pregnancy is result of rape* | 68 | 70 |
| Should be illegal* | 15 | 14 |
| It depends | 14 | 14 |
| *Should how long a woman has been pregnant matter in determining whether it is legal or illegal to have an abortion?* | | |
| Yes, stage of pregnancy should be factor in legality | 55 | 58 |
| No, stage of pregnancy should not factor into legality | 12 | 15 |
| Refused | 1 | <1 |
| **NET Abortion should be legal in some cases, illegal in others** | **68** | **74** |

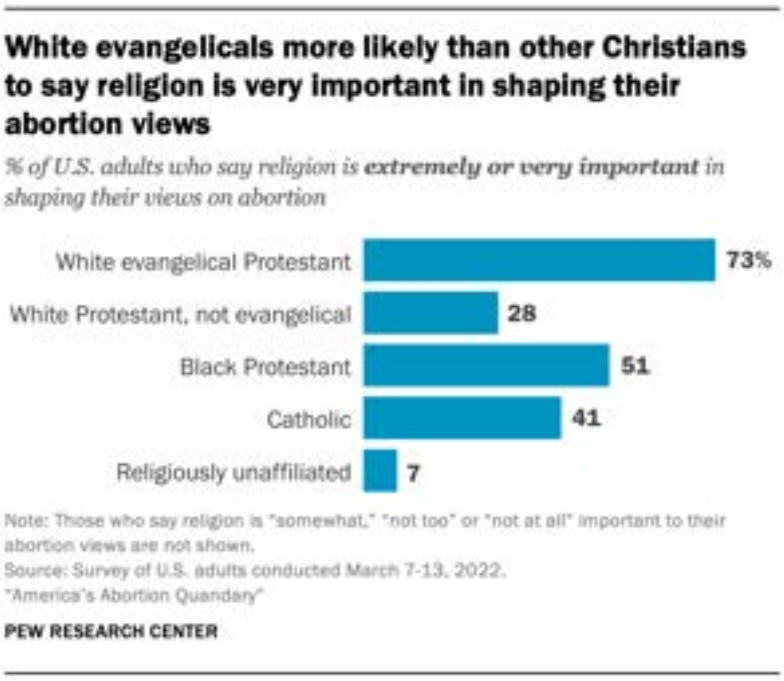
* Figures shown for those who say abortion should be legal (or illegal) in these situations include those who say abortion should be legal (or illegal) in all cases without exception.
Note: Figures may not add to subtotals indicated due to rounding. Those who did not answer are not shown.
Source: Survey of U.S. adults conducted March 7-13, 2022.
"America's Abortion Quandary"

PEW RESEARCH CENTER

The survey also finds that by some metrics, women report being closer to the issue than men. For example, women are more likely than men to say they have thought “a lot” about abortion (40% vs. 30%). They are also considerably more likely to say they personally know someone who has had an abortion (66% vs. 51%) – a gap that is evident across age groups, political parties and religious groups.

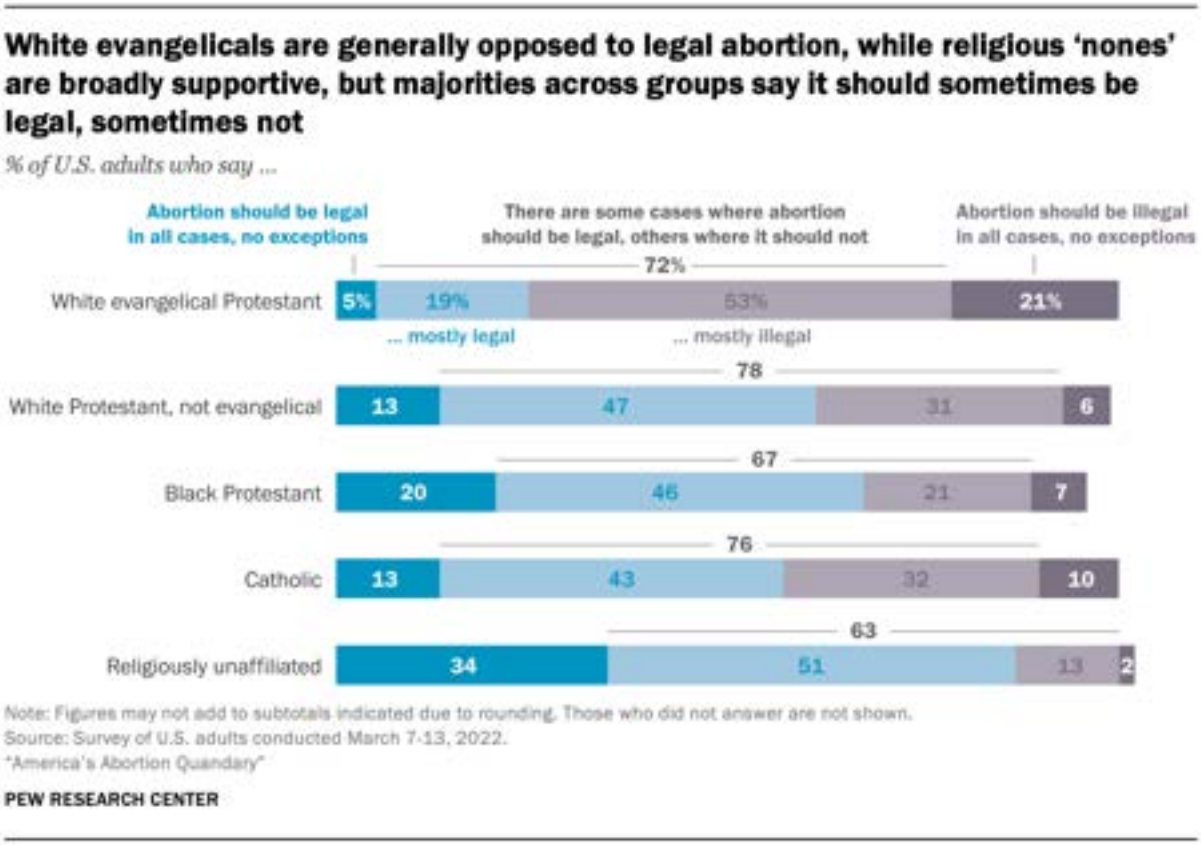
But there are only modest gender differences on the survey’s questions about abortion’s legality; women and men mostly agree with each other that abortion should be legal in cases of danger to the life or health of the pregnant woman and in the case of rape. More than half of both women and men agree that how long a woman has been pregnant should be a factor in determining whether abortion is legal in any given case. And while women are slightly more likely than men to say abortion should be legal in all cases with no exceptions (21% vs. 17%), large majorities of both women (68%) and men (74%) say there are some cases where abortion should be legal and others where it should be illegal.

## White evangelicals are most opposed to abortion – but majorities across Christian subgroups see gray areas




Among religious groups analyzed in the survey, White evangelical Protestants are most opposed to abortion. Nearly three-quarters say that abortion should be against the law in all cases without exception (21%) or that it should be illegal in most cases (53%). White evangelicals are also far more likely than U.S. adults who identify with other religious groups to say that life begins at conception and that the fetus is thus a person with rights; 86% of White evangelicals express this view. White evangelicals are also more likely than those in other Christian groups to say their opinions on abortion are influenced by their religious beliefs.

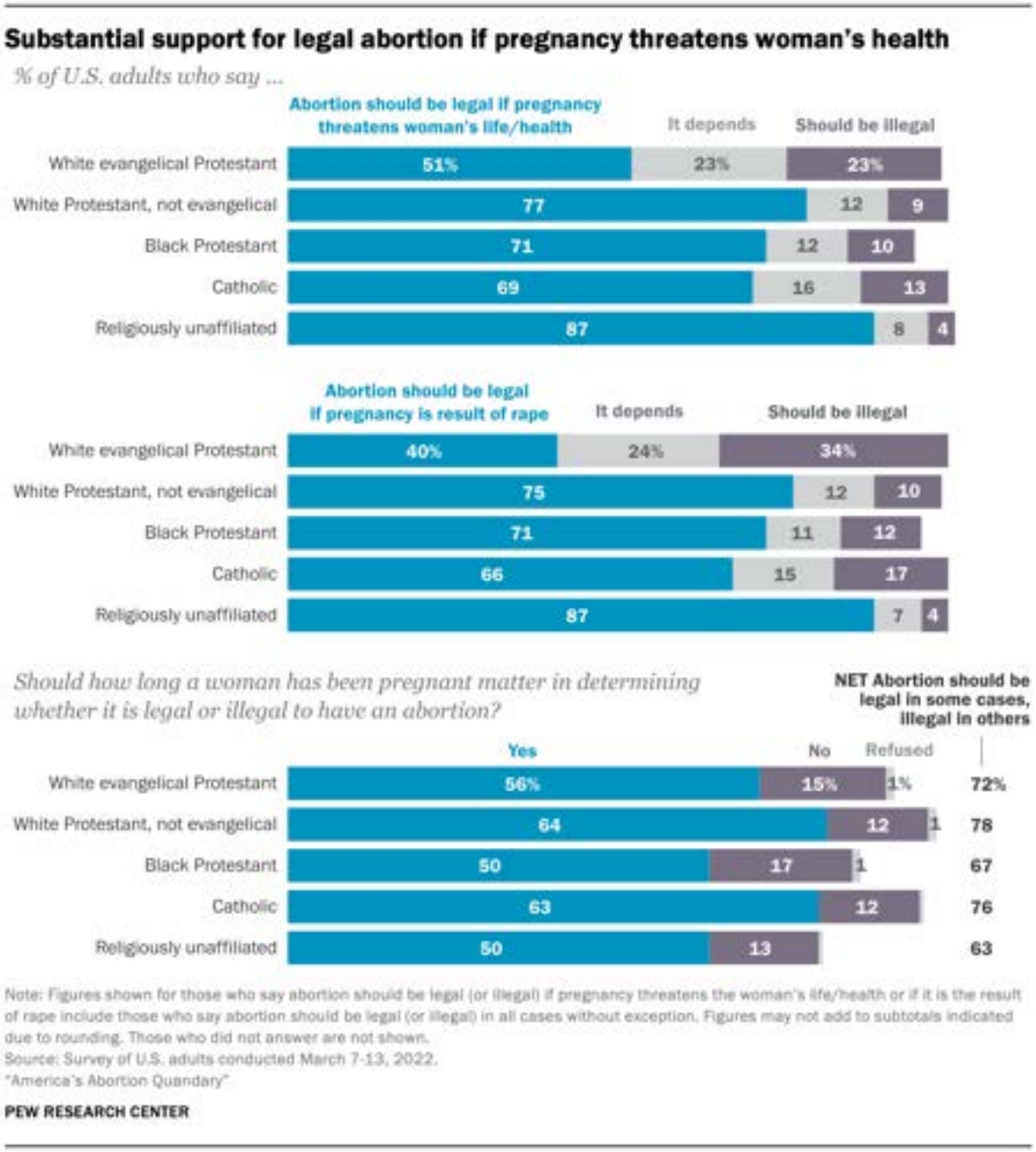
At the other end of the spectrum, religious "nones" – U.S. adults who describe themselves, religiously, as atheists, agnostics or "nothing in particular" – are most supportive of legal abortion. Among religious "nones," upwards of eight-in-ten say abortion should be legal in all cases with no exceptions (34%) or that it should be legal in most cases (51%). Self-described atheists are more absolutist in their opinions about abortion than any other religious group analyzed in the survey, with 53% saying abortion should be legal in all cases, no exceptions.




White Protestants who are not evangelical, Black Protestants, and Catholics tend to be less opposed to legal abortion than White evangelicals, but they are also less supportive of it than religious "nones."

One commonality across these groups is that sizable numbers in all of them see the issue of abortion in shades of gray. Large majorities in every group – ranging from 63% of religious "nones" to 78% of White non-evangelical Protestants – say abortion should be legal in some circumstances and illegal in others. Half of White evangelicals (51%) say abortion should be legal if the pregnancy threatens the life or health of the woman. Half of religious "nones" (50%) say the stage of pregnancy should factor into decisions about whether abortion should be legal.

Although the survey was conducted among Americans of all religious backgrounds, including Jews, Muslims, Buddhists and Hindus, it did not obtain enough respondents who are religiously affiliated with non-Christian groups to report separately on their responses. Small subgroups of Christians are unable to be analyzed separately for the same reason.




## Guide to this report

The remainder of this report discusses these findings in additional detail. Chapter 1 focuses on legal questions surrounding abortion. Chapter 2 examines the broader moral and religious questions surrounding the topic. Chapter 3 discusses the public's experiences and engagement with abortion.

Next: 1. Americans' views on whether, and in what circumstances, abortion should be legal

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# Leading anti-abortion groups urge state lawmakers not to pass bills criminalizing women for abortions

By Veronica Stracqualursi, CNN
Published 2:32 PM EDT, Thu May 12, 2022


Drew Angerer/Getty Images

Led by the Rev. Patrick Mahoney, second from right,, a small group of anti-abortion activists prays in front of the Supreme Court building on Wednesday, May 11, 2022, in Washington.

**Washington (CNN) —** Some of the largest anti-abortion organizations in the US are urging state lawmakers to reject legislation that would criminalize women for having abortions, saying "turning women who have abortions into criminals is not the way."

"We state unequivocally that any measure seeking to criminalize or punish women is not *pro-life* and we stand firmly opposed to such efforts," more than 70 national and state anti-abortion groups wrote in an open letter Thursday.

The letter's signatories include National Right to Life, Susan B. Anthony List, Americans United for Life, March for Life Action and the US Conference of Catholic Bishops.

The possibility that Roe v. Wade could be overturned has sparked fears that women who have abortions could face greater risk of criminal prosecution. Last week, Louisiana lawmakers advanced a bill that would have classified abortions as homicides, potentially allowing for women to be criminally charged for terminating their pregnancies, though most restrictive abortion bills typically exempt women from its criminal penalties or civil liability clauses.

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Women have been punished under other laws, such as "fetal assault" laws, and charged with crimes that include drug use during pregnancy or self-managed abortion, according to the American College of Obstetricians and Gynecologists, which opposes the criminalization of pregnancy.

Louisiana's GOP-led state House on Thursday pared down the controversial measure to remove the bill's original language seeking to classify abortions as homicides after state anti-abortion groups opposed the bill, saying it was their "longstanding policy that abortion-vulnerable women should not be treated as criminals." The House bill is effectively dead, the amendment's Republican sponsor said.

Earlier in the week, Gov. John Bel Edwards, a rare anti-abortion Democrat, also spoke out against the bill, calling it "radical."

The national anti-abortion groups did not single out a state in their letter or mention specific legislation or policy.

Carol Tobias, president of National Right to Life, told CNN that the letter was prompted in part by the Louisiana bill and the uncertainty of what states may do in the event Roe is overturned, and also to counter the abortion rights rallies this upcoming weekend, which may point to the bill as reason to back their cause.

"We're not interested in penalizing women," she said, adding that they would want abortion providers to be held accountable.

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Louisiana lawmakers pull back from classifying abortion as homicide

The organizations say that if Roe is overturned, "this will be a tremendous opportunity for states to create durable policy that can stand the test of time."

"But in seizing that opportunity, we must ensure that the laws we advance to protect unborn children do not harm their mothers," they say.

They argue that women are "victims of abortion and require our compassion and support as well as ready access to counseling and social services in the days, weeks, months and years following an abortion."

In anticipation of a conservative-majority Supreme Court striking down Roe v. Wade, Republican-led states have enacted laws that restrict abortion – 13 of which have passed so-called "trigger laws," which are abortion bans designed to go into effect once Roe is overturned.

If Roe is overturned, nearly half of all the states have laws that aim to restrict abortion access, according to an analysis by the research group the Guttmacher Institute, which supports abortion rights.

*This story has been updated with additional developments.*

*CNN's Chuck Johnston contributed to this report.*

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OCTOBER 2022 POLICY ANALYSIS


# 100 Days Post-Roe: At Least 66 Clinics Across 15 US States Have Stopped Offering Abortion Care

**Marielle Kirstein**, Guttmacher Institute
**Joerg Dreweke**, Guttmacher Institute
**Rachel K. Jones**, Guttmacher Institute
**Jesse Philbin**, Guttmacher Institute



First published online: October 6, 2022

October 2, 2022 marked 100 days since the US Supreme Court overturned *Roe v. Wade*, a decision that has resulted in states across the nation severely restricting access to abortion

Among the 66 clinics where abortion is no longer available, 40 are still offering services other than abortion, while 26 have shut down entirely.

Our analysis, which builds on research we conducted 30 days after *Roe* fell, focuses on the 15 states that were enforcing either total or six-week abortion bans as of October 2. While most of these bans include very limited circumstances when an abortion may be allowed, those exceptions are designed to be difficult to navigate and are often unusable in practice.

## States Where Clinics Stopped Offering Abortions or Closed Entirely

In the 13 states that had implemented total abortion bans as of October 2, all clinics were forced to stop offering abortions. In the other two states, Wisconsin and Georgia, the situation is precarious. Clinics in Wisconsin have faced legal uncertainty around the state's pre-*Roe* total abortion ban, leading providers in that state to stop offering abortions out of fear of future prosecution. In Georgia, which is enforcing a ban on abortion starting at six weeks of pregnancy, clinics have been affected by the shortened timeframe to offer abortion services.

At the 40 clinics that have remained open for services other than abortion, our research did not ask about the scope of activities they are undertaking, but it may include providing other sexual and reproductive health services (e.g., prescribing birth control) or helping patients find abortion care in other states. However, 26 clinics have been forced to close their doors. When clinics close down or stop offering abortion care, it represents a lost source of health care for their community.

## Changes to Abortion Clinic Services

Our research tracked the following changes to abortion services at clinics in 15 states as of October 2, 2022, compared with the situation right before *Roe* was overturned.

- **Alabama** (previously 5 clinics)
  - 0 clinics offering abortion care

- 0 clinics offering abortion care
- 1 clinic closed entirely, 1 open for other services

- **Georgia** (previously 14 clinics)
  - 13 clinics offering abortion care
  - 1 clinic closed entirely
- **Idaho** (previously 3 clinics)
  - 0 clinics offering abortion care
  - 1 clinic closed entirely, 2 open for other services
- **Kentucky** (previously 2 clinics)
  - 0 clinics offering abortion care
  - 1 clinic closed entirely, 1 open for other services
- **Louisiana** (previously 3 clinics)
  - 0 clinics offering abortion care
  - 3 clinics closed entirely, 0 open for other services
- **Mississippi** (previously 1 clinic)
  - 0 clinics offering abortion care
  - 1 clinic closed entirely, 0 open for other services
- **Missouri** (previously 1 clinic)
  - 0 clinics offering abortion care
  - 0 clinics closed entirely, 1 open for other services
- **Oklahoma** (previously 4 clinics)
  - 0 clinics offering abortion care

- 0 clinics offering abortion care
- 2 clinics closed entirely, 5 open for other services

- **Texas** (previously 23 clinics)
  - 0 clinics offering abortion care
  - 12 clinics closed entirely, 11 open for other services
- **West Virginia** (previously 1 clinic)
  - 0 clinics offering abortion care
  - 0 clinics closed entirely, 1 open for other services
- **Wisconsin** (previously 4 clinics)
  - 0 clinics offering abortion care
  - 0 clinics closed entirely, 4 open for other services

## Impact on People Needing Abortions

The new reality of clinics no longer offering abortions or closing down entirely is having a devastating impact in states with abortion bans—and far beyond.

- The 14 states where abortion is currently unavailable accounted for 125,780 abortions in 2020. Individuals who can no longer obtain an abortion from a clinic in these states are now forced to travel to another state for abortion care (facing additional direct and indirect costs associated with travel logistics, child care and time off work), self-manage their abortion or continue their pregnancy (and accept the significant associated health risks).
- Likewise, 41,620 abortions were obtained in Georgia in 2020. Under the state's six-week abortion ban, which prohibits abortion before many people even know they are pregnant, anyone needing an abortion faces an extremely limited time frame for scheduling and

Importantly, the loss of clinics is felt in all states—even those where abortion remains legal. Ample anecdotal evidence shows that abortion clinics in these states are being inundated with people from states with abortion bans seeking care. These dramatic increases in caseloads mean clinic capacity and staff are stretched to their limits, resulting in longer wait times for appointments even for residents of states where abortion remains legal.

## More Chaos, Confusion and Harm to Come

Even before *Roe* was overturned, getting an abortion was difficult or outright impossible for many people, especially those who were already facing steep barriers to accessing health care, including people with low incomes, Black and Brown people, immigrants, young people, those with disabilities and rural populations. These inequities are likely to worsen as clinic-based abortion care disappears in many states, a number of them clustered in regions like the South.

An already precarious abortion access landscape is likely to continue to deteriorate. Our state legislative tracking predicts that a total of 26 states are certain or likely to ban abortion within a year of *Roe* being overturned. Already, several states—including Indiana, Ohio and South Carolina—had total or six-week abortion bans go into effect briefly before they were temporarily blocked in court. These bans could go into effect again as soon as the court cases are resolved. These disruptions to service provision—even when temporary—affect the ability of established providers to quickly resume abortion care. Further, rapidly changing laws may make it unclear to some patients whether they can legally seek an abortion in their state.

Much more research will need to be conducted to grasp the full extent of the chaos, confusion and harm that the US Supreme Court has unleashed on people needing abortions, but the picture that is starting to emerge should alarm anyone who supports reproductive freedom and the right to bodily autonomy.

action temporarily suspended their bans.

Between September 20 and October 2, we used multiple sources—including clinic websites, news stories, social media and information from colleague organizations—to track the status of abortion services. For each clinic, we determined if the facility was open or closed; if open, if it was providing abortions or other sexual and reproductive health care; and, if providing abortions, whether abortion care was available past six weeks' gestation. In cases where online information was seemingly out of date (e.g., a clinic indicated it provided abortion care even though there was a state ban in effect), we conducted one or more mystery calls using the phone number listed on the clinic's website. If a phone line was not answered after two or more calls during business hours, we considered the clinic to be closed. Data were imported into Stata17 to systematically count the number of clinics that had closed or had stopped providing abortions and were continuing to offer other services.

We analyzed American Community Survey data from 2020 in Stata17 to calculate the number and percentage of women of reproductive age living in the 15 states we investigated.

The authors thank Ava Braccia, Christina Geddes and Tammy Lever for collecting the data used in this analysis.

## SUGGESTED CITATION

Kirstein M et al., 100 Days Post-*Roe*: At Least 66 Clinics Across 15 US States Have Stopped Offering Abortion Care, Guttmacher Institute, 2022, www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15....

RESOURCE

**Interactive Map: US Abortion Policies and Access After Roe**

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## U.S. POLICY RESOURCES

AXIOS Austin



Sep 12, 2022 - News

# Influx of out-of-state patients causes abortion delays

Oriana Gonzalez, Nicole Cobler

Illustration: Natalie Peeples/Axios

when treatment is more intensive and costs are higher.

**The big picture:** It's a byproduct of more people traveling across state lines in the post-Roe landscape and testing reproductive health providers in states that don't have abortion bans, *writes Axios' Oriana Gonzalez.*

- Experts believe that as clinics struggle with demand, the number of abortions performed after the 13th week of pregnancy — which is around the end of the first trimester — might increase.

- The procedures can be harder to obtain, because "as pregnancy progresses, the number of people who are skilled to provide that care further goes down," Colleen McNicholas, chief medical officer at Planned Parenthood of the St. Louis Region and Southwest Missouri, told Axios.

**By the numbers:** About 93% of reported abortions in 2019 were performed at or before 13 weeks of pregnancy, 6% were conducted between 14 and 20 weeks and 1% were performed at or after 21 weeks, per the Centers for Disease Control and Prevention.

- At an Illinois clinic, patients from states other than Missouri and Illinois have risen to 40% of cases, compared to 5% before the federal right to abortion was struck down.

**Zoom in:** Since September 2021, Texans seeking abortion care have had to leave the state if they're more than six weeks pregnant. The law prohibited the practice after embryonic cardiac activity can be detected — before many people know they are pregnant.

- Since then, more than 400 abortion patients with a Texas zip code visited Planned Parenthood health centers in Kansas, compared to fewer than 10 abortion patients from September 2020 to June 2021, according to the organization.

- Abortion patients with a Texas zip code more than doubled from 19% to 41% of the total number of abortion patients at Planned Parenthood health centers in

**Now, Texas trigger law,** which went into effect last month, makes it a felony to perform an abortion from the moment of fertilization.

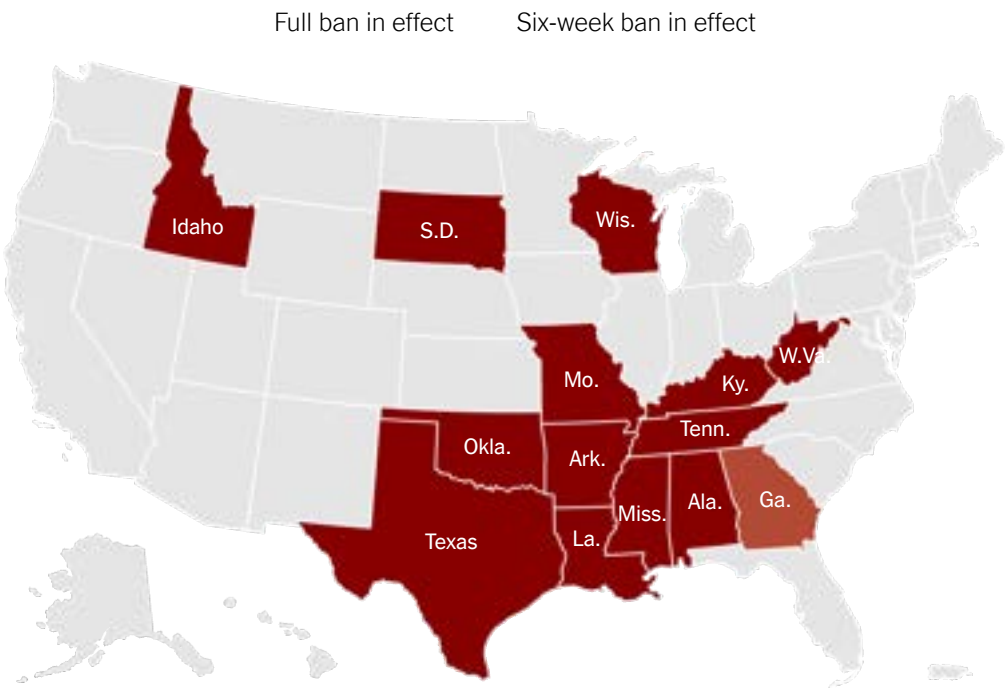
**In Colorado,** Michael Belmonte, a Denver OB-GYN, told Axios that the clinic he works in had already been overwhelmed with out-of-state patients since Texas' six-week abortion ban took effect in 2021.

- Wait times for the clinic are around two to three weeks. While Belmonte said it's "certainly possible" that could grow to five to six weeks with higher demand, the clinic has recruited additional providers and made other contingencies.
- The clinic has seen more out-of-state patients who are further along in their second trimester with severe fetal conditions who are unable to access abortion care in their states.

The New York Times | https://nyti.ms/3sYKAjR

# Tracking the States Where Abortion Is Now Banned

By
The New York Times
Updated Oct. 13, 2022, 11:00 A.M. ET




Most abortions are now banned in at least 13 states as laws restricting the procedure take effect following the Supreme Court's decision to overturn Roe v. Wade. Georgia also bans abortion at about six weeks of pregnancy, before many women know they are pregnant.

In many states the fight over abortion access is still taking place in courtrooms, where advocates have sued to block enforcement of laws that restrict the procedure.

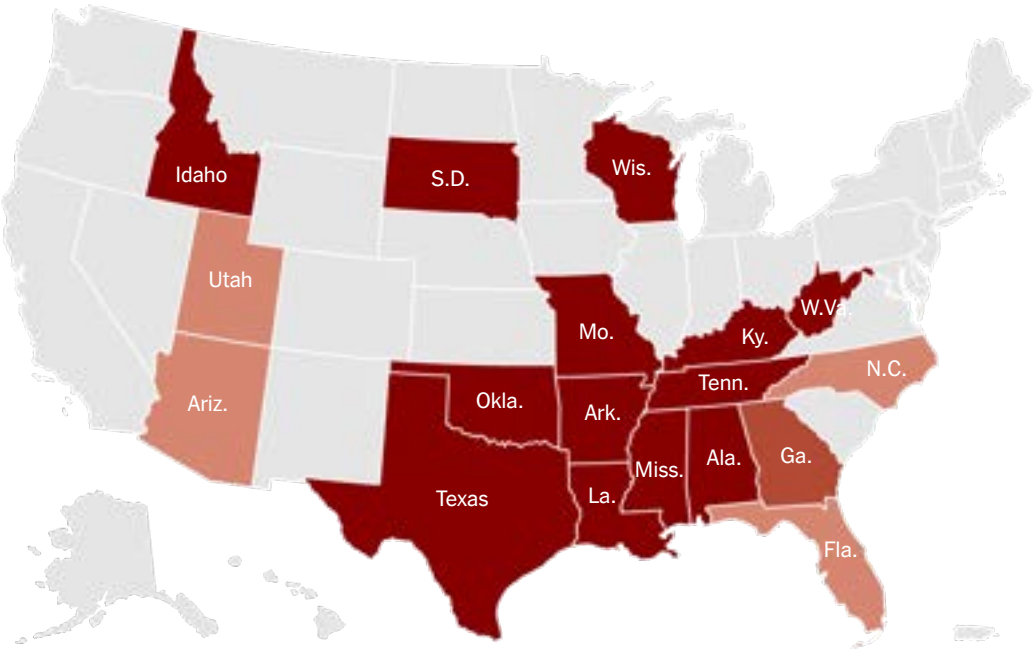
**Latest updates**

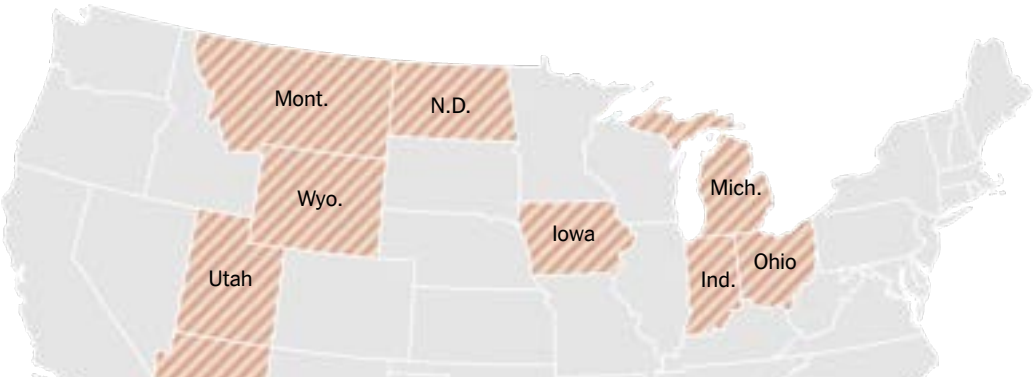
- Indiana's ban on nearly all abortions will likely remain blocked until early next year. The Indiana Supreme Court will hear oral arguments in the case in January.

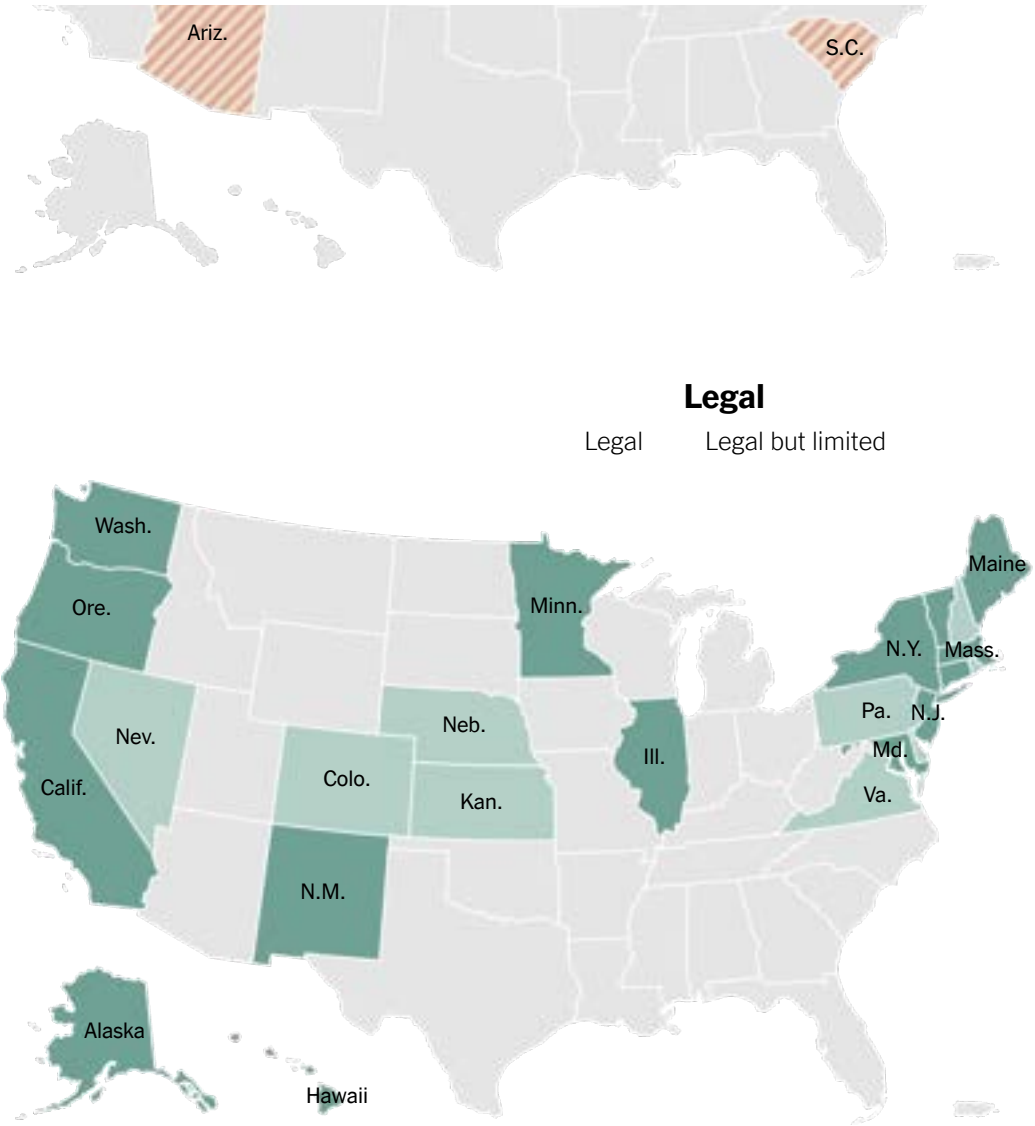
The New York Times is tracking abortion laws in each state since the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization, which ended the constitutional right to an abortion.

## Legal status of abortion

About half of states are expected to enact bans on abortion or other gestational limits on the procedure. In some of these states, abortion remains legal for now as courts determine whether existing or new bans can take effect. In the rest of the states, abortion is legal but may still be restricted, or access may otherwise be limited.






## State details

More details on the current status of abortion in each state are below.

Search states

| STATE<br>PARTY CONTROL | STATUS OF ABORTION | LEGAL UNTIL |
|---|---|---|
| **Alabama**<br>Gov. Sen. House | Banned | — |

Abortion is banned with no exceptions for rape or incest.

| STATE<br>PARTY CONTROL | STATUS OF ABORTION | LEGAL UNTIL |
|---|---|---|
| **Arkansas** | Banned | — |
| Abortion is banned with no exceptions for rape or incest. | | |
| **Idaho** | Banned | — |
| Nearly all abortions are banned, but a federal judge has blocked a piece of the law, ruling that doctors could not be punished for performing an abortion to protect a patient's health. Abortion advocates and the Department of Justice have sued to challenge the bans. | | |
| **Kentucky** | Banned | — |
| Abortion is banned with no exceptions for rape or incest. | | |
| **Louisiana** | Banned | — |
| Abortion is banned with no exceptions for rape or incest. | | |
| **Mississippi** | Banned | — |
| Abortion is banned with exceptions for rape, but not incest. | | |
| **Missouri** | Banned | — |
| Abortion is banned with no exceptions for rape or incest. | | |
| **Oklahoma** | Banned | — |
| Abortion is banned at the point of fertilization. | | |
| **South Dakota** | Banned | — |
| Abortion is banned with no exceptions for rape or incest. | | |

| STATE<br>PARTY CONTROL | STATUS OF ABORTION | LEGAL UNTIL |
|---|---|---|
| **Tennessee** | Banned | — |
| Abortion is banned with no exceptions for rape or incest. | | |
| **Texas** | Banned | — |
| Abortion is banned with no exceptions for rape or incest. | | |
| **West Virginia** | Banned | — |
| Nearly all abortions are banned as of Sept. 16. | | |
| **Wisconsin** | Banned | — |
| The state has a law from before Roe that bans abortion with no exceptions for rape or incest, and makes performing the procedure a felony. The Democratic governor and attorney general have filed a lawsuit in an attempt to block the ban. | | |
| **Georgia** | Gestational limit | 6 weeks |
| Abortion is banned after six weeks of pregnancy, after a court allowed a 2019 law to go into effect. Abortion rights groups have sued to block the ban. | | |
| **Arizona** | Gestational limit | 15 weeks |
| A state court temporarily blocked enforcement of an 1864 law that banned abortion with no exceptions for rape or incest. A separate ban on abortion after 15 weeks of pregnancy is in effect. | | |
| **Florida** | Gestational limit | 15 weeks |
| Abortion is banned after 15 weeks of pregnancy. Abortion providers and advocates have sued to block the ban. The state's Supreme Court recognized the right to an abortion in its Constitution three decades ago, but the court has become more conservative, with three of the seven judges appointed by the Republican governor. | | |
| **Utah** | Gestational limit | 18 weeks |
| A judge temporarily blocked the state's trigger ban on most abortions. A ban on abortion after 18 weeks of pregnancy is in effect. | | |

| STATE<br>PARTY CONTROL | STATUS OF ABORTION | LEGAL UNTIL |
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| **North Carolina** | Gestational limit | 20 weeks |

Abortion is banned at 20 weeks of pregnancy, after a federal judge allowed an older law to go into effect. The governor has issued an executive order to shield those seeking or providing abortions in North Carolina from laws in other states.

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| **Indiana** | Ban blocked | 22 weeks |

A judge has blocked a ban on nearly all abortions while a lawsuit against it proceeds. The Indiana Supreme Court will hear oral arguments in the case in January.

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| **Iowa** | Ban blocked | 22 weeks |

In June, the state's Supreme Court overruled a 2018 decision that said the right to an abortion was protected under the State Constitution. A ban on abortion after six weeks has been blocked by a judge since 2019, but the governor is seeking its enforcement.

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| **North Dakota** | Ban blocked | 22 weeks |

A judge temporarily blocked a ban on nearly all abortions, after the state's sole abortion provider filed a lawsuit challenging the ban.

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| **Michigan** | Ban blocked | Viability |

The state has a law from before Roe that bans nearly all abortions, but it has been blocked in state court. The Democratic governor and attorney general have said they will not enforce the ban. The governor issued an executive order to shield those seeking or providing abortions in Michigan from laws in other states.

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| **Montana** | Ban blocked | Viability |

The Legislature passed three anti-abortion laws in 2021, including a ban on abortion after 20 weeks of pregnancy, all of which have been blocked by a court since last year. The Montana Supreme Court has ruled that its Constitution protects the right to an abortion.

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| **Ohio** | Ban blocked | 22 weeks |

A judge indefinitely blocked the state's ban on abortion after six weeks of pregnancy while a lawsuit against it proceeds.

| STATE<br>PARTY CONTROL | STATUS OF ABORTION | LEGAL UNTIL |
|---|---|---|
| **South Carolina** | Ban blocked | 22 weeks |

The South Carolina Supreme Court temporarily blocked a ban on abortion after six weeks of pregnancy; a lower court judge had allowed the ban to take effect in June. Lawmakers are working on a bill that would ban or further restrict abortion.

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| **Wyoming** | Ban blocked | Viability |

A judge temporarily blocked a ban on nearly all abortions on July 27, the same day the ban was set to take effect.

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| **Colorado** | Legal but limited | No gestational limit |

State law protects abortion, but a 1984 law prohibits using state funds to cover the cost of most abortions. In July, the governor issued an executive order to shield those seeking or providing abortions in Colorado from laws in other states.

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| **Delaware** | Legal but limited | Viability |

State law protects abortion and a new law expands access to providers, but state funds cannot be used to cover the cost of the procedure.

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| **Kansas** | Legal but limited | 22 weeks |

The state's Supreme Court ruled in 2019 that a pregnant woman's right to personal autonomy is protected in its Constitution, and Kansans voted on Aug. 2 to reject a ballot measure that would have amended the State Constitution to say it contains no right to an abortion. State funds cannot be used to cover the cost of most abortions, and the state has enacted multiple restrictions that limit access to the procedure.

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| **Nebraska** | Legal but limited | 22 weeks |

A bill to enact a trigger ban failed in the Legislature earlier this year, before the Supreme Court overturned Roe. The state has enacted multiple restrictions that limit access to the procedure, including a ban on abortion after 22 weeks, and state funds cannot be used to cover the cost of most abortions. The governor said in August that he does not have enough votes to pass a more restrictive ban.

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| **Nevada** | Legal but limited | 24 weeks |

State law protects abortion but state funds cannot be used to cover the cost of most abortions. The governor issued an executive order to shield those seeking or providing abortions in Nevada from laws in other states.

| STATE<br>PARTY CONTROL | STATUS OF ABORTION | LEGAL UNTIL |
|---|---|---|
| **New Hampshire** | Legal but limited | 24 weeks |
| Abortion will most likely stay accessible, though it is not expressly protected by state law and state funds cannot be used to cover the cost of most abortions. The state repealed a pre-Roe ban on abortion in 1997. | | |
| **Rhode Island** | Legal but limited | Viability |
| State law protects abortion but state funds cannot be used to cover the cost of most abortions. The governor issued an executive order to shield those seeking or providing abortions in Rhode Island from laws in other states. | | |
| **Pennsylvania** | Legal but limited | 24 weeks |
| Abortion is not protected by state law. The state has enacted multiple restrictions that limit access to the procedure, and state funds cannot be used to cover the cost of most abortions. Republicans control the state legislature, but the governor, a Democrat, has vetoed abortion restrictions. The governor issued an executive order this year that shields those seeking or providing abortions in Pennsylvania from laws in other states. | | |
| **Virginia** | Legal but limited | Viability |
| Abortion will most likely stay accessible, though it is not expressly protected by state law and state funds cannot be used to cover the cost of most abortions. Split control of the state legislature may prevent significant changes until the next election, in 2023. | | |
| **Washington, D.C.** | Legal but limited | No gestational limit |
| Local law protects abortion throughout pregnancy. The city plans to bolster protections, though Congress ultimately oversees the city's laws. Congress prohibits the use of taxpayer funds to cover the cost of most abortions in the city. | | |
| **Alaska** | Legal | No gestational limit |
| The state's Supreme Court has recognized a right to "reproductive choice" under its Constitution. | | |
| **California** | Legal | Viability |
| State law protects abortion, and the governor signed a bill to shield abortion providers from out-of-state bans. Voters will decide in November whether to adopt an amendment to protect abortion rights. | | |

| STATE<br>PARTY CONTROL | STATUS OF ABORTION | LEGAL UNTIL |
|---|---|---|
| **Connecticut** | Legal | Viability |
| State law protects abortion. A law expanding which clinicians can provide abortions took effect July 1. The law also shields both providers and patients from out-of-state lawsuits. | | |
| **Hawaii** | Legal | Viability |
| State law protects abortion, and a new law expands access to providers. | | |
| **Illinois** | Legal | Viability |
| The state's Supreme Court has recognized abortion protections under its Constitution, and state law protects the procedure. | | |
| **Maine** | Legal | Viability |
| State law protects abortion. The governor issued an executive order to shield those seeking or providing abortions in Maine from laws in other states. | | |
| **Maryland** | Legal | Viability |
| State law protects abortion, and new laws increase access to providers and insurance coverage. | | |
| **Massachusetts** | Legal | 24 weeks |
| The Massachusetts Supreme Judicial Court has recognized the right to abortion under its Constitution. Recently enacted laws protect abortion, and the governor issued an executive order to shield those seeking or providing abortions in Massachusetts from laws in other states. | | |
| **Minnesota** | Legal | Viability |
| The state's Supreme Court has recognized the right to abortion under its Constitution. The governor issued an executive order to shield those seeking or providing abortions in Minnesota from laws in other states. | | |

| STATE<br>PARTY CONTROL | STATUS OF ABORTION | LEGAL UNTIL |
|---|---|---|
| **New Jersey** | Legal | No gestational limit |
| State law protects abortion throughout pregnancy, and the governor has proposed making the state a “sanctuary” for those seeking the procedure. | | |
| **New Mexico** | Legal | No gestational limit |
| Abortion will most likely stay accessible, though it is not expressly protected by state law. The governor issued an executive order to shield those seeking or providing abortions in New Mexico from laws in other states. | | |
| **New York** | Legal | Viability |
| State law protects abortion. Legislators have proposed other protections, including an amendment to the State Constitution. | | |
| **Oregon** | Legal | No gestational limit |
| State law protects abortion throughout pregnancy, and the Legislature approved $15 million to support those seeking the procedure. | | |
| **Vermont** | Legal | No gestational limit |
| State law protects abortion throughout pregnancy. In November, voters will decide if the State Constitution should include abortion protections. | | |
| **Washington** | Legal | Viability |
| State law protects abortion, and recent laws expand access to providers. | | |

Note: Nebraska has a unicameral Legislature that is nonpartisan. In Alaska, control of the state’s House of Representatives is split between parties.

Note: Weeks of pregnancy are counted since the last menstrual period.

By Allison McCann, Amy Schoenfeld Walker, Ava Sasani, Taylor Johnston, Larry Buchanan and Jon Huang. Additional reporting by Margot Sanger-Katz and Kate Zernike.

**Correction:** June 24, 2022
An earlier version of this article misstated the legal status of abortion in Utah. As of 4 p.m. on June 24, the state attorney general had issued a statement saying the state's abortion ban had been triggered, but it had not yet been authorized by the legislature's general counsel. By 8:30 p.m., the counsel authorized the ban and it went into effect.

**Correction:** June 28, 2022
A table in an earlier version of this article misstated which abortion ban is being challenged in Texas state court. Abortion rights supporters are challenging a pre-Roe ban, not the state's trigger ban.

# Supreme Court declines to hear fetal personhood case

By Ariane de Vogue and Devan Cole, CNN
Updated 4:16 PM EDT, Tue October 11, 2022

Stefani Reynolds/AFP/Getty Images

(CNN) — The Supreme Court declined on Tuesday to wade into the so-called fetal personhood debate, deciding not to take up a case out of Rhode Island over whether fetuses should have constitutional rights.

A Catholic group and two pregnant women wanted to sue on behalf of the women's unborn fetuses, but the Rhode Island Supreme Court – citing Roe v. Wade – said in May that they didn't have the legal right to bring the case.

The challengers urged the Supreme Court to step in and take the case after it overturned Roe in June. But the court declined to do so without comment.

"This Court should grant the writ to finally determine whether prenatal life, at any gestational age, enjoys constitutional

This Court should grant the writ to finally determine whether prenatal life, at any gestational age, enjoys constitutional protection – considering the full and comprehensive history and tradition of our Constitution and law supporting personhood for unborn human beings," the petitioners wrote in their request for the court to consider the case.

The issue of fetal personhood raises complicated questions regarding the rights of fetuses that could impact issues such as in vitro fertilization and child support going forward.

Since the court overturned Roe earlier this year, conservative states have enforced bans either restricting the procedure or banning it outright.




The Catholic Church once allowed for abortions. Everything changed in 1873

02:52 - Source: CNN

The New York Times | https://www.nytimes.com/2022/07/13/health/abortion-pills-pharmacies.html

# *U.S. Tells Pharmacists Not to Withhold Pills That Can Cause Abortion*

New Biden administration guidance warned that failing to dispense such drugs "may be discriminating" on the basis of sex or disability, citing other conditions that they can treat.

By Sheryl Gay Stolberg

July 13, 2022

WASHINGTON — The Biden administration warned the nation's 60,000 retail pharmacies on Wednesday that they risk violating federal civil rights law if they refuse to fill prescriptions for pills that can induce abortion — the second time this week that it has used its executive authority to set up showdowns with states where abortion is now illegal.

In four pages of guidance, the federal Department of Health and Human Services ticked off a series of conditions — including miscarriage, stomach ulcers and ectopic pregnancy — that are commonly treated with drugs that can induce abortion. It warned that failing to dispense such pills "may be discriminating" on the basis of sex or disability.

The guidance came two days after Xavier Becerra, President Biden's health secretary, instructed hospitals that even in states where abortion is now illegal, federal law requires doctors to perform abortions for pregnant women who show up in their emergency departments if they believe it is "the stabilizing treatment necessary" to resolve an emergency medical condition.

The back-to-back actions make clear that while Mr. Biden's authority to preserve access to abortion is limited after the Supreme Court eliminated the constitutional right to the procedure last month, he will push those limits where he can. Legal experts on both sides of the issue agreed in interviews that the administration was trying to assert that federal law pre-empts that of states that have banned abortion, a move that would almost surely be challenged in court.

"They are trying to identify federal statutes that in some way will supersede state abortion restrictions and bans," said Lawrence O. Gostin, an expert in public health law at Georgetown University. Of the guidance for pharmacists, he said, "The obvious goal is to have abortion medication in stock to treat a range of medical conditions and to be available for an abortion."

Yet the new guidance is cautiously written, and steers clear of telling pharmacies that they have to provide the drugs for the purpose of medication abortion, which is banned or restricted in certain states. Nor does the guidance address how a provision in federal law called the Church Amendments would apply. That measure allows health care providers, including pharmacists, not to perform or assist in abortions if they have religious or moral objections.

At issue are three drugs — mifepristone, misoprostol and methotrexate — that are often prescribed for other conditions but can also induce abortions. Experts said the administration was reacting to reports that women of childbearing age are being denied the drugs after the ruling.

Mifepristone is used to manage certain patients with a hormonal disorder called Cushing's syndrome, and misoprostol is prescribed for ulcers. But they are also authorized by the Food and Drug Administration as a two-drug combination that can be taken to terminate a pregnancy during the first 10 weeks, and can also be used in combination following miscarriages. Methotrexate is used to treat autoimmune disorders, such as rheumatoid arthritis, as well as cancer.

"These are very legitimate issues in terms of people being concerned about having access to the basic medications that they have been receiving for years, just because those medications have the capacity to end a pregnancy," said Alina Salganicoff, the director of women's health policy at the Kaiser Family Foundation. "It doesn't sound like they are blocking this for men."

The administration's moves will almost certainly be challenged in court, and advocates for abortion rights concede that it could be a losing battle. If legal challenges work their way up to the Supreme Court, the administration will have to make its case before the same conservative supermajority who voted to overturn Roe v. Wade, the landmark legal case that established a right to abortion in 1973.

"They're trying to mandate the stocking of abortion-inducing drugs and the performance of abortions across the nation using tools that don't grant the federal government that authority," said Roger Severino, who ran the Office of Civil Rights within the Department of Health and Human Services when Donald J. Trump was president. "They are trying to shoehorn abortion into laws that clearly weren't designed to address abortion."

Wednesday's action could put pharmacists in a thorny position. The National Community Pharmacists Association, which represents 19,400 independent pharmacies across the country, said pharmacists "acting in good faith in accordance with their state's laws" lacked "a clear pathway forward" and needed more guidance from states.

"States have provided very little clarity on how pharmacists should proceed in light of conflicting state and federal laws and regulations," B. Douglas Hoey, the organization's chief executive, said in a statement. "It is highly unfair for state and federal governments to threaten aggressive action against pharmacists who are just trying to serve their patients within new legal boundaries that are still taking shape."

A spokesman for Walgreens, one of the nation's largest pharmacy chains, said the company would review the guidelines; he had no further comment.

During a background call with reporters, an official from the Department of Health and Human Services said that when state and federal laws conflicted, federal law took precedent.

Mr. Biden has been under intense pressure from Democrats and advocates for reproductive rights to take bold steps to preserve the right to abortion after the court's decision in Dobbs v. Jackson Women's Health Organization. Among other things, they have been pushing for him to declare a public health emergency — something his administration seems unwilling to do.

Wednesday's guidance was issued by the health department's Office of Civil Rights. Monday's guidance for hospitals was accompanied by a letter to health care providers, delineating their responsibilities under the Emergency Medical Treatment and Active Labor Act, known as EMTALA, a 1986 law that requires anyone coming to an emergency department to be stabilized and treated regardless of insurance status or ability to pay.

Mr. Severino argued that the guidance to hospitals "flips EMTALA on its head," because the law defines an emergency as a condition in which the absence of immediate medical attention "could reasonably be expected to result in placing the health of the patient, or (in case of pregnancy, the unborn child) in serious jeopardy." But Mr. Gostin took the administration's position, saying that in the case of a pregnant woman in distress, the law permitted abortion "if it was necessary to save her life and there was no other way to stabilize her."